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The Nuremberg Principles in Non-western Societies

A Reflection on their Universality,
Legitimacy and Application

Ronald Slye (ed)

**The Nuremberg Principles in Non-western Societies:
A Reflection on their Universality, Legitimacy and
Application**

Nuremberg Forum 2015

**Edited by
RONALD SLYE**

About the International Nuremberg Principles Academy

The International Nuremberg Principles Academy (Nuremberg Academy) is a foundation dedicated to the advancement of international criminal law. It is located in Nuremberg, the birthplace of modern international criminal law, and is conceived as a forum for the discussion of contemporary issues in the field. The mission of the Nuremberg Academy is to promote the universality, legality and acceptance of international criminal law. The foundation's main fields of activity include interdisciplinary research, trainings and consultant services specially tailored to target groups, and human rights education. The Nuremberg Academy places a special focus on the cooperation with countries and societies currently facing challenges related to international criminal law. The Nuremberg Academy was founded by the German Foreign Office, the Free State of Bavaria and the City of Nuremberg.

The opinions expressed in this publication are solely those of the authors and do not reflect the views of the institutions the authors are affiliated to or of the International Nuremberg Principles Academy.

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This publication would thus not have been possible without the foresight, hard work, and dedication of the International Nuremberg Principles Academy, including Ambassador Bernd Borchardt, the Founding Director of the Academy. Darleen Seda, Project Officer and Assistant Researcher in International Criminal Law at the Academy, played a key role both in organizing the conference and in putting this publication together. This publication would not have been possible without her intellectual and administrative contributions. Godfrey Musila laid the groundwork for the publication, soliciting authors and beginning the editorial process. Finally, I would like to thank all of the contributors to this publication, as well as the many other individuals who participated in the conference. Our hope is that the stimulating conversations begun at Nuremberg and that continue here through this publication, will continue to challenge and inspire all of those who seek to further the universal application of the Nuremberg Principles.

Ronald C. Slye
Editor

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1 Introduction

Ronald C. Slye

International criminal law has seen enormous advances in the more than seventy years since the start of the modern international criminal law movement that began at Nuremberg and Tokyo. On the law-making side, dozens of treaties have been concluded that deepen the normative framework of international criminal law. The four Geneva Conventions of 1949 have become the first and only treaties to which all states of the world are a party. Municipal legal systems have incorporated international crimes within their legal systems. Institutionally, *ad hoc* international and hybrid courts have been created, and we are close to celebrating the twentieth anniversary of the treaty that created the first permanent international criminal court, the International Criminal Court (ICC). Jurisprudentially, international criminal law has been refined, interpreted, and implemented through municipal courts, the two *ad hoc* tribunals, numerous hybrid courts, and now the ICC. Providing accountability for international crimes is now included as part of diplomatic discussions surrounding the major conflicts of the day, from Libya to Syria to the Ukraine.

At the same time, enforcement of international criminal law is low. International tribunals depend on reluctant states for cooperation and enforcement, resulting in little of either. Impunity is more common than accountability, particularly when it comes to those most responsible. The ICC and other institutions dedicated to enforcing international criminal law have had little if any deterrent effect on some of the worst atrocities of the past decade, and paradoxically appear to have emboldened or entrenched leaders such as Robert Mugabe in Zimbabwe, Omar al-Bashir in the Sudan, and Bashar al Assad in Syria.

More fundamentally, international criminal law is increasingly under assault, both normatively and institutionally. Normatively, cultural relativist critiques that parallel those raised in the broader human rights field are emerging. While no state openly supports genocide or torture, there is a persistent critique of international criminal law that argues that its emphasis and priorities are set by the interests, history, and culture of the West and the North. Institutionally, the ICC is under increasing pressure from states, particularly from (though not limited to) Africa, who challenge the legitimacy of the institution. In the last decade, the African Union has passed a number of resolutions challenging not only specific cases before the ICC (most notably those of sitting heads of state), but at times challenging the legitimacy of the institution itself. Asia is the region with the most significant lack of state participation in the ICC, with China, India, and Indonesia being noticeably absent. Within the Islamic world, thirty of the fifty-seven members of the Organization of Islamic

Cooperation are not a party to the Rome Treaty.¹ The state that rhetorically is the most vocal concerning human rights and accountability for international crimes, the United States, is also not a party. In fact only two of the five permanent members of the Security Council are members of the ICC. Yet as explored in a volume by Mark Janis and Carolyn Evans (1999) one finds in many historical traditions throughout the world concepts that are remarkably similar to what one finds in the modern human rights and international criminal law regimes. The fact that one finds common aspirations in many historical traditions suggests that some of the current tensions may have less to do with culture, tradition, principles or history, and more to do with power and politics. One needs to be cautious however about oversimplifying a historical tradition by projecting our own modern conceptions of justice, human rights, and international law on historical societies. History provides us with different approaches to establishing a stable and just social order, and we should be attentive to experts from these respective traditions when assessing the compatibility of such traditions with the emerging global justice system.

In observance of the seventieth anniversary of the start of the Nuremberg Trials, the Nuremberg Academy brought together a diverse group of such experts to explore the gap between the promise of universal accountability for international crimes and the contemporary reality of the partial acceptance and implementation of that ideal. From November 20 - 21, 2015 scores of academics and practitioners came together in Nuremberg to explore contemporary challenges to the Nuremberg Principles, particularly as presented from Islamic and African societies. While the debates illustrated in these contributions reveal tensions within the emerging international criminal law system, they also reveal opportunities. As I argue in my contribution to this volume, all conceptions of justice, including criminal justice, are historically contingent. While there is more cross-fertilization across and within contemporary societies, one finds similar dynamic interchanges throughout history – societies borrowing and learning from each other. The debates and tensions we observe today are thus not unique to this period in history, and are explained in part by the different approaches to justice, but also by a struggle against the current global and political order. It is fitting that these proceedings were hosted by the International Nuremberg Principles Academy, an organization that has taken on the mandate of not only maintaining, but also expanding, the legacy of universal aspiration to terminate impunity for crimes under international law.

The contributors to this volume do not claim to provide a complete explanation, or even description, of the tensions currently facing international criminal law; nor do they claim to provide a comprehensive solution to addressing these tensions. They do, however, provide important insights into the challenges and opportunities presented by the modern international criminal law movement, particularly as institutionalized in the ICC. One can discern two broad approaches among the contributors: 1) an exploration of the relationship

¹ Comparing the membership of the OIC (<http://www.oic-oci.org/oicv3/states/?lan=en>) with the parties to the Rome Statute.

between principles found in African and Islamic traditions and those found in the international criminal law; and 2) an exploration of the relationship between these traditions and international criminal law *in practice*. The first focuses more on fundamental principles and values; the latter focuses on the conflicts, and opportunities, provided through the doctrine of complementarity.

Malekian, Babiker, and Asaala most closely fall within the first set of contributions. Malekian and Babiker explore the similarities and differences between traditional Islam and modern international criminal law, while Asaala performs a similar exercise with respect to African legal traditions.

Malekian has written extensively about Islamic law and international criminal law. In his contribution he draws upon literature and religion to describe principles commonly found in both Islamic and international criminal law. He argues that the basic tenets of Islamic international criminal law have been around for centuries, thus predating much of the development of similar principles in the West. Malekian systematically discusses each of the Nuremberg Principles and argues how the same or similar principles can be found in Islamic law, often predating their articulation at Nuremberg by centuries. These similarities lead him to call upon Islamic judges to interpret Islamic law in a way that is consistent with broader international human rights law, including international criminal law. Such an interpretation is not only permitted, he argues, but demanded by the overall purposes of Islam and Islamic law.

While finding close overlap between Islamic law and international criminal law, Malekian also acknowledges the tensions between the ICC in particular, and other legal systems including Islam. He thus also addresses the theme of the second set of contributors who place the challenges to international criminal law and the ICC in the context of challenges posed by powerful states like the United States. Malekian thus finds that much of the conflict is based less upon different conceptions of justice and more on the political interests of both the ICC and its member states. In particular, he criticizes many Islamic states for not living up to the ideals of Islam itself – and identifies this failure, rather than a conflict between Islam and international criminal law, as the main source of the friction between Islamic states and the ICC and the broader international criminal law movement.

Babiker takes a less optimistic view than Malekian of the compatibility of Islamic law with international criminal law. He argues that modern international humanitarian law (and presumably more broadly international criminal law) is “alien” to Muslim societies as the latter did not contribute to its development. At base Babiker identifies a fundamental tension between the idea of Islam and the modern system of nation-states. International criminal law – in fact most of international law – is premised on the idea of a territorial state. Islam, in contrast, does not use territory to delineate nation, but instead faith. This fundamentally different conception of belonging underlies the tension Babiker identifies between Islam and international criminal law. Unlike Malekian, he does not find elements of

the contemporary international criminal law regime in Islam: “...the classic or modern laws of war in Islam do not recognize the concept of massive crimes or envisage repression of international crimes as defined in international treaties (i.e. the ICC Rome Statute).”

Babiker’s prognosis is not completely bleak, however. He criticizes what he terms the more aggressive or politicized forms of Islamic governance, which he contrasts with a more mainstream and measured interpretation of Islam. While he acknowledges that there may be some areas of irreconcilable conflict between Islam and international criminal law, he also sees opportunities for constructive dialogue and engagement between the two legal systems. He discusses, for example, a more restorative justice approach to criminal law found in the Islamic conception of reparations for crimes – the institution of *diyya* or blood money. This suggests elements of a common approach with both the ICC regime (which incorporates reparations) and strands of justice found in African legal traditions.

Asaala approaches her task in a similar way to Malekian, undertaking a systematic comparison of the Nuremberg Principles in the light of African conceptions of justice. She identifies a tendency at the international level to conflate justice with prosecution and punishment as one of the tension points between international criminal law and Africa. Historically African societies have adopted a more open approach to justice that includes, but is not dominated by, prosecutions. One can of course find elements of a similarly nuanced and expansive approach to justice in the history of most cultures in the world, including Europe and North America. This more restorative approach to justice has a large following within Africa, and is in sharp contrast to the more dominant narrative of the international criminal law system, at least as articulated by major institutions like the ICC.²

Asaala discusses one of the more controversial challenges to the international criminal law system championed by the African Union: immunity for sitting heads of state. The African Union’s criticism of the ICC can be traced back to the indictment of President Omar al-Bashir of the Sudan. The concerns raised by the AU were heightened with the indictment of the Kenyan President Uhuru Kenyatta and, to a lesser extent, his Deputy President William Ruto, even though each of them were indicted prior to being elected to their respective offices. Asaala interprets the AU challenge to indictments of sitting heads of state as less a function of powerful African leaders trying to protect themselves from accountability and more as an attempt to protect the dignity of the African state. One does not need to accept immunity for sitting heads of state to acknowledge the importance African peoples have placed on protecting the integrity and strength of the African state given the history of colonialism and slavery on the continent. Perhaps because of this history Asaala does not challenge the claim of immunity for such African leaders, but instead argues that such leaders should be

² For example, the ICC Prosecutor released a statement praising the recently concluded agreement in Colombia noting that “genuine accountability...by definition includes effective punishment.” ICC, *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Peace Negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army*, September 1, 2016. <https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia>.

held accountable by first removing them from office and then subjecting them to either domestic or international justice.

While these first three contributors mostly focus on the horizontal relationship between the international criminal law system and African and Islamic law, the other contributors focus more on the vertical relationship between the global criminal justice system and domestic legal systems. Some of the remaining contributors explore this relationship through the ICC's doctrine of complementarity, while others focus on efforts to provide justice at the regional level.

Olasolo, Hansen, and Labuda explore the relationship between the domestic and international criminal justice systems through a complementarity analysis of Colombia, Kenya, and the Democratic Republic of the Congo (DRC) respectively. Olasolo explores the tension between what he identifies as an obligation to prosecute those responsible for international crimes and alternative approaches to addressing past atrocities such as truth commissions. Truth commissions and similar approaches are often described under the broad umbrella of transitional justice, and Olasolo thus begins with a discussion about what constitutes transitional justice. He uses the recent example of the transitional justice mechanisms agreed to in Colombia to explore the interplay of domestic preferences with respect to accountability and the ICC. Colombia has adopted a modified prosecutorial approach that includes elements of a conditional amnesty that builds upon the experience of the South African amnesty, but includes stronger elements of accountability. Given that Colombia is the focus of a preliminary examination by the ICC's Prosecutor, an important question is whether the Colombian agreement on accountability provides a minimal level of justice that would make any claim to prosecute before the ICC inadmissible. To address this question, Olasolo draws upon the strengths and weaknesses of the prosecutorial model and alternative models like truth commissions. His plea is that practitioners and theorists take into account both approaches and draw upon their strengths, rather than adopting an either/or approach. He calls for replacing what he describes as the "dialogue of the deaf" that has characterized the interactions between the fields of transitional justice and international criminal law, with a process "that harmonizes the legal content of a state's duty to investigate, prosecute, and punish those responsible for *ius cogens* crimes (and the correlative victims' rights to truth and justice)..."

Hansen uses Kenya as his case study to explore the relationship between local and international justice. His account suggests that what divides Kenya and the ICC is not a difference over conceptions of justice, but a lack of commitment on the part of the Kenyan Government to investigate and prosecute cases related to the 2007 post-election violence (which was the focus of the ICC investigation). More subtly, he raises the concern that domestic legal systems may nominally take on accountability for international crimes – through, for example, the creation of an international crimes division of their criminal justice system – but that such efforts may, through either design or lack of capacity, fail to deliver

the accountability they promise. Hansen thus takes a more pessimistic view than Asaala of the push behind challenges to the ICC by the African Union, and a more critical view of efforts to provide domestic accountability that at best may be under resourced and under supported, and at worst designed to fail.

Labuda explores the effect of the ICC on the DRC, drawing upon empirical data and interviews with some of the key players in the DRC justice system. Labuda systematically examines the influence of the ICC in transforming the DRC judicial system to better address international crimes – what is often referred to as positive complementarity. On the positive side Labuda notes that the definition of international crimes under DRC domestic law mirrors the definition at the international level, and that military tribunals in the DRC regularly use the ICC’s definition of crimes and their elements. On the negative side, the DRC falls short of international standards because of its heavy use of military, as opposed to civilian, courts. Labuda and Hansen provide timely case studies that critically evaluate the effect of positive complementarity on ICC situation countries.

Deng, Swart and I explore the relationship between international criminal justice and domestic legal systems through the lens of hybrid and regional tribunals. Deng examines recent efforts to provide justice for international crimes committed in South Sudan, in particular the proposal to create a hybrid tribunal for the prosecution of such crimes. While many thought that the creation of the ICC would decrease the appeal of hybrid and *ad hoc* tribunals, the appeal of prosecutorial spaces that straddle the international and the local has certainly not decreased, and some argue that such an approach has increased in its appeal since the creation of the ICC. There are a number of reasons for the appeal of these hybrid and regional alternatives, from a desire to prosecute crimes that are not within the jurisdiction of the ICC (for lack of subject matter, temporal, or personal jurisdiction) to preferring a process that provides more local participation and access than that provided by the ICC. While Deng focuses on the possible creation of a hybrid court, he adopts a similar approach to Labuda, both discussing the effect of the ICC on the criminalization of international crimes at the domestic level, as well as an analysis of public perceptions concerning appropriate models of justice in South Sudan.

Swart highlights a potential third alternative under complementarity: the use of regional, and sub regional, courts. While hybrid courts straddle temporarily the domestic and the international – they are created to address international crimes committed within a particular time at a particular place – regional and sub regional courts occupy a permanent space between the domestic and the international. Given the diversity of peoples on the African continent, even a regional approach faces significant challenges in creating a coherent African approach to international criminal law that would better mediate between the international legal system and African domestic legal systems. The continent’s diversity has resulted in a number of sub regional regimes to address trade, security, and human rights, such as the Economic Community of West African States (ECOWAS), the East African

Community, and the Southern African Development Community (SADC). These sub regional regimes may thus provide a more coherent, and legitimate, place for cross fertilization between domestic African criminal justice systems and the international justice system. As articulated by Swart, sub regional systems represent “a move away from the global to the culturally specific,” while at the same time representing “a move away from a state-centered perspective previously dominant in newly independent African states.” Swart is not uncritical, however, of the use of these sub regional systems to provide accountability for international crimes, noting that the current regional and sub regional systems in Africa are neither efficient nor productive.

Swart also discusses the proposal to expand the African Court of Human and People’s Rights to include criminal jurisdiction. The African Union drafted a protocol at Malabo that, if ratified by enough states, would add criminal jurisdiction to the continent’s regional human rights court. Swart takes a more critical approach to the Malabo Protocol than I and Asaala do, though I do tend to agree with the cautionary note expressed by Max du Plessis (and quoted by Swart) that the proposed regional criminal court risks creating an African “regional exceptionalism.” My contribution does try to strike a more optimistic note, highlighting the innovative aspects of the Malabo Protocol that would expand the definition of international crimes (to include, *inter alia*, trafficking and environmental crimes) and personal jurisdiction (to include corporations) in a way that better addresses those crimes that most affect African states and their peoples.

Finally, Yang brings us back to the relationship between the local and the international. He identifies the heart of the tension between the international criminal justice system and many states in Africa as the distance (both figurative and literal) between an international system primarily designed and created by the most powerful Western states, and the local context in which many of the atrocities being adjudicated occurred. He makes a plea for more deference to local preferences, and a stronger acceptance of legal pluralism at the international level. The ICC’s doctrine of complementarity has embedded within it certain value judgments about what constitutes a minimally acceptable form of criminal justice. Yang’s plea for a greater embrace of legal pluralism urges the ICC and other relevant institutions to learn from the rich and varied approaches to justice found throughout the world. He thus brings us back to one of the points made by Olasolo in his contribution – to be more open to alternative, less retributive forms of justice (though I suspect Yang and Olasolo might differ on the boundaries of these different approaches). While he focuses on Africa, Yang provides a possible way forward for engaging with both Islamic and African traditions within the current international criminal justice architecture. An approach to international justice that adopts a more expansive view of legal pluralism risks diluting accountability, but if adopted carefully and appropriately may instead provide a space for constructive engagement between diverse legal traditions and the emerging international criminal justice system as it moves to maintain and expand the appeal and applicability of the Nuremberg Principles. It is fitting that the institution established to maintain and

expand the reach of the Nuremberg Principles has brought together such a talented group of scholars and practitioners who collectively point us in the direction of such a constructive dialogue.

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2 Comparative Substantive International Criminal Justice

*Farhad Malekian**

The legal philosophy of criminal law is a difficult subject. It is even more difficult to explore the relationship between the political philosophy of the Nuremberg Tribunal and Islamic law. The intention here is to explore the moment when the Nuremberg Principles entered into the international criminal legal system, and to evaluate the philosophy of Islamic international criminal law regarding those principles. My purpose is to establish that the legal substance of both systems are similar, notwithstanding that one has far-reaching effects on the international legal system through the authority of the United Nations, while the other has extensive effects on the international legal system through the principle of *al-Nas*, meaning *humankind*. Thus, when one considers the core intentions of both legal systems one may conclude that the basic legal principles in both bodies are identical, even though, in the formal application of the international legal system, we do not employ the legacy of Islamic international criminal law or its principles of justice. The challenge is that both legal systems have at present significant political barriers to their efforts to achieve such recognition and respect.

2.1 Introduction

All wars involve the commission of crimes, or to quote the title of an excellent philosophical article consisting only of two pages and which was published almost one hundred years before the two World Wars, “*All War [is] contrary to the Will of God*”. (Coues 1845). As Coues, observes “Good comes of good, evil from evil. The fact then being established that war invariably brings moral evil in its train, proves that war is contrary to the will of God”. (Ibid, 128) As John Steinbeck also asserts, “All war is a symptom of man's failure as a thinking animal” (Steinbeck 1943, 9). They reflect the bankers’ wars (Rivero).

This chapter emphasizes the significant universal validity of the principles of the Nuremberg Tribunal and its consistency with the framework of Islamic international criminal law. The Nuremberg Tribunal will remain forever a pillar of justice, peace, and humanity before which

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the conquering states applied criminal justice to the accused. This singular achievement was unfortunately achieved with one-eyed justice or, in other words, the victors ignored their own criminal conduct committed against a defeated state's civilization, population and above all its children. It may be necessary for the admiration of the victims to mention here that hundreds of thousands of German women were raped by the Soviet armed forces and to a lesser degree by United States soldiers. In addition to this, between 20 and 60 million of our Soviet brothers and sisters were murdered under the Stalinist regime; and 4 million more of our Indian brothers and sisters perished because of the shortage of food caused by the British boycott of India. I do need to mention the tragedies of Hiroshima and Nagasaki, or the military "comfort stations" created by abducting women from a number of countries under the authority of the Japanese government. *International justice is scarcely just, but tries to be just and to express itself as justice through one-eyed justice.*

I am also aware of the fact that the contemporary international legal, political and human community is suffering from a substantial number of international conflicts that cannot be tolerated any longer by any legal system. This is true for the European Union legal system, the United Nations legal system, the Organization of American States legal system, and more importantly by the *authentic* principles of Islamic international criminal law. I emphasize the word *authentic*. This means that I am not referring to, nor do I give any potential value to, the Principles of Islamic International Criminal Law, Mohamadism Law, or the Qur'anic Law that are imposed by certain recognized leaders of Islamic regimes for their own interests and for the safety of their own regimes.

Nor do I refer to, nor give value to, those elements of international human rights law, international criminal law, and international criminal justice imposed by certain permanent members of the Security Council.³ This article evaluates the universality of the Nuremberg Principles with that of the Islamic system, and explores their potential value for preventing international violations and implementing international criminal justice (Malekian 1999). The substance of our laws should secure justice and ensure the rule of law for the application of international criminal law and human rights law conventions. Otherwise, justice is incomplete, thus opening the gate to non-democratic rule.

2.2 The Basic Structure of Both Legal Systems

Whilst the system of international criminal law is a relatively new branch of public international law, its foundations are based on the cultural legacies of the peoples of Western and non-Western civilizations. Averroës, the Islamist from Spain known as the "founding father of secular thought in Western Europe" and still a follower of Pythagoras, was one of the influential writers on the relationship between Western and non-Western ideologies. Samuel von Pufendorf (1632-1694) and Hugo Grotius (1583-1645) also wrote of the

³ See the excellent article by Robert F. Kennedy, Jr. (2016).

positive effect of Islamic law in Europe, particularly with respect to the humanitarian law of armed conflict. C.G. Weeramantry, the judge of the International Court of Justice and the author of *Islamic Jurisprudence: An International Perspective* (1988), emphasizes that the provisions of the Islamic law of nations, in particular international humanitarian law of armed conflict, influenced the classical authors of international law (Al-Dawoody 2011, 91). The first stone tools for the building of justice and the creation of the system of international criminal law were jointly wielded by participants from both Western and non-Western nations. This means that there has always been a strong relation between these two legal systems of international criminal law, although they are generated from two different legal origins.

The system of international criminal law has been mostly applied to serious criminal violations committed by individuals, groups, organizations and states (Malekian 1985). This has been regardless of what some Western and non-Western governments have claimed concerning its strength and mobility. It is the first branch of public international law that deals with all of its violators as independent subjects of law. By contrast, within other branches of public international law, individuals, groups, or organizations historically did not constitute direct subjects of law until the creation of a considerable number of international treaties. In fact, Islamic international criminal law has, from the time of its inception, recognized individuals as a subject of law, and the notion of criminal responsibility is attributed to the individual alone. Islamic international criminal law established from the beginning the first concept of duties and responsibility of individuals at a time when the European-based law of nations had not developed any idea of the concept of individual responsibility under international law, nor of international humanitarian law. The foundation of the international humanitarian law of armed conflict can be traced back to Muhammad Ibn al-Ḥasan al-Shaybānī, who was an Islamic author who wrote about the law of armed conflict in 804. Hugo Grotius introduced similar concepts in Europe for the first time over 800 years later, in 1645. The Islamic humanitarian law of armed conflict thus had an 800 year head start on its European counterpart.

The events of the Nuremberg International Criminal Tribunal in 1945 and the adoption of the Universal Declaration of Human Rights in 1948 resulted in the recognition of individuals as the direct beneficiaries of international human rights law, and as responsible subjects of international criminal law and justice (Jackson 1947; Ratner and Abrams 2001; Glueck 1946; Ginsburgs and Kudriavtsev 1990; Detmold 1984; Fuller 1977; Malekian 1991; Cassese et al. 2002; Conot 1983). The system of international criminal law is thus the first and the foremost branch of public international law to attribute the concept of international criminal responsibility to all classes of offenders, including states, organizations, groups, and individuals of all ranks. This means that one may define the system of international criminal law as a body of rules to hold accountable those suspected of committing international crimes and submitting them to the jurisdiction of international criminal courts. This is the

universal legacy of the Nuremberg Tribunal, which one can find already developed in the Islamic system of criminal law before the establishment of the Nuremberg Principles.

2.2.1 Sources of Both Legal Systems

A comparative study of Islamic and international criminal law reveals the fact that the systems of criminal law have a lot in common. For instance, while the basic sources of Islamic international criminal law rest on the *Qur'an*, they are similar to the basic sources of international criminal law arising from Article 38 of the Statute of the International Court of Justice. Islamic international criminal law is conceived as belonging exclusively to Islamic states, but it is a law emanating from the universal rules of *Shari'ah*, and therefore belongs to the whole world because *Shari'ah* is based simultaneously on a universal globally applicable text and also a specific internal text in its letters. It means it has a capacity of internal and international spirit of adaptability. This means that when we speak about Islamic international criminal law, we are, at the same time, speaking about the general principles of international criminal law that are parallel to the system of Islamic international criminal law and which have, in a few instances, been adapted or modified to the world criminal legal system.

Shari'ah can be reduced to one word, "code," but more accurately it describes a more complex system of law. This system includes the rules, provisions, regulations, orders and norms arising from the *Qur'an* (Malekian 2011a, 1-12). Although the *Qur'an* is the holy book of Islam, it is at the same time the source for the rules of financial law, tax law, family law, social law, procedural law, criminal law and international law, including the humanitarian law of armed conflict. *Shari'ah* also includes the jurisprudence developed by Islamic judicial institutions and the tradition of the *Prophet* of Islam,⁴ known as the *Hadith*, which is the collection of his saying and the manner in which he dealt with serious questions of social, political and juridical events. *Shari'ah* constitutes itself the main source or the body of Islamic law.

Sources of international criminal law include international conventions, customary law, court decisions, opinions of writers, general principles of law, and other documents, which constitute direct and indirect sources of international criminal law depending on their legal nature. Islamic law not only includes these same sources of international law, but also relies on the theory of its constitution, the *Qur'an*, and the *Sunnah*, or all peaceful customs of the Prophet. Other sources of Islamic law are *Qiyas*, or the analogical reasoning which also includes judgements (case law); *Ijtihad*, or individual judgement or *publicists*; and *Ijma*, which literally means consensus on certain matters, e.g. adoption of certain significant international resolutions in the United Nations General Assembly.

⁴ See Weeramantry (1988).

2.2.2 Subjects of Both Legal Systems

Islamic international criminal law and international criminal law deal with similar subjects of law. This is with the reservation that in public international law priority is given to states, organizations, groups, and then individuals in that order, while in Islamic public international law one may list the priority as individuals, groups, organizations, and then states. However, both systems and their respective systems of human rights law, recognize individuals, groups, organizations and states as their subjects. Reviewing the treatment of these subjects in both legal systems of criminal law highlights the fact that Islamic law places more emphasis on individuals. The same conclusion arises regarding the accountability today of an individual or their culpability before an international criminal court. However, it was only after the universal adoption of the Nuremberg Principles that individuals were recognized as the primary subjects of international criminal law. Islamic law recognized individuals as the main subjects of criminal responsibility for their criminal conducts fourteen hundred years before the Nuremberg Tribunal first sat.

2.3 What Is Islamic International Criminal Law?

Islamic law flourished and evolved over fourteen centuries ago. Its core aim was to decrease ignorance among Arabs and to introduce and increase the knowledge of human rights principles in all Arab regions. Prophet Mohammed is the Holy Prophet who revealed Islam. The basic sources of Islamic law are the *Qur'an* and the traditions of the Prophet, also known as the *Sunnah*. Islamic law has consequently progressed from the interpretation of these two original sources that are supplemented by the opinions of Islamic jurists. In other words, the Islamic faith has developed a large corpus of legal opinions derived from various interpretations of these sources. All of these make up the *Shari'ah* law.

The translation of the term *Shari'ah* in English is Islamic Law, which originally consisted of *Shari'ah* (the revealed law of Islam, the normative law, the way to justice) and *fiqh* (the jurisprudence of Islamic law, the understanding of the relation between various judgments). Like the common law, it also includes the interpretation of case law by judges through ethical, philosophical, moral and particularly legal analysis. Islamic law thus has elements of both civil and common law systems. One of the significant features of Islamic law, then, is that it is based on both inquisitorial and adversarial methods of jurisdiction. The philosophy of law therefore includes the manner in which scholars of Islamic law discover and express their views relating to certain versions or decisions. By this we mean that when we refer to Islamic law we include all parts of the law, including its jurisprudence.

The concept of Islamic international criminal law includes that part of Islamic jurisprudence which denotes certain principles, customs, obligations, norms, or rules aimed at prohibiting and preventing the commission of certain conduct in the relations among individuals, groups, and states. The concept of Islamic international criminal law not only includes those

rules or customs of Islamic law, but also customary and conventional rules of international criminal law. Like the system of international criminal law generally, Islamic international criminal law seeks to prevent, prohibit, prosecute and punish acts which are contrary to international peace, security, equality and justice.

The system of Islamic international criminal law has existed for centuries, but has not been analyzed as a separate legal discipline (Hamidullah 1953a; Hamidullah 1953b; Khadduri and Liebesny 1955; Khadduri 1955; Khadduri 1966; Al-Ghunaimi 1968). This is also true for much of the history of international criminal law, which until recently had been regarded only as a small part of international public law. Instead it was usually considered under the laws of war. Although international criminal law was discussed within the work of some prominent international lawyers like Vespasian Pella (1925) (who developed the concept of international criminal responsibility of states or entities), its treatment as a separate body of law only became official after the establishment of the Nuremberg Principles.

There are numerous principles that one finds in both international criminal law and Islamic law. One of the fundamental principles of Islamic international criminal law, as with the Nuremberg Principles, is *nulla poena sine lege* or *nullum crimes sine lege*; conduct cannot be subject to criminal liability unless law has already prohibited the conduct.⁵ Thus, the legality principle constitutes one of the basic principles of both legal systems.

The principle of the binding character of certain obligations of international law is not only one of the elements of the Nuremberg Principles, but also one of the foundational principles of Islamic international public law, and thus an integral part of Islamic international criminal law. The second Nuremberg Principle reads, "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law". This Principle is accepted as a theoretical matter for Islamic states, while those in political power influence its practical application.

Islamic international law places a significant weight and value on the juridical description of international agreements. The principle of the integrity of international treaties in Islamic international law is, properly speaking, *pacta sunt servanda*. Islamic states are therefore legally obliged to put into operation and complete the provisions of treaties or agreements concluded between Muslim and non-Muslim states. The principle of integrity of agreements under Islamic international law is essentially based on the verses of the *Qur'an* (Malekian 2015a). This original source of Islamic law requires Islamic states, Islamic nations, and Muslim individuals to respect the obligations of a treaty and fulfil its requirements. The *Qur'an* therefore recognizes the fulfillment of the provisions of international treaties as an integral part of the duties of Islamic nations. This theory is also valid in the case of international criminal law treaties to which Islamic states are a party. Those treaties, which

⁵ The *Qur'an*, 4:105.

constitute an integral part of *jus cogens* law (fundamental prohibitions that concern all states), are applicable to all states or nations of the world (see Section **Fehler! Verweisquelle konnte nicht gefunden werden.**).

Islamic law requires equal application of the provisions of a treaty to all contracting parties. This is based upon the theory that fulfillment of the obligations of a treaty is predicated on mutual respect for its provisions. This theory applies equally to Western or non-Western nations. When one of the contracting parties to a treaty violates a provision of that treaty, there is no obligation on the other parties to carry out their obligations under the treaty regarding the violating party.

Still, even if an Islamic state considers itself not legally bound to the provisions of an international criminal convention, this does not necessarily prevent the attribution of criminal responsibility to the relevant state because, in the case of particularly grave international crimes such as genocide, aggression, crimes against women, war crimes, and torture, non-ratification or resort to the provisions of Islamic sources does not negate responsibility. The same philosophy applies to any Western state.

2.4 Major Criminal Principles

The International Law Commission in 1950 evaluated the universal validity of the Nuremberg Principles, producing seven principles of international criminal law in *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*. The Commission neither adopted nor rejected the Principles. Despite this fact, the Nuremberg Principles are an integral part of customary international criminal law and the law of *jus cogens*. They also are an essential part of the statutes of the *ad hoc* international criminal tribunals and the ICC. In the following paragraphs, we will examine whether the relevant principles considered by the Tribunal and the International Law Commission also exist in the provisions of Islamic international criminal law and justice.

2.4.1 The Principle of Responsibility

Today, the principle of criminal responsibility constitutes not only a part of conventional international criminal law, but also an integral part of customary international criminal law. The principle of criminal responsibility imposes criminal accountability on those who have violated the basic or substantive part of international criminal law. The International Military Tribunal at Nuremberg asserted that “Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.⁶ This Principle also constitutes a significant part of Islamic international criminal law. This is because Islamic law creates not only rights

⁶ IMT, “Judgment of October 1, 1946,” in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany*, Part 22 (August 22, 1946 to October 1, 1946) (hereinafter “Nuremberg Judgment”) at 55. http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf

for individuals, but also duties and obligations; the responsibility of individuals constitutes a core principle of Islamic law. The intention of the principle is to signal to individuals who engage in unlawful, irrational, immoral, or criminal conduct that they cannot escape criminal responsibility for their actions. Such actions may violate the legal structure of law, the ethics of law, the basic principles of humanity, the elements of universality of the law, the principle of moral obligations, or the love of humanity.

The principle of morality in Islamic law establishes what is right and what is wrong, and is associated with two acknowledged principles of Islamic law, *amr bil maroof* and *nahi 'anil munkar*. Similar principles can be found in traditional philosophies of law. The principle of morality may also be thought of as the principle of the love for justice when the basic elementary requirements of social relations are infringed during war or peacetime. The Nuremberg Tribunal also recognized the principle of morality as one of the most serious contributions of the trials. The principle of morality in fact played an important role within the Charter of the Tribunal, the Tribunal's procedures, and the official record of the individual indictments and *judgments*. The entire structure of the Charter was based on two pillars: the principle of legality and the principle of morality.

Thus, it would be difficult to argue that the principle that "any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment"⁷ is against Islamic principles of justice for the prevention of impunity. The principle is so clearly a part of both systems of law that no logical interpretation of the philosophy of Islamic or international criminal law can be reached without it.

2.4.2 The Principle of Non-Validity of Internal Immunity

The second Nuremberg Principle concerns the doctrine of dualist legal systems. It points to the fact that a person who has committed an international crime is responsible, and therefore accountable, before the provisions of international law regardless of whether such conduct violates national law. Consequently, reference to the provisions of internal law to bar the application of relevant provisions of international law is invalid. The Nuremberg Tribunal rightly asserted:

"...the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law".⁸

⁷ Nuremberg Principles, Principle I.

⁸ IMT, *Nazi Conspiracy and Aggression*, Opinion and Judgment. Washington: United States Government Printing Office, 1947, at, pp.52-53.

The reference in the Charter of the Nuremberg Tribunal and in the trials itself to this supremacy of international law occurred mostly with respect to the case of crimes against humanity. The principle of the binding character of certain obligations of international law is in fact a corollary to the principle of international accountability.

This Principle that invalidates an attempt to acquire immunity from international accountability by asserting the applicability of national law not only constitutes an integral part of Islamic practice, but also an integral part of the general principles of international criminal law today. Since the structure of Islamic international criminal law and Islamic national criminal law are the same, there is no need in Islamic law to distinguish between dualism and monism. Internationalization of all rules in Islamic law is beyond all concepts of human law, including Canon law, Civil law and Common law. In addition, the first principles of Islamic law include the acceptance of the concept of responsibility for all acts of individuals and the prevention of impunity as well as the implementation of appropriate justice.

2.4.3 The Principle of Responsibility of Heads of State

One of the critical changes in the system of law in general and the system of international criminal law and justice in particular has been the abolition of head of state immunity concerning their criminal conduct. The principle of head of state responsibility and the responsibility of superior officers is based on Article 7 of the Charter of the Nuremberg Tribunal. According to the Charter and Nuremberg jurisprudence, the principle that an individual acted as head of state or as a responsible government official does not relieve him from international responsibility. The Tribunal stipulates that no immunity can apply to the conduct or decisions of persons who violate the core principles of international criminal law or commit international crimes. This very wise doctrinal development by the Tribunal became the basis for the formulation of Nuremberg Principle III identified by the International Law Commission. Thus, it became obvious that the principle of international law that provided immunity for state officials under certain given circumstances was no longer valid. The Nuremberg trials of the major war criminals also made it clear that:

“The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law”.⁹

This statement of the Charter has become a controversial principle of international criminal justice today. Although the principle has been applied by international criminal courts, both

⁹ Nuremberg Judgment, at 56.

the *ad hoc* tribunals and the permanent International Criminal Court (ICC), its validity has been challenged by Western and particularly by non-Western states.

The Principle is also a significant part of the legal statutes of contemporary international criminal courts and has been applied in the case of heads of state such as Charles Taylor. The Principle obviously rejects immunity for all those who commit war crimes, crimes against humanity and genocide, but are not brought under a national or international criminal jurisdiction. The Principle therefore also constitutes a part of the Complementarity Principle. At the same time, the Principle has been rightly criticized because it applies in practice only to those who have lost their political immunity and not to those who are supported by the military and political forces of their governments. The Principle unfortunately has become one of the fundamental reasons for the development of the theory of *one-eyed justice* in international criminal law as a whole. The hope is that international, regional and national criminal courts will implement the Principle equally in the future.

2.4.4 The Principle of the Irrelevance of Acting Pursuant To Superior Orders

One of the significant developments of the Charter of the Nuremberg Tribunal was Article 8, which was incorporated as one of the principles articulated by the International Law Commission. The main intention of this Principle was to decrease the military, political or moral value of superior orders with respect to conduct that violates the basic structure of the international humanitarian law of armed conflicts. It augments the idea of respect for human dignity and aims to decrease violations that cause unnecessary suffering against humankind. It asserts that a crime that is committed by a subordinate does not relieve his superiors of criminal responsibility. This Principle also asserts that superior orders may not be used as a defense by an accused. Principle IV thus reads:

“The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him”.

The Nuremberg Tribunal refused to accept the traditional argument that defendants acting under superior orders could escape from international criminal responsibility. The Tribunal thus stated that:

“The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment [...] The true

test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible”.¹⁰

The Charter of the Nuremberg Tribunal and the work of the International Law Commission thus codified the importance of individual moral agency. The principle of the irrelevance of superior orders requires a subordinate to consider the question of violence, atrocities and brutality of the conduct and exercise moral choice if possible. This means that morality plays an important role in the system of international criminal law and justice. The statutes of the *ad hoc* and permanent international criminal courts also strongly support the principle. Article 33 of the Statute of the ICC concerns superior orders:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

This principle of morality constitutes one of the basic ideas of *Shari'ah* law and is an integral part of Islamic international criminal law (Malekian 2015a). Islamic law encourages and highly values the principle of moral obligations if moral choice is in fact possible (Malekian 2015a). With this principle of morality, Islamic international criminal law endeavors to decrease violence and the principle of revenge. It seeks to increase the value of forgiveness, brotherhood, and sisterhood (Malekian 2015a). In fact, Islamic law prohibits argument of *tu quoque* because of the harm it allows to the dignity of human beings as a whole. Some defendants used the argument of *tu quoque* before the ICTY, but it was firmly rejected by the court. The right to disobey superior orders that violate international criminal law has also been asserted concerning the illegal war in Iraq waged by the United States armed forces (Kennedy 2016).

2.4.5 The Principle of Complicity

The principle of complicity is a rather complicated concept in criminal law (Smith 1991). One of the basic reasons for the increased occurrence of international crimes is the participation or complicity by others whose conduct makes the commission of the crime much more possible. The principle of complicity in the commission of a crime is originally associated with

¹⁰ Ibid.

Article 6 of the Charter of the Nuremberg Tribunal and is formulated into Principle VII of the work of the International Law Commission. At the Nuremberg Trial, several of the defendants were convicted of war crimes and crimes against humanity that they did not commit themselves, but for which they gave orders for the commission of atrocities and massive violations against the victims. They were found guilty as part of a conspiracy to commit those crimes.

The concept of complicity was not a new concept in national criminal laws. It is a well-recognized principle of general criminal law of all nations. This is with the reservation that the concept was, for the first time, introduced as a part of the system of international criminal law in order to prosecute those who were most responsible for the commission of atrocities. The Nuremberg Charter in Article 6 refers to the complicity of instigators, leaders, organizers, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit crimes against humanity, war crimes, or crimes against peace. The Charter recognized that those individuals were liable for all acts performed by any person in execution of such a plan. This significant function of the principle of identifying complicity can also be found in the statutes of the *ad hoc* and the permanent international criminal courts. The international criminal tribunals such as the ICTY, the ICTR, and the ICC have applied the principle of complicity in their judgments and applied it to the commission of serious international crimes or atrocities against humankind (Ferencz 2014).

In the international criminal courts, the concept may refer to those individuals who do not physically perpetrate the crime; they do not regularly engage in direct criminal conduct, but their decisions and actions are nevertheless responsible for mass atrocities, and their culpability for the commission of mass atrocities is viewed as higher than those individuals who committed specific acts of violence (Aksenova 2014). This position is reflected in Article 25(3)(c) of the ICC Statute. It recognizes that a person is criminally responsible and liable for punishment for a crime within the jurisdiction of the International Court if the relevant person, for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

2.4.6 The Principle of the Right to a Fair Trial

One of the core principles of a reasonable criminal justice system is the principle of right to a fair trial for the accused. This is one of the oldest principles of criminal justice, and its content has been debated from various points of view in an effort to improve criminal justice. It is a principle that has been violated most frequently in domestic legal systems. The Charter of the Nuremberg Tribunal included the principle of the right to a fair trial. Principle V identified by the International Law Commission reads, "Any person charged with a crime under international law has the right to a fair trial on the facts and law".

This Principle implies that a defendant charged with a crime under international law has the right to a fair trial before the Tribunal and should be treated humanely. Although, the Nuremberg Charter permitted trials in absentia,¹¹ all defendants had the right to a just and prompt trial.¹² An entire chapter of the Nuremberg Charter was devoted to the *Fair Trial for Defendants*, and guaranteed a number of rights to ensure a fair trial. These rights included the right to give any explanation relevant to the charges; the right to have proceedings, including the trial, conducted in a language the defendant understands; the right to receive a copy of the indictment in a language with which he is familiar and at a reasonable time before the trial; the right to conduct his own defense or to have the assistance of counsel; the right to present evidence necessary for the protection of his rights during his defense at the trial; and the right to cross-examine any witness called by the prosecution.

The principle of the right to a fair trial is today an integral part of international criminal justice and all international criminal tribunals. The ICC statute requires it to conduct the trial of the accused in accordance with acceptable human rights principles, which are equal to the dignity of man. Islamic law also broadly encourages the fair treatment of the accused and that guilt should be proven beyond any reasonable doubt. The words and principles of the ICC on fair trial are certainly similar to those found in Islamic law. The philosophy of Islamic jurisprudence underscores this similarity, but many Islamic states have grossly violated this principle of fairness and humane treatment of the accused in their actual practice. Unfortunately, in a considerable number of cases, Islamic nations have not even brought the accused before any criminal court at all. They have instead imposed capital punishment without any procedural criminal investigations, and a significant *number* of accused have been savagely raped in order to break down their personality, causing some to commit suicide.¹³

2.5 Basic Principles of Criminal Justice within Both Legal Systems

Islamic international criminal law and the global system of international criminal law share fundamental principles of criminal justice that are found in the Nuremberg Principles. These include:

- a) prohibition against *ex post facto* law (retroactive law);
- b) *de lege ferenda* (the law for future);
- c) *de lege lata* (the law in force);
- d) *nullum crimen sine lege* (a conduct cannot be treated as criminal unless some rule of law has already declared it to be criminal and punishable as such);

¹¹ Nuremberg Charter, Art. 28.

¹² Nuremberg Charter, Art. 1.

¹³ See Economic and Social Council, *Situation of Human Rights in the Islamic Republic of Iran: Note by the Secretary-General*, (Forty-fourth Session, 1989), UN Doc.A/44/620 (November 2, 1989).

- e) *nulla poena sine lege* (no punishment without law);
- f) principle of inviolability of the rights of individuals;¹⁴
- g) *nullum crimen nulla poena sine stricta* (prohibition of inhuman sanction);
- h) *nullum crimen nulla poena sine lege scripta* (carefulness of application of punishment in violation of unwritten law)¹⁵;
- i) conformity (opportunity to follow the law);¹⁶
- j) humanize (if other means of penalties are available);¹⁷
- k) equivalence (similar conduct should have similar punishment); and
- l) the application of the principle of proportionality (see Ramadan 2006, 48).

Thus, one may find in both legal systems the concept of accountability through 1) normative regulations, 2) procedural rules, 3) evidence, and 4) applicable sanction. These are fundamental to any legal system that claims to be just, and they further the rule of law for justice, transparency, and equal application of sanctions, and thus lessen impunity.

Judges may develop case law to bring their country's legal system into conformity with these basic principles of criminal justice, as one can see in the European Union. Under Islamic law the judge is responsible for the development of law, the correct interpretation of the law, the unbiased application of the law, and even for the application of law that is not Islamic law but does not contradict *Shari'ah*. Islamic law permits a judge to apply only foreign law if the parties to the case are non-Muslim. Radical approaches to Islamic law call for the development of the positive strength of law and updating it to the present requirements of justice.¹⁸ Therefore, an Islamic judge is permitted to apply those provisions of the European Union criminal law that are not in conflict with Islamic law. This is not only for the purpose of developing other appropriate principles of law into the Islamic legal system, but also for the improvement and conformity of Islamic law with the modern system of criminal law. In Islamic law there is nothing that would prevent its evolution alongside other international legal systems if their aims are consistent with fundamental principles of human rights law. This should be the whole intention of Islamic legal jurisprudence.¹⁹

The objective of this evolutionary development is to protect humanity, which is part of the structure of European Human Rights laws. We should not interpret this evolution, by any

¹⁴ Organization of Islamic Cooperation, *The Cairo Declaration on Human Rights in Islam*, Annex to Res. 49/19-P, <http://www.oic-oci.org/english/article/human.htm> (hereinafter "Cairo Declaration on Human Rights"), at Articles 17, 18, and 19.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*, at Article 20.

¹⁸ Here, we do not mean the wrongful interpretations of law that are applied in some contemporary Islamic nations.

¹⁹ This means that groups such as the fanatical ISIS do not represent Islamic law at all, but have been used in modern conflicts around oil in the relevant regions of the world by the United States CIA. This is the continuation of the September 11 game. The reality is that Islamic faith is now employed as the hidden weapon of the CIA (Kennedy 2016).

means, as indicating that the relevant judge has violated the basic principles of Islamic law. It is in fact to the contrary. The Islamic judge develops the law to the standards of internationalization and demonstrates the capability of case law and the concept of *jihad for legal development*. This is what I may also call a *juridical jihad* by the judge making the law more readable, more acceptable and more desirable for the advantages of human social interests. This is similar to the concepts of educational *jihad*, agricultural *jihad*, medical *jihad* and *jihad* for the purpose of enlightenment.

Islamic law does not develop in a way easily understood by many Western or non-Western lawyers, but instead evolves to consolidate the *universalization* of humanity from all aspects of the law. This can be modelled and reflected from the provisions of any law, as long as the law does not conflict with the basic principles of humanity as a whole. These basic principles include respect for the individual, the principle of goodwill or sisterhood, and the principle of faith for the implementation of true justice. Despite these principles, and despite the adoption of a considerable number of international human rights instruments by Islamic nations, it is a regrettable fact that Islamic nations do not implement these principles and conventions regarding certain significant matters of freedom and liberty of individuals. Consequently, many Islamic states violate human rights principles in most aspects of their social relations.

2.5.1 Islamic Jurisdiction against Retroactivity

Islamic international criminal law does not permit retroactive application of the law, which has sometimes been employed in the global system of international criminal law. An offence must first be described as a crime by the legislator and cannot be newly criminalized after its commission. The principle of legality is thus a fundamental principle of the Islamic criminal justice system, including Islamic international criminal law. It is for this reason that the *Qur'an* stipulates that:

“We have revealed the Book to you with the truth that you may judge between people according to the complete Code and knowledge of justice which God has given you”.²⁰

According to this source, the prosecution and punishment of individuals should only be carried out on the grounds of pre-existing criminal law criminalizing the given conduct. This interpretation means that the Islamic international criminal law is against any type of *ex post facto* criminal jurisdiction.

One can thus draw the conclusion that Islamic law would view the assertion of international criminal jurisdiction after the Second World War as invalid. This is because the post-World War II Tribunals based their jurisdiction on retroactive law and partly *de lege lata* against the

²⁰ The *Qur'an*, 4:105.

perpetrators of international crimes. However, the perpetrators of war crimes during the Second World War could have been punished if the principles of criminal jurisdiction of different cultures had been taken into consideration in developing the constitution of the International Military Tribunal in Nuremberg. Islamic international humanitarian law would have easily allowed the prosecution and punishment of perpetrators of war crimes and crimes against humanity. The nature and character of the Nazi holocaust is strongly condemned under Islamic law, and since the Jews and other victims of the holocaust were an integral part of the union of humankind, the universal jurisdiction of pure Islamic law would encompass these crimes.

The principle of legality in Islamic international criminal law therefore implies respect for two important elements:

“The first is that no obligation exists prior to the enactment of legislation, and the second is that all things are presumed permissible. The application of those rules to the criminal law signifies that no punishment shall be inflicted for conduct which no text has criminalized and that punishment for criminalized conduct is restricted to instances where the act in question has been committed after the legislation takes effect” Al-‘Awwa 1982, 134.

This power of the legalization of the given international conduct in Islamic international criminal law increases the common value of the law and consequently makes its practical implementation possible. In a broader perspective, it decreases the commission of criminal activities at an international level. This principle of non-retroactivity is a fundamental part of contemporary international criminal law and is found in the Statutes of the ICC and that of all other *ad hoc* tribunals. Today, both systems of international criminal law are of a similar view concerning the non-application of the principle of retroactivity.

2.5.2 Impunity against Islamic Rules

The contemporary philosophy of Islamic law, in contrast to its traditional jurisprudence, seeks common ground for its theories, aims, ambitions and philosophies with those legal bodies that are already accepted by the international legal community as a whole, including in the areas of international human rights law, international humanitarian law of armed conflict, and the system of international criminal justice (Malekian 2012). The objective therefore is neither to apply the traditional Islamic jurisprudence in the political or legal sphere of present-day international relations, nor to introduce its penal measures to other legal systems. It is rather to achieve international criminal justice by accurately implementing fair principles that may not be ignored by any individual who has violated the law. Another main purpose of contemporary Islamic criminal justice is to hinder impunity by means of political, economic, and juridical strength. The intention is also to join the struggle for the eradication of poverty and aggression; the entire application of the principles of self-defense, self-protection, and self-determination; and the full implementation of the

principle of proportionality under the system of international human rights law. All these intentions can also be seen within the legal structure of the provisions of the United Nations and international agreements.

This means that although the Islamic system protects the rights of individuals, groups and nations, it also fights against impunity for those who have committed serious international crimes and are still free or even in power. Pure Islamic law demands prosecution and punishment whilst it also encourages forgiveness for the advancement of justice and the creation of an established peace. The theoretical philosophy behind Islamic criminal jurisdiction is not necessarily punishment of individuals, but to identify and condemn all acts that are prohibited by law and that violate individual or group rights. That is why forgiveness, amnesty, truth and reconciliation commissions, restoration or reestablishment of justice with love, are all strongly encouraged by Islamic philosophy. Under Islamic criminal law, a judge is under a recognized legal duty to establish full satisfaction for the victims, protect the rights of the accused, and above all to solve, as far as possible, all cases with a peaceful method of justice.

Based on the idea that the legal, religious, and political sovereignty of Islam must be carried out independently, far from group or state monopolization, and with slavish adherence to synthetic justice, the deep-seated ethical philosophy of traditional Islamic law does not permit those who are arbitrators, judges, mediators, and prosecutors to engage in trades which may affect their judgment. This strongly held ethical position protects the integrity of judgments and prevents impunity by minimizing corruption, fraud, falsification, or any other illegal behavior.

Although relevant state authorities, legislatures, judges, or *ijtihad* directs Islamic law, it is the law of individuals, and its entire body therefore deals with the protections of the rights of individuals. This means that individuals are not only protected by the law, but are requested to safeguard the entire body of the law as a great responsibility. The original body of law in Islam is public property and thus not monopolized by the state. It is based on a permanent constitution that belongs to the people and not exclusively to the legislative bodies. The intention is to make law more respectable. However, in reality, the whole system of Islamic legislation is the monopoly of whoever leads the legal system. A clear example is the present situation of interpretation and monopolization of the whole legal system in Iran. The entire legal machinery is subject to economic corruption, as it is in Russia and in some Latin American states too. In Iran, one can buy the judge, the prosecutor or a witness who has never witnessed any of the acts relevant to the case in question (Ghaemi 2015; Shahidsaless 2016).

2.6 Jus Cogens Norms beyond Both Legal Systems

The system of international criminal justice exclusively concerns criminal violations of the rules of international law, such as international human rights law, the international humanitarian law of armed conflicts, transnational criminal law, and international criminal law. Although it is true that each of these sets of rules constitute a separate branch of international law, they are, at the same time, an integral part of this legal system. In fact, the system cannot properly function without the existence of each of those branches and remain effective. For instance, the system emphasizes the very significant function of international human rights law principles. This means that the system imposes on states certain international obligations that must be followed at all times and cannot be ignored when certain serious violations of international criminal law are occurring. This is the real intention of the principles of *pacta sunt servanda*, customary international criminal law, and *jus cogens* laws which are applicable to both Western or non-Western states. Naturally, no Islamic nation is free from the binding character of these principles.

2.6.1 Concern of All States

The new and even the old interpretation of the system of Islamic international criminal law reveals the fact that there is a profound hegemony between international criminal law and Islamic international criminal law that cannot be denied by a realistic international lawyer. The international criminal law of *jus cogens* that protects those substantial aims of the system of international criminal law are the same in both legal systems. In other words, the Islamic nations have not only become parties to the institutions of international criminal law because of their international legal and political personality, but are also, along with other states, under obligations to respect *jus cogens norms*. Such norms are contained within the universal Islamic prohibition of humiliation of humankind (concern for all individuals). A simple definition of *jus cogens* norms illustrates that they are the same in both legal systems: those norms, provisions, principles, and laws that are an integral part of the common dignity of all people and are vital for the maintenance and respect of fundamental human rights laws. In both systems a state should not ignore, derogate or modify those norms, including through the provisions of bilateral, mutual, or multilateral international conventions.

The maintenance of *jus cogens* norms is consequently necessary for the development of potent love for justice and security of all human beings as a whole. *Jus cogens* norms may be found in the provisions of crimes against humanity, war crimes, aggression, genocide, torture, abolition of slavery, non-impunity, and accountability before international criminal courts. All these have slowly developed the basic policy of the Nuremberg Principles such as *responsibility*; non-impunity of *heads* of states; and the fact that non-criminalization under national criminal law does not affect the criminalization under international criminal law. Other applicable principles include the non-application of the defense of superior orders;

complicity as constituting a mode of responsibility; the necessity of the application of fair trial guarantees; and the categories of crimes against humanity. These principles apply to all states regardless of their geographical position, or their military or political strength, and so evidently include Islamic and non-Islamic nations.

2.6.2 The Origin of Pacta Sunt Servanda

We still need to determine why the Nuremberg Principles affecting the complete philosophy of international criminal law should be recognized as *jus cogens*. Firstly, we must specify that *pacta sunt servanda* applies to *jus cogens* norms, but the contrary may not necessarily be correct. This is because *pacta sunt servanda* speaks about the obligations and duties of states towards one another. These may be unilateral, bilateral, or multilateral obligations created by a convention. The obligations and duties of states may vary from convention to convention and from case to case, depending on the purposes and legitimacy of the treaty. The principle of *pacta sunt servanda* applies, in another words, to what is written or promised in the provisions of treaties. Secondly, we may terminate the application of *pacta sunt servanda* to an obligation due to the provisions of the treaty itself, particular circumstances arising from a given condition, or because of a serious violation of a significant provision of the treaty. In contrast, we cannot terminate *jus cogens* norms.

The difference here between the system of *jus cogens* and *pacta sunt servanda* is that although the former enjoys the characteristics of the latter, it is almost never terminable. The system of *jus cogens* requires consensus, and so long as the states of the world have not reached a contrary consensus, they are binding on all states. Yet, achieving such consensus is rather impossible. This is particularly true for international criminal law. It would be strange indeed, and incredibly unrealistic, to expect that the international human, legal and political community would one day agree to permit the commission of genocide, crimes against humanity, war crimes, torture, rape, or atrocities under Islamic or non-Islamic provisions.

In addition, *jus cogens* norms do not require signature or ratification by a state to be legally binding because of their importance in protecting the principles of brotherhood, sisterhood, humanhood, and certain basic values of the international community. This means that *jus cogens* norms protect individuals, groups and states from those forms of violations that are against the fundamental needs of all human beings. These needs include both the formation of human identity predicated on a person's biological status as a human being, and the same person's human legal personality under the basic principles of international human rights norms.

Jus cogens norms include certain international crimes that have most often gone through the characterization of *conventional* or customary international criminal law and are much stronger than ordinary customary or conventional rules. They assure certain obligations, the reverence of which relates to the strengthening of international legal and political community and the violation of which pertains to the disobedience from the frameworks of

international crimes (Malekian 1987, 19). In other words, in the course of various international negotiations, states may debate and negotiate certain customary rules, but *jus cogens* norms are not negotiable. Because of this very potential substantial validity of these *jus cogens* norms for the prevention of grave international crimes, they are called the *peremptory* norms of international criminal law. This means the very high value and care arising from the community interests to prevent serious violations of international human rights law in all parts of the world. One may therefore assert that the Nuremberg principles and their developments constitute an integral part of substantive criminal law of international criminal justice.

2.6.3 Obligatio Erga Omnes

The principle of *obligatio erga omnes* is an established principle of public international law, international criminal law, and international criminal justice (Tams 2005; Malekian and Nordlöf 2012a). The principle refers to obligations that states have towards the international community as a whole and are obliged to respect them and should not ignore their legal validity. It describes the position of certain rules, provisions, regulations, norms, or principles in the inner structure of law that should not be withdrawn by any subject of international or international criminal law (Malekian 2011b). States should respect and apply the principle of *obligatio erga omnes* for the maintenance of justice, equality, security, and international peace.²¹ In the *Jorgic* case before the European Court of Human Rights, the Court supported the German courts argument concerning its assertion of jurisdiction over certain *jus cogens* crimes.

According to the European Court, no regional or international conventions were violated by the German Court through its exercise of such jurisdiction. The Court held that states had an *erga omnes* right concerning certain *jus cogens* norms, which gave the German government the right to establish jurisdiction *ratione materiae* and *ratione personae*. The Court stated that:

“Pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*”.²²

The potentiality of *jus cogens* norms and their validity of implementation should be measured against the consolidated role of the Nuremberg Principles in conjunction with the principle of *obligatio erga omnes* for the prevention of impunity and the enforcement of international criminal justice in international level.

The principle of *obligatio erga omnes* has been analyzed from various points of view, and is the basis for the approval of certain rules of international responsibility of states by the

²¹ International Court of Justice, *Barcelona Traction, Light and Power Company Ltd.*, Judgment, 1972 ICJ Rep., at para. 34.

²² European Court of Human Rights, *Jorgic v. Germany*, Appl. no. 74613/01, Judgment, December 10, 2007, at para. 68.

International Law Commission.²³ In a primary definition, the principle of *obligatio erga omnes* means that whenever certain international crimes have reached the level of a *jus cogens* norm, they automatically qualify as a rule to which the principle of *obligatio erga omnes* applies, and thus a rule that is binding on all states and enforceable by all states (Randall 1988, 829-30). This includes Islamic, Western and non-Western states.

A fundamental difference between the term “*jus cogens*” and the term “*obligatio erga omnes*” is that a *jus cogens* norm constitutes that part of international criminal law or international criminal justice that is binding on all states, such as that articulated in the Nuremberg Principles. *Obligatio erga omnes* describes certain legal obligations that apply to states with respect to *jus cogens* norms (Bassiouni 1996, 64). It imposes obligations and responsibilities on states, individuals, entities, and regional bodies such as the European Union, Arab Union, and the United Nations.

Still, *jus cogens* and *obligatio erga omnes* constitute together the most important source for the recognition of crimes against peace, war crimes, crimes against humanity, and genocide. The concept of *obligatio erga omnes* is rather a new concept in the vocabulary of international criminal law. This is because the legal validity and philosophy of *jus cogens* norms was mostly established after the adoption of the Vienna Convention on the law of treaties in 1963. Consequently, international courts have mostly treated the term *obligatio erga omnes* in relation to public international law and the use of the vocabulary by writers is rather a new term in the legal structure of international criminal law. In any event, such international obligations have mandatory nature and the Nuremberg Principles are in this category.

2.6.4 Justifications for Jus Cogens Norms

The seven Nuremberg Principles constitute an integral part of *jus cogens* norms. This is because they have been incorporated not only into several law-making treaties to constitute a part of international criminal law, but also into the body of customary international criminal law through consistent state practice. Some states or writers may not accept the legal status of the concept of *jus cogens* or *obligatio erga omnes*. The situation most often varies with the political position of a state that rejects such concepts because it does not recognize them as valuable for its national or international policies and, even more often, a state may consider *jus cogens* or *obligatio erga omnes* as harmful to its interests.

Many states decide whether to accept the Nuremberg Principles on a case-by-case basis. We can see this in the practice of both Western and non-Western states, and thus also Islamic states. When it comes to their own criminal conduct, Islamic states appear to ignore the existence of *jus cogens* norms, but concerning the criminal conduct of the most powerful states, they decry the impunity enjoyed by states such as Israel, the United States, China, the

²³ United Nations, Year Book of the International Law Commission: 1963 Vol. II, UN Doc. A/CN.4/SER.A/1963/ADD.1.

United Kingdom and Russia. Western states may also have similar opinions regarding the criminal conduct of certain Western, non-Western, and Islamic states. This means in practice that Islamic states simultaneously accept and reject the universality of the Nuremberg Principles.

The justification for such contradictory views may be theoretically strong, but it has no basis in the applicable jurisprudence. Such *jus cogens* norms are not only found in conventional international criminal law that is subject to *pacta sunt servanda*, but also from the fact that their power derives not from such conventions, and thus applies to all states. Take the example of genocide. Obviously, the international community cannot accept a state's defense of its commission of genocide. This is notwithstanding the fact that the state has not ratified the Genocide Convention, or refers to its national constitution, or demands restrictions on the basis of Islamic law, or by excusing its criminal conduct by defending its position due to the protests set forth against it by the population of an occupied territory. These arguments cannot be effective against the substance of *jus cogens* norms which are obligatory in all circumstances. The seven Nuremberg Principles are a significant part of contemporary international criminal law and should be respected in all political and legal contexts. This is equally the case for those states that reject the complementarity function of international criminal justice by various means, and instead half-heartedly apply their own national criminal legislation.

2.6.5 The Usefulness of Jus Cogens Norms

Some of the reasons for the recognition of crimes against humanity, war crimes, and genocide as *jus cogens* norms²⁴ and the application of the principle of *obligatio erga omnes* are the following:

- i) Preservation of legal order and safeguarding fundamental human rights law including customary and conventional human rights law. For example “*customary international law* of human rights are peremptory norms and an international agreement violating them would be void”.²⁵
- ii) Prevention of international crimes. The ICTY articulates that “the most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force”.²⁶

²⁴ *Jus cogens* norms are also accepted by the International Law Commission and are incorporated into the law of international treaties. United Nations, *Year Book of the International Law Commission: 1963 Vol. II*, UN Doc. A/CN.4/SER.A/1963/ADD.1, at 187, 198.

²⁵ United Nations, United Nations Conference on the Law of Treaties: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole. UN Doc. A/Conf.39/11, at 471-472.

²⁶ ICTY, *Furundžija, IT-95-17/1-T, Trial Chamber, Judgment, December 10, 1998, at para 153.*

- iii) Prohibition of the commission of international crimes. Similar to (ii), the ICTY further illustrates that “clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community”.²⁷
- iv) Prevention of the application of the abolished principle of *ex post facto* law. This furthers the security of the legal system and the high legal validity of *jus cogens* and *erga omnes* policy.
- v) Application of the principle of *de lege lata*, as is described in other subsections.
- vi) Prevention of a state resorting to the plea of force majeure. This is because *jus cogens* and *erga omnes* are “designed to safeguard fundamental human values and therefore must be complied with regardless of the conduct (reasoning) of the other party or parties”.²⁸
- vii) Prevention of impunity. The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant case clarifies that* “we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members”.²⁹
- viii) Extradition of accused persons. This is solely if there will not be any risk for torture or capital punishment. But, this may not be exercised irresponsibly. The concept of prosecution and punishment are two of the core principles of the normative character of *jus cogens* and *obligatio erga omnes*. The Inter-American Court of Human Rights in the case of *La Cantuta, Fujimori* states that “access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States’ *erga omnes* obligation to adopt all such measures as are necessary to prevent such violations from going unpunished”.³⁰
- ix) Applying appropriate procedural rules and not violating certain basic fundamental rights. An example of this is the extradition of two Egyptians namely *Ahmed Agiza* and *Mohamed Alzery* by the Swedish government with close cooperation of the CIA which resulted in a violation of the *jus cogens* norm of torture.³¹

²⁷ Ibid.

²⁸ ICTY, *Kupreškić et al.* IT-95-16, Trial Chamber, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, February 17, 1999.

²⁹ International Court of Justice. *Arrest Warrant of April 11, 2000 (Democratic Republic of Congo vs Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, February 14, 2002, at para.55.

³⁰ Inter-American Court of Human Rights, *Case of La Cantuta v. Peru*, Series C No. 160, Judgment, November 29, 2006.

³¹ Council of Europe, Committee on Legal Affairs and Human Rights, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, Draft report – Part II (Explanatory memorandum), AS/Jur (2006) 16 Part II, June 7, 2006, at paras. 242-3.

http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf

- x) Emphasizing the non-applicability of statutes of limitations for certain international crimes. For example in the *La Cantuta, Fujimori* case referred to in (viii), the purpose is for states to exercise “their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for” *jus cogens* crimes.
- xi) Prevention of the plea of superior orders. This means *jus cogens* and *obligatio erga omnes* ensure the non-applicability of the defense of obedience to superior orders for the purpose of mitigation of sentence or impunity. The plea of states of emergency and force majeure are not an acceptable defense for infringing the common interests of mankind (Triffterer 2002).
- xii) Accountability for all those who have committed crimes. Here the purpose is to prevent impunity and limit, as much as possible, future violations. In *R on the application of Binyan Mohamed and Secretary State for Foreign and Commonwealth Affairs*, the High Court asserted, “the prohibition on State torture imposes obligations owed by States *erga omnes*, to all other States which have a corresponding right and interest in compliance”.³²
- xiii) Protection of the rights of victims. This is the core purpose of all categories of *jus cogens* crimes (Malekian 2015b; Malekian 2014; Malekian and Nordlöf 2012b)
- xiv) Protection of the rights of witnesses. This is now an established principle of international tribunals; the legal procedures of ICTR and SCSL created rules for the protection of those who are witnesses of *jus cogens* crimes and were terrorized by the accused.
- xv) Protecting and using all evidence according to an international standard. For instance, in the *Barcelona Traction case* the ICJ asserted that “obligations of a State towards the international community [...] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.³³ *The judgment of the Court implies an international standard of norms regulating* particular systemic concerns of all states.

³² High Court of Justice (UK), *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs (Rev 31-07-2009)*, [2009] WLR 2579, [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, August 21, 2008.

³³ International Court of Justice, *Barcelona Traction, Light, and Power Company, Limited (Belgium v Spain) Judgment*, February 5, 1970, ICJ Reports 1970 3, at para. 32.

2.7 Cultivation of Nuremberg Principles in the ICC

The systems of international criminal law and Islamic international criminal law are created for the purpose of securing and demanding respect for certain humanitarian principles. The final stage of all these principles is formulated into the international legal personality of the ICC. To review the development of international criminal justice which has been consolidated since the establishment of the Nuremberg Tribunal would require several volumes (Rosen 2016). The Nuremberg Tribunal procedures alone would take up a large number of volumes, to which one must add the development of its principles into the *ad hoc* international criminal tribunals, such as the ICTY, the ICTR, and the SCSL (Slye and van Schaack 2009, 64-70). However, there are not many studies about the principles of Islamic international criminal law, or even, one might say, the principles of an Islamic international criminal court, or how the ICC reflects the needs of Islamic states.

2.7.1 The Existence of Several ICCs

Islamic practice is different from the ethical reality of *Shari'ah*. This same disconnect between practice and aspiration may be found in the theories of Marx, the theory of the Security Council, the interests of the most powerful states, the European ICC, the African ICC, the American ICC, the Iranian ICC, the Al-Bashir ICC, the Syrian ICC, and not least the ISIS ICC. In reality, there are several forms of ICC that are shaped, formed and trusted by different actors, and each one of them has its own visible and hidden interpretation of the principles of morality and legality. By this I mean that the interpretations that give rise to these different forms of ICC are always in tension with one another. That is why the legal philosophy of the complementarity principle is very weak and does not work effectively to prevent impunity of certain powerful notorious international criminals, both from Western and non-Western states.

The ICC is, in fact, with due regard to its provisions, an inter-domestic criminal court, but it comes into its international function with the complementarity principle. *The complementarity principle* is a fundamental part of the Rome Statute. It means that when the *little* ICC in a state under the jurisdiction of which crimes have been committed cannot be established by the given political authorities, whether because of intentional or unintentional delinquency, and when criminals will thus escape prosecution as well as punishment, then the *big* ICC will switch on its functions. This function may be carried out *inter alia* in accordance with a request by the state in question, the office of the prosecutor of the ICC, or the Security Council. Consequently, the *International Criminal Court* is a court of "last resort". By this we mean that it is a Court for the implementation of justice and prevention of impunity, but with due regard to the decisions of national authorities of states that have jurisdiction over an international crime. Islamic and non-Islamic states have, from a practical point of views, reacted in a similar way to the ICC, with the difference that

Western states have more power to influence the ICC than do Islamic states. This is one of the reasons why Islamic states criticize the policies or decisions of the prosecutor of the ICC.

The existence of several conceptions of the ICC with their different descriptions and dimensions explains the apparent paradox between different legal and political ideologies in the world. In other words, it is difficult to impose a system of international criminal justice and prevent the commission of international crimes when states have different perspectives regarding the fundamental formation of the International Criminal Court. It is not the principles of the Nuremberg Tribunal, the ICTY, the ICTR, or the ICC that are in conflict with the legislation of states, but the very political nature of the ICC itself which makes its application and prevention of impunity difficult. When love for true justice does not exist, justice will never come. When justice is the product of a political deal, love for justice will never be achieved. When the killing of millions of people, the destruction of their countries, and the devastation of their homes are sanctioned repeatedly by the resolutions of the Security Council, love for justice will even be confused between the inhabitants of the victim nations and their neighbors. If the ICC is going to deliver a genuine love for justice, it has to be based on a true love for justice, proper love for prevention of impunity, and a love that prioritizes quality over quantity.

2.7.2 The Establishment of Ad Hoc International Criminal Courts

The development of the Nuremberg Principles can be examined in the constitutions of a number of international criminal tribunals that have been established since Nuremberg. One is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (the ICTY), established in The Hague in 1991. The other is the International Criminal Tribunal for Rwanda (the ICTR) established in accordance with the provisions of the Security Council Resolution to prosecute those responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring states, between January 1, 1994 and December 31, 1994.³⁴ The ICTR is headquartered in Arusha, Tanzania, with offices in Kigali, Rwanda. However, because of the circumstances of the cases brought before the Tribunal, its Appeals Chamber is located in The Hague.

One can also refer to the establishment of the Special Court for Sierra Leone (SCSL), which was set up as the result of a request to the United Nations by the Government of Sierra Leone. The Special Court undertook to address serious crimes against civilians and the crimes committed by the UN peacekeepers during the country's civil war between 1991 and 2002. The SCSL is the first international tribunal to try and convict people for the use of child soldiers (the AFRC trial). It also established that forced marriage can constitute an inhumane

³⁴ United Nations Security Council, Resolution S/RES/955, November 8, 1994.

act as part of crimes against humanity (the RUF trial). The SCSL also examined crimes committed by the United Nations peacekeepers (the RUF trial).

Another criminal tribunal that is part of the legacy of the Nuremberg Principles is the Special Tribunal for Lebanon, also known as the Hariri Tribunal. The Hariri Tribunal was established by the Security Council, but applies Lebanese criminal law. Its aim is to prosecute those responsible for the murder of the former Lebanese prime minister and 22 others in 2005. It was established in March 2009, and has primacy over national courts in Lebanon. The Tribunal has its seat in Leidschendam, on the outskirts of The Hague, and a field office in the Lebanese capital, Beirut. The Hariri Tribunal has been criticized as being more a political than legal tribunal (Jacobs 2014).³⁵

The ICTY, the ICTR, the SCSL, and the SCL have prosecuted offences that are also crimes under Islamic international criminal law, including crimes against humanity, war crimes, genocide, torture, mass rape, violations of the humanitarian law of armed conflict, recruitment of child soldiers, and enforced marriages. Although forced marriage is permitted under some Islamic states' internal rules, all Islamic nations do not permit the practice. The notion of forced marriage is also a deeply entrenched cultural practice. Islamic international criminal law does not permit forced marriages that are carried out under war conditions,³⁶ and such marriages violate the international humanitarian law of armed conflict of both legal systems. Some Islamic states, however, permit forced marriages during peacetime, which is obviously contrary to the basic elements of international human rights law.

2.7.3 ICC within Shari'ah

One of the most serious questions concerning the ICC and Islamic criminal justice is whether the "Establishment of the Court" (formulated in Part 1 of the Rome Statute) contradicts the basic principles of criminal justice in Islamic states (Roach 2006, 143). Islamic criminal justice is based essentially on the full respect of *Shari'ah*, which constitutes the main source of Islamic law (Malekian 2013, 1220-5).

Under Islamic law, international treaties must be obeyed if they have been entered into freely with appropriate negotiation, appropriate treatment of the representatives of the parties, proportionate relations without any use of force, equal opportunity for the contracting parties, and authentic ratification.³⁷ Since the establishment of the ICC is consistent with the general rules of the 1969 Vienna Convention on the law of treaties, and

³⁵ It is viewed by some as a creature of the US and France, and the President of the Republic of Lebanon never signed the agreement for its establishment. The tribunal has been particularly criticized for its use of trials *in absentia*, which violates the concept of fair justice and the provisions of international human rights law. The judges of the Tribunal control most of its procedures, which has been the basis for some to assert its non-impartiality (Tolbert 2014, 4-6).

³⁶ "O you who have believed, it is not lawful for you to inherit women by compulsion. And do not make difficulties for them..." The Qur'an: 4:19; "Indeed, Allah orders justice, good conduct, and giving to relatives; and forbids immorality, bad conduct, and oppression. He admonishes you that perhaps you will be reminded." The Qur'an: an-Nahl 16:90. Consult also Malekian (2011a).

³⁷ The *Qur'an* states "do not break the oaths after ratification thereof; when you have consented that God is a surety over your covenant". 16:91.

those rules are equivalent to the provisions of Islamic public international law relating to the law of treaties, the establishment of the Court evidently is not against *Shari'ah* or Islamic jurisprudence (Malekian 2011, 12).

In addition, certain articles or provisions of the ICC which reflect *jus cogens* norms are applicable to all states without the need for ratification. With those Islamic states which view certain provisions of the ICC as contrary to their national legal systems, the conflict does not arise because of the existence of two distinct legal regimes, but rather because a political interpretation has most often taken priority over the appropriate implementation of the law. This conflict is more serious when the question relates to the criminality, accusation and prosecution of an Islamic authority in a national or an international criminal court. This same phenomenon may be observed with respect to Western state leaders (Badar 2013).

2.8 Conclusion

Whilst the principle of non-impunity crystallized in the Islamic system of international criminal law almost 1,450 years ago, serious violators of this principle have mostly succeeded in ignoring the power of national, regional, *ad hoc*, or permanent international criminal courts. Yet since the creation of the Nuremberg Principles, impunity for individuals accused of committing grave violations of international criminal law can no longer be justified by arguments based on interpretation, non-ratification, or reservations. The ICC is part of the legacy of the Nuremberg Principles, and so a substantial number of Islamic state leaders may be held to account for their core international crimes. A similar judgment also applies to the brutal conduct of ISIS and those intelligence agencies behind its creation.

Because there is significant homogeneity between the Nuremberg Principles and Islamic international criminal law, we could rename the *Nuremberg Principles* as the *Medina Principles*, to demonstrate that there is no difference between the two systems of international criminal law. A comparative approach to the *jurisprudence of* Nuremberg-Islamic principles demands that we urgently *need* to strengthen international criminal jurisdiction regarding the enforcement of laws criminalizing war crimes, crimes against humanity, aggression, genocide, torture, discrimination, humiliation, unlawful imprisonment, and rape in peace or in war. The relevant principles of both systems regarding these crimes apply to all nations through their establishment as *jus cogens* norms. However, both legal regimes have failed in the prosecution of most of those responsible for such crimes, and implementation of the principle of complementarity is, controversially, even more of an illusion. Pure love for justice, truth, transparency, human rights laws, equality before the law, and fair treatment of the accused are confronted with the love for power and impunity under Western and non-Western laws (Malekian 2005, 721; Malekian 1993; Malekian 1995).

Despite the fact that pure Islamic law is ignored by many political authorities in Islamic states, the purpose and intention of Islamic law is to bring human beings together for the

furtherance of love, the unity of mankind, and the maintenance of justice with ethical and philosophical principles of criminal law. This means that an Islamic lawyer or judge is empowered to interpret the law to further the principles of humanity. This means that so long as the principles of criminal law of neighboring countries or others do not contradict the principles of human rights law or Islamic law, they are considered an integral part of *Shari'ah* and are consequently permitted to be implemented as part of Islamic law. The internationalization of human rights law in Islamic law has been one of the fundamental developments in the transformation of positive and natural rights of man into a global perspective. Any realistic international lawyer cannot deny the presence of human rights law in the inner structure of both legal systems.

There are indeed minor discrepancies between the two systems of criminal law, the global international criminal law system and the Islamic international criminal law system. Recognition and respect of the similarities between the two systems is vital for the proper consolidation of truth, equality, justice, and peace at the global level. Recognizing and respecting these similarities may prevent a considerable number of international crimes, including crimes against humanity, war crimes, aggression, and genocide in many Western and non-Western regions.

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3 The Relevance, Legitimacy and Applicability of the Nuremberg Principles and Islamic Law of War in Repressing International Crimes in Modern Islamic States and Societies

Mohamed Abdelsalam Babiker

3.1 Introduction

This chapter addresses the contemporary challenges facing the application of the Nuremberg Principles in Islamic states and societies and interrogates the relevance and legitimacy of the principles as applied by Muslim states. It highlights notions of justice and compares laws and norms based on Islamic laws and principles, and whether such norms are in harmony or in congruence with contemporary international criminal law (ICL) and international humanitarian law (IHL) as applied in the context of Muslim states and societies.

Part I of this chapter argues that modern IHL is alien to Muslim societies as Islamic states did not contribute effectively to the law-making of international law including IHL and ICL. Islamic law of war has its own distinctive norms and Islamic contribution to the making of international law is minimal because Muslim states as sovereign nations have only recently emerged from colonialism, in common with other post-colonial territories. IHL is rooted in the modern centralized western European concept of the nation-state, and its entire legal framework was based on notions and foundations which are alien to Islam. Islam does not recognize the centralized concept of the territorial state; rather the state extends with faith rather than with territory. However, during the post-colonial era Islamic states were clearly committed to working within the modern IHL framework and contributed to the making of IHL norms in various ways to develop the law by employing a secular, humanist IHL discourse as part of the community of nations. Since the recent rise of the discourse of “Islamism” and political Islam, and the rise of radical Islamic movements in many Muslim states adopting the slogan that “Islam is the solution”, some states and groups have become aggressive or defensive with regard to their previous secular and nationalistic approaches. In some Muslim states, Islamic movements which controlled or assumed power have re-defined their relationship with Eurocentric international law and become more rejectionist of IHL.

Part II of this chapter focuses on the divergences and convergences of IHL and the Islamic law of war. It argues that Islam and IHL are increasingly treated as competing normative systems in terms of their norms as well as the actual practice of states. There is competition between a secular IHL and a religious version of IHL, in particular the orthodox views of certain Islamic schools of thought that adopt conflicting and competing versions of Islamic

humanitarian law. The chapter looks at some fundamental differences between IHL, ICL and Islamic humanitarian law of war in terms of the qualification or applicability of the law, and in particular the temporal and territorial application. It also focuses on the status of combatants and POWs in both IHL and the Islamic law of war, and the divergences and convergences between the two regimes, including the status of armed groups called *en masse* for *jihad* and combatants and rebel groups. The chapter looks at whether the Islamic law of war distinguishes between combatants and non-combatants in armed conflicts, and whether Islamic humanitarianism as a normative legal regime advocates for humane treatment of the enemy (i.e. prisoners of war).

Part III focuses on ICL and the Islamic law of war, and in particular crimes against humanity and war crimes, including gender crimes (i.e. rape as a war crime). It asks whether the notion of international crimes exists under the Islamic law of war. This part seeks to determine whether the Islamic law of war recognizes or acknowledges international crimes, and whether there is a legal framework in place for the prosecution of international crimes in Muslim states or societies. It argues that the classic or modern laws of war in Islam do not recognize the concept of massive crimes or envisage repression of international crimes as defined in international treaties such as the ICC Rome Statute. This is understandable given that ICL is a modern regime developed since the Nuremberg trials 70 years ago. This part also enquires whether the ICL principles which form the bedrock of contemporary international criminal law such as command responsibility and immunities are known to the Islamic law of war. It also addresses incorporation or harmonization of Islamic norms with IHL and ICL, which raises some issues of incompatibility between these legal regimes. This area is problematic and requires more scholarly debate in the light of international law theories (monism, dualism) governing the relationship between international law and municipal law, including Islamic laws of war as a recognized system with its developed jurisprudence. This debate on incorporation or domestication of IHL is crucial given the fact that IHL is a non-self-executing regime and cannot be implemented at the domestic level of Muslim states without enabling legislation.

Finally, Part IV addresses the Islamic concept of reparations for victims of crimes or *diyya* (blood money) in murder cases. Unlike the ICC retributive justice philosophy, *diyya* is a form of restorative justice close to the heart and minds of Muslim communities and satisfies their needs. This restorative justice approach has already been accommodated in the formal justice system in some Muslim societies through the application of the Islamic *diyya* concept, which is essentially restorative in nature in the sense that it allows victims of crimes the absolute right to punish or pardon the accused. Victims also have the right to participate in criminal proceedings. The Islamic system of victims' reparations is more advanced than the Rome Statute of the ICC, as victims can not only access courts and participate in the proceedings and voice their concerns but can also control the outcome of the criminal proceedings.

3.2 Contribution of Muslim States to the Making of IHL: An Overview

This part explores whether modern Muslim states have contributed to the formation of IHL and ICL. IHL remains largely rooted in the context of modern nation-states and was developed by the centralized states of Western Europe. The entire legal framework of IHL was therefore based on the notion of the centralized European sovereign nation-state drawn from a Christian tradition alien to Islam. The Ottoman Empire, as a classical example of a Muslim Empire, was not a modern nation-state, but an empire composed of diverse national units joined together by Islamic faith (Cockayne 2002). This different constitutional foundation affected the potential for the creation of IHL by the principal Islamic players of the day because humanitarian principles were designed and monopolized by the Western powers that created the modern normative framework of IHL during the colonial era (Anghie 2005).

The internationalization of the modern IHL normative framework since the First Geneva Conventions of 1864 and subsequent IHL Conventions and Additional Protocols was a European phenomenon which did not take into account Islamic civilizations, and thus reflects a western hegemony of international law and order and was seen as inherently alien to Islamic values and norms. IHL attempted to accommodate the differences between it and the Islamic system by adopting a secular modernist approach (Cockayne 2002), but the question remains of how IHL, as an artefact of Christian civilization, has actually negotiated and accommodated its way and norms with other legal systems, and in particular Islamic Law.

The acceptance by European powers of the equal participation or contribution of Islamic states within public international law and order came only after the decline of the Ottoman Empire. At the time, the integration of Islamic States into the modern legal order of the community of nations in fact amounted to a form of subjugation of the nascent Islamic *umma (nations)* into distinctive or dismantled nation-state units (Cockayne 2002). Hence, Islamic participation in the nation-state system and in fora developing the body of IHL did not start from a position of equality, and Islamic states and scholars have not attempted, until recently, to develop independent humanistic Islamic approaches related to the law of war (Kelsay 1990).

In the post-colonial era international law started to be perceived as a universal system reaching across multiple civilizations rather than being limited to the Eurocentric world. This proved to be beneficial to Islam by placing it on a level footing with European civilization and drawing attention to the supranational character of Islam within the public international legal system (Kelsay 1990). The admission or recognition of Islamic law as part of the law of nations finds its early manifestation in various international law instruments, including the

Statute of the Permanent Court of International Justice and IHL treaties.³⁸ Thus, universalization of international law has offered Islamic states the opportunity to participate in the international law-making process in the post-colonial era. However, in this process Muslim states have apparently abandoned any objection to the validity of the public international law system in Islamic states based on any cultural relativity discourse (i.e. the cultural, historical and religious specificity of Islamic nations) (Kelsay 1990). An argument normally arises in the context of modern human rights debate in the majority of Muslim states when dealing with the international human rights regime, in particular with regard to the elaboration, reservation and adoption of some human rights instruments or Conventions (An-Na'im 1992; An-Na'im and Deng 1990).

Furthermore, it is argued that the encounter between IHL and Islam between 1899 and 1945 was characterized by nationalist expressions of Islamic states at the time rather than the adoption of Islamic ideology or versions as a basis for IHL (Cockayne 2002). However, from 1945 to 1977, Islamic representatives played important roles in reshaping IHL to deal with the realities of post-colonial conflict when negotiating Additional Protocols I and II to the Geneva Conventions.³⁹ Their participation was marked, however, not by transnational Islamism, but by nationalism (Schindler 1979, 8).

During the post-colonial era Islamic states were clearly committed to working within the modern IHL framework and contributed to the making of IHL norms (Cockayne 2002). Not only were they using the nation-state system upon which IHL was predicated to develop the law to their own ends, but also they were employing a secular, humanist discourse as a means of justifying their actions to the community of nations.⁴⁰ This reflects the trend of the post-colonial era: the suppression of Islamic identity within the discourse of international humanitarian and public international law, perhaps in an effort by Islamic actors to use those systems to their own ends, or perhaps a less controlled process of civilizational subjugation. However, since the rise of the discourse of Islamism and political Islam and the rise of Islamic movements in many Muslim states and the adoption of the slogan that "Islam is the solution," many states have become aggressive or defensive with regard to their previous secular and nationalistic approaches. In some Muslim states, Islamic movements in control of states such as Sudan and Iran, have re-defined their relationship with the Eurocentric international legal system and have become more rejectionist. The issue therefore is how

³⁸ Article 9 of the Statute provides that members of the Court should represent the main forms of civilization and the principal legal systems of the world. Article 38(3) provides that the Court should apply "[t]he general principles of law recognized by civilized nations". Islam is regarded as one of the "main forms of civilization" to which the Statute referred, and one of the "principal legal systems of the world" and the Court was obliged to recognize it as a source of international law.

³⁹ International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 UNTS 3; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, 1125 UNTS 609. Issues that arose during the negotiation of these two protocols included the Arab-Israeli conflict that broke out in 1948 raising the question of the threshold of application of IHL and the place of national liberation movements; the Suez crisis of 1956; the Indo-Pakistani conflict of September 1965; the Algerian war of liberation in the late 1950s and early 1960s; and the PLO (with regard to formulating Article 1 of Additional Protocol I to the Geneva Conventions, which extended the protections of IHL to those fighting colonial domination, foreign occupation or racist regimes).

⁴⁰ For example, the Palestinian national liberation movement as a nationalist movement justified by humanist principles rather than religious sentiment (Cockayne 2002).

the two systems can coexist in this modern era of confrontations. It is this issue that lies at the heart of the encounter between Islam and European law within IHL and will be discussed below. This question, no doubt, involves two aspects: (a) the compatibility between IHL norms and Islamic norms; and (b) the operation of such norms as practiced by modern Muslim states.

3.3 Islamic Law of War and IHL: Compatible or Competing Normative Regimes

In recent years, signs have begun to emerge of a fundamental change of attitude by some Islamic states towards IHL, ICL, and human rights law; a number of states to portray the Islamic legal order as an *alternative* to these legal regimes, rather than as a contributor to them. The records of discussions on Additional Protocol II, which regulates internal conflicts, contain crucial indications of the emergence of skepticism not only towards IHL, but to international law in general. Levie (1987) discusses Egypt's views on the compatibility of draft Protocol II to Islam (5); Saudi Arabia on the compatibility of Article 1 with the Islamic doctrine of full respect and protection for all human beings regardless of color or race (65); and Saudi Arabia on penal provisions (301). These were early signs of a revolutionary move by some Islamic states away from the humanist basis of the IHL legal order to the theocratic normativity of Islam. This shift poses a fundamental challenge to the secular universalism of humanitarian law.

State practice and *opinio juris* of modern Islamic states testify to this reality in the post-colonial era. The Islamic Revolution in Iran, for example, signaled a revival of theocratic Islamic ideology and politics which fundamentally changed the relationship between Islamic states and the public international legal order including IHL. The Islamic Revolution in Iran challenged Islamic states to consider whether their conduct in war was governed by IHL norms or by Islamic norms. It is hence no longer possible for Islamic states to accept that Islam was confined to the role of contributor civilization under a secularist modern IHL canopy; instead, the two systems were now perceived to be in direct competition (Cockayne 2002).

Similarly, in Sudan after the Islamists assumed power after toppling an elected government in a military coup in 1989, the "National Salvation Revolution" Islamic government's approach towards public international law, IHL and human rights reflects hostility towards western humanitarian norms, in particular when Sudan engages with international monitoring bodies of the Human Rights Council.

Thus, Islam and IHL are increasingly treated as competing normative systems. State practice since the 1980s demonstrates apparent competition between a secular IHL and a religious version of IHL, in particular the orthodox views of certain Islamic schools adopting conflicting and competing versions of Islamic humanitarian law related to POWs, combatants, rebellion,

protection of civilians, non-discrimination, and gender. Recently the normative conflict between international criminal law and Islamic norms has found its manifestation during the adoption and negation of the gender provisions of the Rome Statute of the International Criminal Court and the 1989 Convention on the Rights of the Child with regard to the age of maturity of children.

3.3.1 Divergence and Convergence between Islamic Law and IHL: Conflict or Conversation?

There were considerable divergences and convergence between Islamic and IHL norms in a variety of areas, including classifications of armed conflict, status of combatants (both in internal and international armed conflicts), status of prisoners of war and combatants, humane treatment, protection of civilians and property, conduct of hostilities, and illegal means of warfare. When addressing applicable legal norms in both IHL and Islamic law the key question is how religiously divine norms, which draw their authority from a transcendental source (Allah), and humanist norms, which draw their authority from secular man-made laws, can be reconciled (Cockayne 2002). If Islamic rules and IHL rules are not in harmony, which prevail in this normative hierarchy? These issues normally raise the classical but difficult debate on the relationship between international law (i.e. human rights law, IHL) and national norms in terms of which law prevails when there is doctrinal and normative conflict. This of course evokes a critical debate on whether Islamic states normally follow a monist or a dualist school of thought under international law when their normative systems clash with Eurocentric secular IHL norms. This debate is further complicated due to the fact that IHL as a non-self-executing regime requires enabling legislation to give effect to its norms at the domestic level. No doubt, the process of domestication of IHL norms in the domestic legal systems of states is a process of conversation between civilizations, and allows states to harmonize and hence avoid the problem of normative hierarchy. Despite many overlaps between Islamic norms and IHL, some traditional Muslim scholars have maintained that IHL is a man-made law and only acceptable to Muslims so long as it does not conflict with the *Shari'a*; Islamic law has primacy for Muslims as it is a matter of faith that allows no room for deviation. This raises an important debate with regard to the primacy of international law over Islamic law, and the same argument has been raised by Muslim states with regard to their engagement with human rights treaty bodies. The question, however, is whether Islamic laws and the practices derived from those laws can be accommodated with IHL principles. Unlike IHL, which is based on the defined rules of the Geneva Conventions and their Protocols, Islamic jurisprudence is not unified despite deriving its rules from the holy *Quran* as the main source of legislation. The *Quranic* verses allow a wide margin of interpretation, which sometimes gives rise to misconstruction. People read in them what they want to read, choosing to ignore the argument that religion is “essentially an ethical investment, so any religion that is taken to encourage violence should be presumed to have

no sensitivity to evil” (Khalid 2003, 234). As a result, various conflicts between Islamic law and IHL have emerged in practice.

However, it is submitted that there are more similarities between IHL and Islamic law than differences, both in content and in spirit. The relationship between them should be understood as part of a process of conversation and dialogue between civilizations and not between competing sources of norms (Cockayne 2002). IHL norms reflect multiple values and multiple sources of authority and should be able to accommodate differences with Islamic norms (Cockayne 2002). However, the clash of normative systems may not be reconciled in many instances. The following sections demonstrate that in some situations Islamic law and IHL have conflicting norms which cannot be reconciled both at the conceptual and doctrinal level.

3.3.1.1 Classical Classifications of Islamic Law of War Dar Al-Islam (Abode of Islam) and (Dar Al-Harb (Abode of War)

IHL provides for a fundamental distinction in its division of armed conflict into international and non-international. However, Islamic law of war does not recognize such a geographical classification as enshrined in the Geneva Conventions, 1949 and the Additional Protocols of 1977. Instead, classical interpretations of Islamic law provide for a fundamentally different concept: the abode of war and the abode of peace. It is common among Muslim legal scholars in classical literature of Islamic jurists to divide the world into two abodes: the abode of Islam (*dar al-islam*) and that of war (*dar al-harb*); some scholars add a third, *the abode of covenant* (*dar al-`ahd* or *dar as-sulh*). The abode of Islam consists of countries where the power lies with Muslims, where the rules of Islam are implemented and Islamic rituals are performed (Al-Zuhili 2005, 278). People of that abode are Muslims and people of the covenant. Non-Muslims who live in Islamic territory according to a covenant have to pay *gizia*, or money, to secure their *amman* (security) to ensure safety as minority groups. This classical doctrine, no doubt, violates the right of equality and non-discrimination of those non-Muslims whose rights should be recognized under any modern constitutions and international human rights instruments.

The abode of war comprises countries which are outside Islamic sovereignty and their people are belligerents (Al-Zuhili 2005, 278). The abode of covenant consists of those regions that have concluded peaceful trade pacts, a conciliation agreement, or a long-term truce with Muslims as they are no longer at war with Muslim states. However, other schools of thought, as asserted by Imam Al-Shafi (767-820), have argued that in Islamic jurisprudence, and in contemporary international law, the world is one abode. If there is no security and war prevails instead of peace, there will be two zones: one peaceful and the other belligerent (Al-Zuhili 2005, 278). This opinion is advocated by some Orientalists and other writers, who claim that the abode of war waged in permanent antagonism against the abode

of Islam is not acceptable, and that antagonism is considered to be temporary and limited to the actual areas of combat or armed conflict (Al-Zuhili 2005, 279).

3.3.1.2 Jus Ad Bellum and Jus In Bello V. Jihad And The Concept Of Just War

There are numerous and complex causes of war. However, IHL does not recognize the concept of just war, and therefore, a clear distinction is made between *jus ad bellum* and *jus in bello*. As in the case of classification of armed conflicts discussed above, Islamic law of war also does not follow such a classical distinction. The concept of *jus ad bellum* or the legality of going to war is very problematic under the Islamic law of war as most wars are justified on noble causes to defend Islam, in particular in a *jihad* war where combatants and Muslims are urged to die for the cause to defend Islam against the infidels or disbelievers.

The term *jihad* has become widespread in Islamic jurisprudence. As explained by Sheikh Wahbeh al-Zuhili (2005, 279), "*jihad* and *mujahada*, or militant struggle, mean exerting the utmost effort in fending off the enemy". Jihad is also defined as "warfare waged by a Muslim against a disbeliever, with whom he has no oath, to raise the word of God Almighty, or against his presence in or penetration into the [Muslim] territory" (Al-Zuhili 2005, 279). However, *Jihad* is lawful in Islam only as a necessity to suppress aggression but not for the sake of waging war. It was prescribed in the second year of the *Hegira* (forced exile of the Prophet, Peace be Upon Him), after Muslims had patiently borne for fourteen years the harm done to them by the pagans. The proof can be found in God Almighty's words:

"To those against whom war is made, permission is given (to fight), because they are wronged, and verily, God is Most Powerful for their aid. (They are) those who have been expelled from their homes in defiance of right, (for no cause) except that they say, 'Our Lord is God.'"⁴¹

This Quranic verse illustrates the reason for the legality of a jihad war, namely that Muslims are oppressed by others (the unbelievers). Whereas God had forbidden warfare in more than seventy Quranic verses, this was the first verse that prescribed it, as confirmed by another verse:

"Fighting is prescribed for you, and ye dislike it. But it is possible that you dislike a thing which is good for you, and that ye love a thing which is bad for you. But God knoweth. And ye know not."⁴²

⁴¹ Surah Al-Haj [22:39-40] -Qur'an.

⁴² Surah Al-Baqarah [2:216]- Qur'an.

Hence, religion was not the motive for warfare in *jihad*, nor was its purpose to subordinate others and compel them to convert to Islam. *Jihad* was intended instead to ward off injustice, champion the cause of the weak, and drive back the enemy. Islam did not acknowledge war as a national policy, a method of conflict resolution, or a means to satisfy a desire for hegemony or to gain spoils beings. Accordingly, war is not deemed lawful except when an absolute necessity calls for it (Al-Zuhili 2005, 280).

There are also procedural rules before the declaration of either war or *jihad* that must be observed. The enemy should be made to choose one of three options: Islam, as a token of peacefulness; reconciliation or a peace treaty with Muslims; or finally war, if the enemy insists on waging war. It is evident that giving the choice between three options excludes the character of compulsion. Thus, it is pertinent to argue here then that waging war in Islam, in particular in the practice of modern Muslim states, is not acceptable under Islamic doctrine; *jihad* can only be called for in situations of self-defense, injustice or to fight aggressors. This is the foundation of public international law as use of force is only acceptable in situations of self-defense and aggression.

However, critical issues need to be addressed with regard to Islamic perspectives of *jihad* war when waged in the context of a non-international armed conflict (NIAC). In NIAC situations, *jihadist* war in modern practices of Muslim states indicates serious issues related to *jus ad bellum* as well as violations of *jus in bello*. In countries where there are internal armed conflicts, many countries justify *jus ad bellum* on religious grounds to fight the infidels in a *jihad* war for the sake of religion. Consequently, any violations of *jus in bello* are justified on this basis including the protection of civilians, and the treatment of combatants or rebels as infidels. In the Sudan's second civil war, for example, *jus ad bellum* during the 1990s was justified on religious grounds and hence the concept of just war in the discourse of the laws and policies of the government are so apparent.

Just war is very problematic in non-international armed conflicts involving mixed Islamic and non-Islamic populations, particularly where communities within the territorial state are fighting on an ethnic or religious basis. Conflicts based on religion, no doubt, risk reviving the mediaeval Christian doctrine of just war and undermining the universality of IHL (Cockayne 2002). Although the majority of Islamic states have adopted the IHL framework and become part of the Geneva Conventions of 1949 and their Additional Protocols of 1977, contemporary armed conflicts indicate that some Islamic states have called civilians for Jihad or martyrdom *en masse* to fight the infidel so as to be rewarded in heaven for defending the faith.

Regarding *jus in bello*, there are many areas in which Islamic law is undeveloped when compared with the four Geneva Conventions of 1949 and their Additional Protocol of 1977, in particular with respect to the conduct of hostilities or the conduct of war. It is not clear under the Islamic law of war what is permissible and what is not, in particular with regard to the regulations between non-Muslim citizens (Al-Dawoody 2011, 108-9). The difficulty is that

the *Quran* as the main source of Islamic law gives different rulings in different situations and that the Prophet acted in different ways or gave different instructions in different contexts (Cockayne 2002). These specific instances gave rise to disagreements among the jurists in their interpretations. Some jurists have applied the principles of abrogation arguing that the Quranic text, or precedents set by the Prophet, abrogated previous ones (Cockayne 2002).

3.3.1.3 Status of Prisoners Of War and Combatants under Islamic Law of War

The treatment of prisoners of war is clearly outlined in the Islamic law of war as in IHL; both advocate compassion to the captured enemy and those *hors de combat*. Islam confers rights to POWs, and Muslims are bound to obey these rules and rights. Combatants are also obliged not to commit torture with fire. In the *hadith* there is a saying of the Prophet that: "Punishment by fire does not behoove anyone except the Master of the Fire" (Abu Dawud, 2673). The injunction deduced from this saying is that the adversary should not be burnt alive. Islam also provides emphasis on forgiveness and compassion, which are the preferred courses of action if a prisoner falls into the hand of the enemy. As in the case of the four Geneva Conventions of 1949 and the Additional Protocols of 1977, Islamic humanitarian law provides for the protection of the wounded. Soldiers who surrender or are no longer able to fight or rendered *hors de combat* due to wounds or sickness for any other reason should not be attacked.

Under Islamic humanitarian law prisoners of war should not be slain: "No prisoner should be put to the sword", very clear and unequivocal instruction given by the Prophet. The *Quran* had also laid down rules for prisoners of war in Surah Muhammad⁴³ and Surah Al-Anfal.⁴⁴ Islam recommends that prisoners of war (captives) be treated kindly, as God the Almighty says: "And they feed, for the love of God, the indigent, the orphan and the captive."⁴⁵ Captives are often either released through "grace bestowed on them without any return,"⁴⁶ or are exchanged for money or in return for other captives. The sick and the wounded should be given medical treatment, and the dead should be buried to preserve their dignity.

However, having said that there is prohibition against killing prisoners of war, Islamic jurists have conflicting opinions about them as in certain situation they can be killed. Despite an agreement between IHL and Islamic law on the sanctity of human life and dignity, there still remain certain contentious areas where opinions of Islamic scholars differ on the treatment of POWs.

Islam draws a clear line of distinction between combatants and non-combatants of the enemy country. As far as non-combatants are concerned (such as women, children, the old and the infirm), the instructions of the Prophet are as follows: "Do not kill any old person,

⁴³ Surah Muhammad [47:4]- Qur'an.

⁴⁴ Surah Al Anfal [8:67,70] Qur'an

⁴⁵ Surah Al-Insan [76:8]- Qur'an

⁴⁶ Surah Muhammad [47:4]- Qur'an.

any child or any woman” (Abu Dawud, 2614).⁴⁷ “Do not kill the monks in monasteries” or “Do not kill the people who are sitting in places of worship”.⁴⁸ During a war, the Prophet saw the corpse of a woman lying on the ground and observed: “She was not fighting. How then she came to be killed?” (Abu Dawud, 2669). From this statement of the Prophet jurists have drawn the principle that those who are non-combatants should not be killed during or after the war. Islam clearly differentiates between a combatant and a non-combatant. Islamic law of war provided guidelines for the protection of non-combatants, which are similar to the provisions enshrined in IHL. One such shared provision is the importance of a sanctuary of life within a war zone for those rendered *hors de combat*. Similarly, both laws strongly advocate humane treatment of the enemy.

3.3.1.4 Protective Norms under Islamic Law of War

Classical scholars have argued that universal Islamic doctrines predate IHL and that Islamic law has provided humanitarian protection and guarantees in a variety of areas. The development of warfare throughout history led Muslim scholars to formulate new rules to regulate the conduct of war and hostilities. The *Quran* requires that parties to a conflict not exceed the limits of proper conduct of war in the field when war is justified. As in the case of modern IHL, if war does take place, it is subject to clear regulations under classical Islamic *Shari’a*. Religious teachings had an evident effect on the emergence of the rules of war, which attained the status of legal rules based on three fundamental requirements: necessity, humanity and chivalry. The following principles have accordingly been prescribed since the early days of Islam: a non-combatant who is not taking part in warfare, either by action, opinion, planning or supplies, must not be attacked; the destruction of property is prohibited, except when it is a military necessity to do so, for example for the army to penetrate barricades, or when the property makes a direct contribution to war, such as castles and fortresses; principles of humanity and virtue should be respected during and after war; and it is permitted to guarantee public or private safety on the battlefield (Al-Dawoody, 2011, 107-131).

The conduct of hostilities is strictly regulated by the *Quran*, the words of the Prophet and the commands of Abu Bakr as-Siddiq (632-634), the First Caliph of Islam. One of the best known *hadiths* is “Move forward in the Name of God, by God, and on the religion of God’s Prophet. Do not kill an elderly, or a child, or a woman, do not misappropriate booty, gather your spoils, do good for God loves good doers” (Sahih Muslim (1731), Susan Al Tirmidhi (1408)). Abu Bakr reiterated several commandments. This is the text of his famous decree:

⁴⁷ Abu Dawud book includes hadith collection of Prophet Mohamed sayings, stating that Prophet Mohamed stated ‘ If you in battle in the name of God Do not kill... Do not slaughter... Do not kill an infant’, Abu Dawud, 2614)

⁴⁸ *Hadits Riwayat Baihaqi, Sunan Al-Kubro*, no. 17591. See also Musnad of Ibn Hanbal.

“I prescribe ten commandments to you: do not kill a woman, a child, or an old man, do not cut down fruitful trees, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palms, nor inundate them, do not embezzle (commit *ghulul*), nor be guilty of cowardliness”.

Al-Bayhaqi (17591), Sunan AbuDawud (2631).

These sets of instructions and codes of conduct constitute both mandatory injunctions and prohibitions. No Muslim is allowed to overstep or violate them unless absolute military necessity so requires, for instance by uprooting a tree or demolishing a wall used by the enemy to prevent the Muslim army from advancing.

3.3.2 Islamic Law of War and International Criminal Law

This section seeks to determine whether Islamic law recognizes or knows international crimes and whether there is a legal framework for the prosecution of international crimes in Muslim societies. It is pertinent to note here that neither classical nor modern Islamic IHL envisage repression of international crimes in its modern sense, such as crimes against humanity, war crimes and genocide as enshrined in international treaties such as the ICC Rome Statute. For example, the laws of war in Islam do not address the concept of massive crimes. This is understandable given that ICL is a modern regime developed since the Nuremberg trials 70 years ago, and thereafter progressively with the establishment of the ICTY, ICTR and other hybrid tribunals. Some Islamic states have adopted relevant provisions which conform to the definition of the international crimes of genocide, crimes against humanity and war crimes as stipulated in the statutes of international criminal tribunals and criminal law principles such as command responsibility, immunities and statutes of limitation. Some Islamic states have taken legislative steps, policies or other measures with a view to implementing or enforcing the Geneva Conventions of 1949 and the Additional Protocols of 1977.

3.3.3 Domestication or Incorporation of IHL and ICL as Part of the Laws of Islamic States

Domestication, incorporation or harmonization of Islamic norms with IHL and ICL raises (as in the case of human rights law) issues of incompatibility between these legal regimes. In the view of this author, this area is problematic and requires more scholarly discussion in the light of international law theories governing the relationship and harmonization of international law and national law, including Islamic law as a recognized system with its developed jurisprudence. One of the challenges which deserve scholarly debate as far as IHL is concerned is that IHL is a non- self-executing regime and cannot be implemented without enabling legislation. Accordingly, it is imperative for Muslim states to have a legal framework in place to give effect to the implementation of IHL and repress international crimes without

entering into a normative conflict with IHL and ICL norms. However, in those states where Islamic laws of war and jurisprudence are in place and where such states are not party to the ICC Rome Statute, there will be a serious gap in prosecuting international crimes. Such crimes cannot be prosecuted under Islamic law unless states are party to the Rome statute.

Some Muslim states such as Sudan have signed the Rome statute and endeavor to incorporate international crimes as part of their national laws. Sudan, however, indicated that it had no intention of ratifying the Rome statute, and claims its signature does not create any obligation. After the Security Council referred the Darfur situation to the ICC, the Government of Sudan (GOS) took certain legal measures by enacting the Armed Forces Act 2007 and the Criminal Act 1991 (as amended in 2009)⁴⁹ in order to incorporate the international crimes of genocide, crimes against humanity and war crimes to repress IHL and ICL violations in the field. This move was taken because Sudan was trying to avoid the ICC intervention in its national jurisdiction. This was hailed as a progressive development (Babiker 2011, 161-182). However, so far the President of the Republic and his top military commanders and civilian officials have not been indicted, but have been shielded from being prosecuted for the alleged commission of war crimes, crimes against humanity and genocide. Both Sudanese criminal and military laws are modeled on the ICC Rome Statute of 1998 (i.e. Article 7 of the ICC Rome Statute) defining crimes against humanity as a widespread or systematic attack directed against any civilian population, and that for an individual to be liable for such a crime he must act with knowledge of that attack against a civilian population, and that attack must be carried out pursuant to or in furtherance of a State or organizational policy to commit such attack (Babiker, 2011, 161-182).

3.3.4 Crimes against Humanity

3.3.4.1 Gender Crimes and Conflict with Islamic Norms

Islamic humanitarian law does not recognize any categories of gender crimes as a crime against humanity. There is dramatic enlargement of the scope of crimes against humanity in the Rome statute found in the very substantial list of gender crimes that include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.⁵⁰

States are also urged to take steps towards compliance and have a duty to take effective measures against gender-based crimes as recognized in the ICC Rome Statute and a series of declarations by United Nations (UN) bodies such as the landmark Declaration on the Elimination of Violence against Women.⁵¹

⁴⁹ The amendments were adopted by the National Assembly on May 25, 2009 and signed into law on June 28, 2009 by the President of the Republic.

⁵⁰ See ICC Statute, Article 7(1)(g); ICTY Statute, Article 5(g); ICTR Statute, Article 3(g).

⁵¹ United Nations General Assembly, Resolution 48/104, 1993.

However, the question of gender relations became an important site of conflict with Islam (Cockayne 2002, 619-20). During the negotiations of the ICC Rome Statute at the 1998 Rome Diplomatic Conference this conflict was apparent, in particular as reflected in the views of some Arab and Islamic States with regard to the definition of gender.⁵² The Islamic States challenged the definition of the term “gender” and its application to substantive norms of criminality. Many of them saw in the draft provisions a first step in the regulation by public international law of gender relations within their borders. They did not agree to accept that the application and interpretation of the law must be without any adverse distinction based on the grounds of gender (Cockayne 2002). As Cockayne (2002) observed, the Islamic states:

“feared that they would at best prevent the ICC from interpreting international law in accordance with *Shari’a*, and at worst place the Court in a position of judgment over domestic practices admitted as compatible with internationally recognized human rights but involving an apparent ‘distinction’ based on gender” (Cockayne (2002, 620).

This prompts the critical question of whether there is a place or a room for Islamic civilization within IHL.⁵³

This process of accommodation and harmonization between western and Islamic states has also occurred in the negotiation of the Rome Statute with regard to the definition of forced pregnancy. A number of Arab Islamic states objected to the inclusion of forced pregnancy as a crime against humanity because this inclusion would create an international obligation upon them to provide forcibly impregnated women with access to abortion. Instead, they adopted the position that prosecution of the conduct of forced pregnancy could occur through charges of rape and unlawful detention, both of which were crimes already included in the Statute. A consensus position was finally reached in which the crime would be included along with a specific clarification that it should not be construed to interfere with national laws concerning abortion or pregnancy. The central question in the forced pregnancy debate was again whether IHL could accommodate conflicting social visions and different civilizations. Its successful resolution demonstrates that humanitarian law can work through dialogue between civilizations. But what is needed in a conversation between these civilizations is to find ways and means in which common values and humanitarian norms can be maintained while allowing room for the application of rules and norms in different civilizational contexts.

⁵² Furthermore, the issue of gender balance in the personnel of the Court also triggered controversies by some Arab states opposing any attempt to impose a quota system. They successfully negotiated a compromise position removing the reference to gender and requiring state parties to take into account, in selecting the judges and other staff, the need for a “fair representation of female and male judges” (Cockayne 2002, 619).

⁵³ “The Arab Islamic States were joined in their opposition to the ‘no adverse distinction’ clause by conservative Christian States particularly concerned about the use of the clause to criminalize State actions aimed at discouraging homosexuality. Some States appeared willing to retain the no adverse distinction clause, providing ‘gender’ was removed altogether, or perhaps replaced by the term ‘sex’, which would avoid the ‘problem’ of homosexuality. This proposal met with defeat at the hands of a coalition of primarily western, liberal Christian-majority States. The Rome Statute presents a definition of gender within international humanitarian law which involves an abstracted, universal concept of society, not particularized to any civilization or tradition” (Cockayne 2002, 620).

However, a close analysis of the definition of gender crimes in the criminal legal framework of some Muslim states reveals that the exercise of civilizational dialogue may not be feasible in all cases and circumstances. This is because so far laws of war in the majority of Muslim states are still not in harmony with the definition of gender crimes provided for in Article 7 of the ICC Rome Statute. For example, rape as a crime against humanity in Article 186 of the 2009 amendments to the Sudanese Criminal Act 1991 is defined as:

“[Whoever] uses coercion in a sexual intercourse with a female or sodomy with a male, or commits outrages upon personal dignity of the victim if such is accompanied by penetration in any way, provided that coercion always exists if the above said acts are committed against a person incapable of giving consent”.

This definition neither covers all acts of penetration nor specifies the forms of coercion and lack of consent required. International jurisprudence on rape with objects is not confined to vaginal or anal penetration but also encompasses oral rape and penetration with objects (REDRESS and KCHRED 2008, 29-31).

Within a few months of the adoption of the ICC Rome Statute, judgments of the *ad hoc* tribunals had developed two somewhat different definitions of the crime of rape. The first was proposed by the Rwanda Tribunal in the *Akayesu* case, which warned that “the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts”.⁵⁴ It defined the crime as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.⁵⁵ The definition was broad enough to encompass forced penetration by the tongue of the victim's mouth, which most legal systems would not categorize as rape, although it might well be prosecuted as sexual assault (Schabas 2006, 48). Subsequently, a Trial Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY) reverted to a more mechanical and technical definition, holding rape to be “the sexual perpetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator.”⁵⁶ The current definition of rape in Article 149 of the Sudan Criminal Act does not include penetration other than sexual intercourse by way of penile penetration into the vagina or anus. It also includes the criminal offence of adultery in defining sexual intercourse, further creating ambiguity about the applicable rules of evidence, seemingly requiring four male eye-witnesses to the act of penetration or a confession for a conviction, a threshold that is virtually impossible to meet. Reference to adultery also exposes women to the risk of prosecution for the crime of adultery because any complaint about rape may be treated as an admission of having had (unlawful) sexual intercourse. Accordingly, there have been hardly any successful prosecutions for rape in

⁵⁴ ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998 [325].

⁵⁵ *Ibid* [326].

⁵⁶ ICTY, *Prosecutor v Furundžija*, Case No. IT-95-17/1-T, Judgment, December 10, 1998 [185].

Sudan and the current criminal law against rape has failed to provide adequate protection for women. The legal confusion created by Article 149 of the Sudan Criminal Act 1991 was created anew in the Armed Forces Act 2007. This confusion is largely created due to the fact that the foundation and nature of Sudan's criminal laws have been Islamized since 1983, and as a result Islamic prohibitions have found their way into subsequent criminal laws. Article 153(2)(d) of the Armed Forces Act, 2007 for example, mixes the crime of adultery, sodomy and "sexual perversion" with gender-based violence. It not only includes adultery but also adds other categories of crimes not related to gender-based violence such as "forceful gestation", "buggery." and "sexual abnormality" (the correct Arabic translation is "sexual perversion").⁵⁷

3.3.5 War Crimes

As in the case of crimes against humanity, war crimes as defined in Article 8 of the ICC Rome Statute are not recognized as part of the Islamic law of war. The Islamic law of war does not make any distinction between international and non-international armed conflicts for any war crimes to be prosecuted in these situations. In other words, the difficulty with the Islamic law of war is that it does not distinguish between crimes committed in the context of an international armed conflict and a non-international armed conflict. This is problematic because the prosecution of a particular category of crime under IHL requires an often complex assessment of the type of armed conflict involved. Courts are also required to distinguish between international and non-international armed conflicts, and this is further complicated by the fact that within the sub-set of non-international armed conflicts there are two distinct categories. The judgments of international criminal tribunals have already shown how difficult this task of qualification can be. Thus, for the Islamic law of war not to address war crimes is likely to cause serious problems of qualification as a pre-condition for the prosecution of war crimes in Muslim states. As indicated earlier, Islamic law of war only distinguishes between the abode of Islam and the abode of war and only for the purpose of waging war or averting aggression but not for the purpose of prosecution of war crimes.

The qualification of armed conflicts is further complicated by the fact that a distinction must be made between war crimes and the other two categories of crimes, namely crimes against humanity and genocide, with respect to the applicable thresholds. Unfortunately, Islamic law of war does not even provide for the punishment of such crimes. Crimes against humanity, for example, must be "widespread" and "systematic," and genocide requires "specific intent". War crimes, on the other hand, can be committed "as part of a plan or policy or as part of a large-scale commission of such crimes".⁵⁸ Although this definition brings war crimes

⁵⁷Article 153(2)(d) reads "Subject to the provisions of the Criminal Act, 1991, there shall be punished, with imprisonment, for a term, not exceeding ten years, whoever commits, within the framework of a systematic and widespread attack, directed against civilians, any of the following acts:... (d) rape, or practicing adultery with any person, or sexual slavery, or coercion to prostitution, forceful gestation, buggery or any type of sexual abnormality, or coercing him/her therefore, or sterilizing him/her to prevent him/her from propagation".

⁵⁸ ICC Rome Statute, Articles 8 (1).

closer to crimes against humanity, both have their own thresholds. For example, the preliminary question that needs to be determined for war crimes charges is the existence of an armed conflict, be it international or non-international, and a nexus must be shown between the acts perpetrated and the conflict. Furthermore, the elements of war crimes clarify that, while the prosecutor must establish these threshold elements of war crimes, he or she need not prove that the perpetrator had knowledge of whether or not there was an armed conflict, or whether it was international or non-international (Schabas 2006, 51-66). Again, all these technical aspects and definitions do not exist under classic or modern Islamic laws.

3.3.6 Lack of Fundamental International Criminal Law Principles in Islamic Law of War

3.3.6.1 Command and Superior Responsibility

The concept of command responsibility does not exist under Islamic law; rather, subordinates in all situations or circumstances must obey commanders' orders as they always express the authority of God on earth. Accordingly, soldiers have to follow superior orders even if such orders contravene IHL and ICL. The only reason that a subordinate can defy orders is if these orders are against the will of God. This explains why Islamic law of war does not include provisions that govern individual criminal accountability for the commission of international crimes. In particular, it does not include essential international criminal law principles required for any individual prosecution of international crimes such as command and superior responsibility, immunities and statutes of limitations. As in the case of any system of criminal laws ICL recognizes traditional modes of criminal liability for those who directly commit an offence and for anyone who orders, aids and abets an offence, as well as for those who engage in criminal conspiracy in relation to certain offences.

Islamic law does not recognize criminal liability on the grounds of command/superior responsibility. Command or superior responsibility is a well-established mode of criminal liability in ICL that imposes an obligation on commanders and superiors to prevent crimes and does not allow them to abdicate responsibility for crimes committed by their subordinates.⁵⁹ However, in some Islamic states the law shields superior army officers from criminal responsibility in courts for acts committed by their subordinates and, as a result, no legal proceedings can be pursued in courts for any negative effects on soldiers as a result of executing lawful orders issued to them by their superiors during or after their service.⁶⁰ This contravenes Article 28 of the ICC Rome Statute, which provides for criminal responsibility of commanders and other superiors. It also contravenes Article 27(1) (irrelevance of official capacity) and Article 33 (superior orders and prescription of law) of the ICC Rome Statute. Both articles apply equally to all people (whether civilian or military), including heads of

⁵⁹ See ICTY Statute, Article 24(1); ICTR Statute, Article 23(1); and ICC Rome Statute, Article 27.

⁶⁰ See e.g. Article 22 and Article 39(7) (Immunities and Privileges of the Sudan Armed Forces Act 1999).

states or governments, members of the government or of parliament, elected representatives or government officials who shall in no case be exempted from criminal responsibility under the ICC Statute.⁶¹

3.3.6.2 Immunities

One of the important principles of ICL not addressed by Islamic law concerns immunity of officials for the commission of international crimes.⁶² In the jurisdictions of many Muslim states, police officers, security force members and collaborators, and members of the armed forces are granted substantive and procedural immunity. They can only be subjected to a full investigation, prosecution and trial for human rights violations during the course of their duty if the head of the respective forces explicitly lifts their immunity.⁶³ This immunity also extends to civil suits with the proviso that Islamic *diyya* (blood money) is to be paid to victims on behalf of the armed forces in case their members violate the law.⁶⁴ The extension of immunities to the army, no doubt, violates equality before the law and the right to litigation.

The immunity provisions in most Islamic states which lack the rule of law and constitutional protections are not in harmony with international criminal law standards and recognized practices, particularly when such provisions are applied in the context of armed conflicts involving the commission of war crimes and crimes against humanity. To legalize immunities in such a context has serious repercussions. ICL does not recognize immunities for international crimes, and there is a consistent practice of the UN, international tribunals and national courts of refusing to recognize the validity of any immunity or amnesty that might free a person from responsibility for international crimes. This principle is also recognized as part of international human rights law according to which states are obliged to remove immunities for serious human rights violations.⁶⁵

Recent developments of international law confirm that heads of states and senior officials no longer enjoy immunity for international crimes, at least not before international tribunals, as recognized in Article 7(2) of the Statute of the International Criminal Tribunal

⁶¹ See ICC Rome Statute, Article 27(1).

⁶² See ICTY Statute, Article 7(2); ICTR Statute, Article 6(2); and ICC Rome Statute, Article 27.

⁶³ See Armed Forces Act 2007, Article 34 (on the institution of legal proceedings against personnel); Article 42(2); Police Act, 2008, Article 45(1); National Intelligence and Security Service Act of 2010, Article 52(3).

⁶⁴ Article 34(3) provides that "[w]here the discharge of the duty, or carrying out of any other lawful order entails death, or injury, which requires *diyya*, the State shall bear payment of *diyya*, or compensation on behalf of the officer, or soldier, who acts in good faith, in accordance with the provisions of this section". See Babiker (2007) for an extensive analysis of the military and Islamic military laws in Sudan (1983, 1986, 1999).

⁶⁵ The Human Rights Committee General Comment 31 states: "...where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility." Human Rights Committee, *General Comment No. 31* (Eightieth Session 2004), CCPR/C/21/Rev.1/Add.13, at para. 18.

for former Yugoslavia (ICTY), Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 27 of the ICC Rome Statute.⁶⁶

3.3.7 Reparations for Victims of International Crimes under Islamic *Diyya* (Blood Money)

The right to reparation for international crimes and gross violations of human rights is recognized in the statutes of international criminal tribunals,⁶⁷ international human rights treaties, and the resolution of the UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁶⁸ Those who have suffered harm through acts or omissions that constitute a violation, are entitled to effective access to judicial and non-judicial procedures and to adequate and effective forms of reparation. This right should include compensation, restitution, rehabilitation, satisfaction and other guarantees of non-repetition.

Reparations for victims under Islamic *diyya* (blood money) has its distinctive norm in Muslim societies, in particular with regard to murder cases. Today there is a lot of controversy regarding the suitability of the Islamic criminal justice system in contemporary Muslim societies. It is often criticized by some liberal Islamic scholars as being behind the times for the 21st century and that its prescribed punishments are inconsistent with international human rights norms.⁶⁹ This criticism is made in particular with respect to *hudud* crimes which apply harsh penalties that are not in harmony with international human rights norms (Oette 2011). There is no doubt Islamic criminal justice is one of the areas that continues to be a subject of human rights concern in respect of both substantive and procedural law. Substantively, there are concerns of some of the prescribed penalties such as amputation of limbs and lashing which are regarded as torture and cruel, inhuman or degrading treatment. Procedurally, there are concerns regarding aspects of Islamic criminal procedure such as the right to fair trial and due process of law (Baderin 2006, 137; An-Na'im 1990, 101-136).

Reparation under Islamic law is an essential tool of redress for victims. The "Islamic" *diyya* or blood money facilitates victims' participation in the proceedings in order to ensure that their rights are guaranteed and victims are able to control the whole process. Under the Islamic law of homicide, the outcome of the case ultimately hinges on the victim's acceptance or refusal of *diyya* (blood money). Under the *diyya*, victims and their families can control the

⁶⁶ Amendment of the Criminal Procedure Act, adopted in the National Assembly on May 20, 2009 and signed into law by the President of the Republic on July 9, 2009.

⁶⁷ In particular, Articles 75 and 79 of the ICC Rome Statute.

⁶⁸ UN General Assembly, Resolution A/RES/60/147, March 21, 2006.

⁶⁹ Baderin (2006, 137) argues "There are three views regarding the application of Islamic law in contemporary Muslim societies. The first view is that of those who see the system as archaic and barbaric and that it must therefore be discarded, the second view is that of those who see it as part of the law of God which must continue to be obeyed and applied by Muslim states, and the third view is that of those who argue that, even though it is part of the law God, the ideal Islamic society in which the system is meant to be implemented does not exist anywhere in the world today, thus should be a moratorium against its application until such an ideal society achieved."

proceedings in the sense that compensation, reparations, pardoning and retribution are all decided by the victims or families as dictated by the *sharia* law principle of *diyya* (blood money), particularly in *hudud* crimes involving murder.

In ethnic disputes where intentional killings and massive crimes are committed, governments normally ignore national criminal justice codes and resort to *diyya* to settle conflicts (El-Tom 2012, 108). In cases of murder or homicide *Sharia* courts normally make a distinction between two rights: private and public rights. The latter belongs to the state to impose whatever *tazir* (reduced) penalties for the murder crime in order to maintain law and order of the society, while private rights essentially belong to the aggrieved victim or his family. These rights cannot be overridden or reversed by the state, and the head of state cannot pardon or commute the sentence. Under *Sharia* law this was regarded as a private right of the injured person and his family and hence the state cannot interfere and take this “heavenly” right away from him or her or the family. As far as legal proceedings in court are concerned (and after a judgment has been reached), victims (not judges) have the ultimate choice of whether to pardon the accused and accept the blood money or insist on prosecution and ask to apply the death penalty in homicide cases. Judges hence give more time for the family of the victim to impose *quisas* (execution) as a *hudud* crime or pardon the accused and accept blood money. If the victims accept blood money, then the accused will not be executed and the state can only impose a lesser *tazir* penalty. If victims however, refuse blood money or *diyya* and opt for retributive justice, in that case judges will proceed with the trial and execute the judgment. Normally, informal traditional justice mechanisms work hard in this context to convince victims or the aggrieved party to accept the *diyya* and not to opt for retribution as this may affect social harmony and disturb societal peace and lead to revenge. If the victims or their families accept *diyya* as a form of compensation, there are certain procedures that have to be followed for collection of the blood money. Payment of blood money in some traditional Muslim African societies is a collective act rather than an individual one. This is because *diyya* is a traditional system of collective compensation employed across some African Muslim populations such in Somalia, Chad and Sudan. Payment of *diyya* is worked out by dividing the amount of imposed compensation by the number of contributing households (El-Tom 2012, 107).

In both formal and traditional justice systems, the ultimate outcome of the proceedings and reparations are decided by the victims. In the view of this author this system has to be entrenched as it combines both formality and informality and hence reduces the level of interference of rule of law institutions in any dispute, and leaves communities to resolve and settle crimes (including international crimes) in accordance with their traditions, customs and religious ethos. Hence, for the formal and traditional justice institutions to work in harmony they must be supported and empowered rather than undermined by modern rule of law institutions which can be influenced or manipulated in the process of delivering justice.

Unlike the ICC retributive justice philosophy, *diyya* can provide a form of restorative justice close to the heart and minds of communities and satisfy their needs. This restorative justice approach has already been accommodated in the formal justice system in some Muslim societies through the application of the Islamic *diyya* concept, which is essentially restorative in nature in the sense that it allows victims of crimes the absolute right to punish or pardon the accused. Finally, one can argue that the features of *diyya* in the Islamic system can be compared with the ICC Rome Statute, and in particular the victim's rights to participate in the criminal proceedings. The Islamic system of victims' reparations is more advanced than the Rome Statute of the ICC related to victims' participation and reparations under which victims' can access courts, participate in the proceedings and voice their concerns.

3.4 Conclusion

It is evident that the applicability of the Nuremberg principles, IHL and ICL to Islamic states and societies faces various contemporary challenges. The legitimacy of these legal regimes and their interaction with the Islamic law of war still needs more dialogue and harmonization between conflicting norms. Although IHL is alien to Muslim societies, as Islamic states did not contribute effectively to the law-making of international law in the post-colonial era, the Islamic law of war can be developed and accommodated within the IHL humanistic discourse and included as part of the community of nations, despite the recent rise of the discourse of Islamism and radical Islamic movements in many Muslim states, and efforts to re-define their relationship with Eurocentric international law with a more rejectionist approach to IHL.

The chapter indicates that there are divergences and convergences between IHL, ICL and Islamic law of war. These legal regimes should not be seen as competing normative systems, but as systems that allow room for accommodation. However, it is imperative to engage in scholarly debate between secular IHL and the orthodox views of certain Islamic schools of thoughts that adopt conflicting and competing versions of Islamic humanitarian law. This debate is important in order to bridge the gap on some fundamental differences between IHL, ICL and Islamic humanitarian law of war in many aspects including qualification of armed conflicts, the status of combatants and POWs, and protection of the civilian populations. There are also huge disparities that should be addressed between ICL norms and the Islamic law of war, in particular crimes against humanity and war crimes including gender crimes. In particular, the notion of international crimes does not exist under the Islamic law of war and there is no legal framework in place for the prosecution of international crimes in Muslim states or societies. Furthermore, it is crucial that IHL and ICL be incorporated or domesticated at the domestic level of Muslim states.

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4 The Legitimacy and Applicability of the Nuremberg Principles to African Conceptions of Justice: A Critical Evaluation

Evelyne Asaala

Ever since they were affirmed by the United Nations, the Nuremberg Principles have played an instrumental role in shaping the development of international criminal justice. These principles include: the principle of individual criminal responsibility; the principle on the irrelevance of the official position of the perpetrator; the principle on the right to a fair trial; and the principle on definition of international crimes. This contribution uses African conceptions of justice as the lens through which to examine the legitimacy and applicability of the Nuremberg Principles. Rather than dismiss Africa's concerns in international criminal justice, it argues that they should be carefully considered as they may significantly add value to international criminal justice. This chapter therefore evaluates each of the Nuremberg Principles by giving an overview of its nature, the practice concerning it at the international level, and the relevance of the principle in African notions of justice.

4.1 Introduction

Since their adoption, the Nuremberg Principles have played a foundational role in the evolution of international criminal law. They include: the principle of individual criminal responsibility; the principle on the irrelevance of official position of the perpetrator; the principle on the right to a fair trial; and the principle on definition of international crimes. Based on these Principles, the post-World War II trials began a trend where individuals have been held accountable through prosecution for violating established norms of international law. These prosecutions have been conducted in the domestic courts of the country in which the crimes occurred, in international tribunals, or in the domestic courts of other countries through the exercise of universal jurisdiction. This contribution uses the African conception of justice as the lens through which to examine the legitimacy and applicability of the Nuremberg Principles. Rather than dismissing Africa's concerns with respect to international criminal justice, it argues that African conceptions of justice must be critically considered as they may add significant value to international criminal justice.

This chapter is divided into five parts. After this brief introduction, the second defines the concept of justice, and the subsequent section evaluates the Nuremberg Principles in turn. This evaluation gives an overview of the nature of the Principles in the Nuremberg context, the grounding of the Principles in international criminal law, African leaders' perceptions of the principles, and finally whether the Principles are relevant to, or have any place in, African notions of justice. It is important that African arguments on the Principles are critically

analyzed, not only to understand better the tensions in the pursuit of justice in Africa, but also to establish whether these arguments can lead to positive contributions in the fight against impunity.

4.2 The Conception of Justice

Under the Nuremberg Principles, justice is equated with retribution. The Nuremberg Charter stated that “there shall be established an International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis”.⁷⁰ It was thus implied that justice entailed prosecuting those persons alleged to have committed the crimes listed under the Charter, and subsequently to punish them if they were found guilty. Although the ICC’s conception of justice combines both retributive and reparative elements, greater emphasis is placed on retribution.⁷¹ The Rome Statute, for example, calls on “every State to exercise its criminal jurisdiction over those responsible for international crimes”,⁷² and to ensure 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”.⁷³ This narrow definition of justice reflects the general acceptance of a retributive conception of justice in international criminal law (Sharp, 2003). For example, the Inter-American Court of Human Rights, in the *Velasquez-Rodriguez case*, observed that the state has a legal duty to prevent, investigate and punish any violation of the rights recognized under the American Convention on Human Rights.⁷⁴ The Inter-American Commission has adopted a similar approach,⁷⁵ and the European Court of Human Rights has acknowledged that an effective remedy for grave human rights violations must include prosecution and punishment.⁷⁶

International treaties have also adopted a similar trend, calling on states to ensure the prosecution of individuals who commit international crimes.⁷⁷ The subsequent establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL), each with specific mandatory provisions requiring prosecution of those responsible for crimes punishable under their Statutes, further underscores this trend.⁷⁸

⁷⁰ Charter of the International Military Tribunal (the “Nuremberg Charter”), Article 1.

⁷¹ International Criminal Court, Rome Statute (“Rome Statute”), Article 5 & 75.

⁷² Rome Statute, Preamble para. 4.

⁷³ Rome Statute, Preamble para 6.

⁷⁴ Inter-American Court of Human Rights, *Velasquez-Rodriguez*, Series C No. 4, Judgement July 29, 1988, para 166.

⁷⁵ Inter-American Commission on Human Rights, *Consuelo et al v Argentina* OEA/Ser.L/11.83 Doc 14 at 41, October 2, 1992; Inter-American Commission on Human Rights, *Mendoza v Uruguay* OEA/Ser.L/V/11.83 Doc. 14 at 154, October 2, 1992.

⁷⁶ European Court of Human Rights, *Aksoy v Turkey*, Appl. No. 21987/93, Judgment, December 18, 1996, at para 98. All ECtHR decisions are available online at <http://hudoc.echr.coe.int/>.

⁷⁷ United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”), 78 UNTS 277, Article 4; United Nations General Assembly, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the “Torture Convention”), A/RES/39/46, Article 7.

⁷⁸ ICTY, Article 1, Statute; ICTR, Art 1, Statute; SCSL, Art 1(1), Statute.

Underlying this school of thought is the doctrine of responsibility to protect.⁷⁹ Ruti Teitel best explains this when she observes that:

“Trials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule” (Teitel, 2000, 7).

Thomas Hobbes (Hobbes 1963, 120; Sharnak 2007, 71) further acknowledges that:

“When a sovereign either cannot or will not protect its subjects from serious harm, then the sovereign loses exclusive jurisdiction over such criminal matters for there are some rights that no man can be understood... to have abandoned or transferred”.

It is this failure of a state to protect its citizens by ensuring prosecution of alleged perpetrators that justifies external intervention. Some scholars have even gone so far as to argue that the duty to prosecute international crimes is a *jus cogens* obligation (Charney 1993, 541; Larbi 2004). African heads of states, the African Union (AU), some African scholars, and several African intergovernmental and regional blocks have criticized the ICC’s conception of justice, particularly given what they describe as the its exclusive focus on Africa (Mamdani 2014; du Plessis 2014; African Network on International Criminal Justice 2014).

An emerging school of thought also argues that the narrow definition of justice as equivalent to retribution is fallacious (Wierda 2009; Keller 2008b).⁸⁰ Contrary to the narrow Nuremberg and ICC conception of justice, international criminal justice can be viewed as a holistic concept carrying with it both moral and legal obligations. Not only is it concerned with isolating human rights violators, it also prevents victims from seeking retribution through political violence, thus establishing peace. It further assists in establishing the truth about the commission of crimes as well as reparation measures to the victims (Kersten 2011). Janine Natalya Clark (2011, 543) defines justice as “a multi-dimensional concept that encompasses judicial and non-judicial forms, retributive and restorative elements”. In the words of Juan Mendez (2001, 32), the former president of the International Centre for Transitional Justice (ICTJ), “[a] promise of impunity may well lead to a cease-fire; but lasting

⁷⁹ This doctrine stipulates that every state has the primary responsibility to protect its citizens from genocide, war crimes, crimes against humanity and ethnic cleansings; the international community has a responsibility to assist states in doing so; and if the state fails to do so, the responsibility falls on the international community, through the UN, to take action. United Nations General Assembly, Resolution A/RES/60/1, October 24, 2005, para 138-140, <http://www.un.org/en/preventgenocide/adviser/pdf/World%20Summit%20Outcome%20Document.pdf#page=30> (accessed 9 September 2015); Genocide Convention, Article 1.

⁸⁰This seems to be the same position taken by the African Union panel on Darfur when it acknowledges that “questions of justice and reconciliation are broadly conceived and cannot be neatly separated”. African Union, *Report of the African Union High-level Panel on Darfur (AUPD)* PSC/AHG/2(CCVII) October 29, 2009. Clark (2011, 543) urges for a broader conceptualization of justice in order to enable one to perceive international criminal trials as a potential facilitator rather than an obstacle to peace.

peace can only be built over a foundation of truth, justice, and meaningful reconciliation”. This school of thought therefore requires a lot of compromise in order to achieve justice in its holistic dimensions. Perhaps this understanding may undo the knots that beset the notion of justice for international crimes in Africa. In fact, traditional African notions of justice embody the values of peace, truth-telling, reconciliation and punishment.

According to some scholars, Uganda’s problems, for example, would be better resolved through this more holistic approach to justice (Keller 2008a, 212). Uganda’s referral to the ICC attracted much opposition amidst arguments that it would have a detrimental impact on prospects for peace (Allen 2006, 85, 186-187; Keller 2008a, 217; Diaz 2005). Some commentators who previously supported ICC prosecution have since justified their arguments as necessary pressure on the LRA towards encouraging peace negotiations (Allen 2006, 116; Keller 2008a, 217).⁸¹ Yet, other scholars argue that alternative non-prosecutorial mechanisms are likely to unlock this impasse (Keller 2008a). This does not imply that these realist scholars rubberstamp impunity; rather, they believe that through the alternative justice mechanism not only will Uganda realize peace, but also the goals underlying prosecution.⁸²

It is therefore important that those who support the current international criminal justice system embrace this ongoing paradigm shift that defines “justice” as more than just prosecution, but rather views it as embodying numerous other beneficial factors. Separating these other factors from the notion of justice, while limiting the latter to prosecutions alone, is what has led to the current deadlock in the pursuit of justice in Africa. A successful approach against impunity would therefore require a comprehensive approach: one that adopts the notion of justice in its holistic nature. The latter school of thought largely informs the discourse in this chapter since African leaders have, to a large extent, embraced its philosophy.

4.3 The Nuremberg Principles

The following sections will review the four core Nuremberg Principles in turn.

4.3.1 The Principle of Individual Criminal Responsibility

Personal liability for international crimes has existed since the United Nations (UN) General Assembly affirmed the Nuremberg Principles. The chief prosecutor at Nuremberg emphasized the importance of individual criminal responsibility for international crimes thus:

⁸¹ Diaz (2005) however acknowledges that supporters of the ICC concede that it is not clear whether the progress in negotiations was triggered by the ICC intervention, the national amnesty or the relative success of the military operations.

⁸² The Refugee Law Project, for example, engages in an informative analysis of this ethos and argues that the same one can equally be achieved through these mechanisms.

“While this law is first applied against German aggressors, the law, if it is so to serve a useful purpose, must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law”.⁸³

Similarly, under the Rome Statute, a person who commits international crimes shall be “individually responsible and liable for punishment”.⁸⁴ This is regardless of whether the crime was committed individually, jointly with others, or through another person, notwithstanding the fact that the other person is criminally responsible.⁸⁵ The notion of individual criminal responsibility is not new to Africa. Although there are African traditional practices that embrace collective punishment for selected heinous crimes,⁸⁶ the procedural approaches recently embraced by post-conflict states in Africa signify total disregard for collective punishment and the embrace of the Nuremberg Principle on individual responsibility. For example, *Ubuntu* in South Africa,⁸⁷ *Ujamaa* in Tanzania,⁸⁸ *Gacaca* in Rwanda,⁸⁹ and *Mat Oput*⁹⁰ in Uganda all concern the responsibility of the individual for acts prohibited as crimes. While the accountability measures in all these approaches may not entail criminal prosecution, the underlying factor is that every individual should account for their actions in one way or the other. At the African Union (AU) level, the *African Charter on Human and Peoples’ Rights* is categorical that “Punishment is personal and can be imposed only on the offender”.⁹¹ In fact, the newly created African Court adopts the principle of individual criminal responsibility. Other than repeatedly using the terms “any person” or “a person” when defining criminal liability, the protocol defines the use of collective punishment as a war crime.⁹² This signals a general acceptance of the principle of individual responsibility within Africa’s own conceptions of justice.

⁸³ Jackson, Robert. 1945. ‘Second Day, Wednesday, 11/21/1945, Part 04.’ In *Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945*, 98-102. Nuremberg: IMT, 1947.

⁸⁴ Rome Statute, Art. 25.

⁸⁵ Rome Statute, Art. 25(3).

⁸⁶ In some Kenyan communities, the offence of murder is still punished by banishing an entire family of the perpetrator by burning their homesteads since they are deemed to be outcasts.

⁸⁷ Pieterse (2004) defines Ubuntu as representing notions of human interdependence, solidarity and communalism.

⁸⁸ This is a philosophy developed by the first Tanzanian president, Julius Nyerere. Its core emphasis was ‘familyhood’ and ‘communalism’ of traditional African societies. It was founded on a philosophy of development whose three essentials were freedom, equality and unity (Ibhwah and Dibua 2003; Cornelli 2012; Majoy and Mulvihill 2009).

⁸⁹ According to Lahiri (2009, 325), gacaca literally translates to ‘grass’ or ‘lawn’ since those involved in dispute resolutions would ordinarily sit on the grass or lawn. This is an ancient method of dispute resolution in Rwanda. It involved respected members of the community known as ‘inyangamugayo’ – one who detests disgrace – serving as judges in a process of resolving civil matters.

⁹⁰ According to Hovil and Quinn (2014), *Mat Oput* entails the drinking of bitter root as a form of reconciliation ritual. It is a cleansing ceremony carried out traditionally by the Acholi of Northern Uganda and was only used when a member of one clan killed a member of another.

⁹¹ African Charter on Human and Peoples’ Rights (“African Charter”), Article 7 (2).

⁹² Malabo Protocol, Article 28D (b) xxxii & (e) xxi. Adopted by the Twenty-third Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, 27th June 2014, the Protocol shall enter into force 30 days after the deposit of instruments of ratification by 15 Member States.

4.3.2 The Principle of the Irrelevance of the Official Status of the Perpetrator

International law has traditionally protected people, agents or property of a sovereign state from foreign jurisdiction. This has been made possible through immunity. The doctrine of immunity arises from the need to protect certain categories of people from the jurisdiction of the foreign state to which they would otherwise be subject.⁹³ It is therefore immunity from the jurisdictional authority of a state. This concept has its foundation in customary international law.⁹⁴ Heads of state, for example, have historically enjoyed absolute immunity (both civil and criminal) from the jurisdiction of their own courts.⁹⁵

The question as to whether state officials alleged to have committed international crimes can justifiably claim immunity before international tribunals is shrouded in uncertainty. The International Military Tribunal (IMT) at Nuremberg took the position that:

“The principle of international law which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings”.⁹⁶

This reasoning was informed by the Nuremberg Principles, which underscore the irrelevance of official position.⁹⁷ While the Nuremberg tribunal was categorical that immunity under international law does not apply to international crimes, the International Court of Justice (ICJ) has taken the view that while such immunity applied before a foreign state court, it might not however apply before an international tribunal.

In the *Arrest Warrant* case, the ICJ was called on to give its opinion on the applicability of immunity *ratione personae* to incumbent Ministers of Foreign Affairs from criminal jurisdiction of foreign states, even when charged with international crimes. The Court

⁹³ International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Separate opinion of Judges Higgins, Kooijmans, Buergenthal, February 14, 2002 (*Arrest Warrant Case*), at 3.

⁹⁴ *Arrest Warrant case*, para 51 and 52; Article 31 of the Vienna Convention on Diplomatic Relations (1961) upholds immunity for a diplomatic agent from criminal jurisdiction of receiving states. This Convention has since become customary international law. The United Nations Convention on Jurisdictional Immunities of States and their Property (2004) upholds the immunities under the Vienna Convention and further upholds privileges and immunities accorded under international law to heads of state *ratione personae*.

⁹⁵ Koller (2004, 13) explains that this ancient doctrine of immunity of heads of states as rooted in the notion that these heads of states personified their state.

⁹⁶ IMT, *Re Goering and Others*, 13 ILR (1946) 203, 221. This principle was derived from article 7 of the Nuremberg Charter which provides, “[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment;” Supreme Court of Israel, *Attorney General v. Eichmann*, Criminal Appeal 336/61, 1962 reprinted in 36 I.L.R. 5 (“Eichmann Appeal”). The court of Israel adopted a similar approach.

⁹⁷ Nuremberg Principle 7 provides that “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”.

however addressed itself to the applicability of both immunity *ratione materiae* and immunity *ratione personae*. Regarding the latter, the Court held:

“that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys *full immunity* from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another state which would hinder him or her in the performance of his or her duties ... In this respect, no distinction can be drawn between acts performed by a Minister of Foreign Affairs in an ‘official’ capacity, and those claimed to have been performed in a “private capacity,” or, for that matter, between acts performed before the person concerned assumed office ... and acts committed during the period of office”.⁹⁸

Having confirmed the absolute nature of immunity *ratione personae*, the ICJ further affirmed the applicability of immunities *ratione materiae* from foreign jurisdictions by diplomatic and consular agents and holders of high state office such as head of state, head of government, and minister of foreign affairs, in accordance with customary international law.⁹⁹ The Court, however, sought to clarify that immunity *ratione materiae* is not absolute, and that in certain circumstances a sitting or former minister of foreign affairs can be prosecuted in a foreign court.¹⁰⁰

Under the Rome Statute, two provisions are central to any discussion on the application of official immunities in international criminal law. These include Articles 27 and 98. Article 27 of the Rome Statute provides that:

- (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
- (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 27 has the effect of removing immunities both at the national and international levels, the former applying when national authorities are acting in response to a request from the Court (Akande 2009, 337-8). Article 27 of the Rome Statute therefore suggests that any state official within the jurisdiction of member states to the Rome Statute can never rely

⁹⁸ Arrest Warrant case, paras 54 and 55.

⁹⁹ Arrest Warrant case, para 51 and 52.

¹⁰⁰ Arrest Warrant case, para 61.

on any immunity (either immunity *ratione materiae* (27(1)) or immunity *ratione personae* (27(2))) under international law to avoid the jurisdiction of the ICC. Article 98(1) of the Rome Statute however qualifies this kind of interpretation:

“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”.

Clearly, the two provisions are inconsistent. While Article 27 removes all forms of immunity, Article 98 requires states (whether or not a party to the Rome Statute) to respect immunity and not to proceed with any arrest or surrender or any request by the Court where this may lead to breach of international law with respect to state or diplomatic immunity of a foreign person. Several interpretations have been adopted with respect to immunity under the Rome Statute which emphasize either Article 27 or 98. The ICC has offered its own view: although state officials of non-member states to the Rome Statute, but who are UN member states, enjoy immunity, the UN Security Council has the power to waive this immunity by exercising its mandate under Chapter VII of the UN Charter.¹⁰¹ Thus, the ICC argues that the Rome Statute is consistent with the Nuremberg Principle on the total irrelevance of official capacity.

African states assert that their heads of state enjoy absolute immunity from prosecution. This has specifically been asserted with respect to attempts to prosecute Al Bashir and Uhuru Kenyatta of Kenya, and previously Gaddafi of Libya. The AU has incorporated this position on head of state immunity within the statute of the proposed African regional criminal court:

“No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office”.¹⁰²

Although Africa seems to be on its way to developing a new norm on the issues of immunity for international crimes, the position adopted by the African Union is problematic for several reasons. First, this provision assumes that the Protocol of which it is a part is the primary

¹⁰¹ The ICC has made similar observations. International Criminal Court, *The Prosecutor v Al Bashir*, ICC-02/05-01/09, Pre-Trial Chamber II, Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, June 13, 2015, at para 6; International Criminal Court, *The Prosecutor v Al Bashir*, ICC-02/05-01/09, Pre-Trial Chamber II, Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir’s arrest and surrender to the Court, April 9, 2014, at para 29.

¹⁰² African Union, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* A.U. Doc. No. STC/Legal/Min. 7(1) Rev. 1, May 14, 2014 (“Malabo Protocol”), at Article 46A *bis*.

international treaty on criminal law. What happens to African countries that are likely to become parties to this Protocol and are also parties to the Rome Statute, which abhors any form of immunity, and the UN Charter? How does one reconcile a country's obligations under the different treaties?

Secondly, the Protocol does not clearly distinguish between immunity *ratione personae* and immunity *ratione materiae*, and it is unclear on the nature of its immunity *ratione materiae*. It however provides absolute personal immunity to a wide range of 'other senior state officers', which Abraham (2015, 14) interprets as applying to personal immunities. Given the nature of personal immunities, this implies that no senior AU state officer can be prosecuted for international crimes until they relinquish power. Regarding immunities *ratione materiae*, the Protocol envisages a *possibility* of future prosecution *after* they leave office. The Protocol does not, however, seem to foresee the very real possibility that state officers who engage in the commission of international crimes may fail to relinquish power for fear of prosecution. Should such officers be left to continue with the atrocities until their tenure in office is over? What if they never leave office? Does this imply that the world should sit back and watch their citizens suffer? Neither is it clear who is included under the phrase "other senior state officials". If all senior state officials enjoy absolute immunity *ratione personae*, for whom is the chamber being created? What about the victims of serious violations? How does one reconcile these immunities with the duty to hold the perpetrators of past crimes accountable as an effective remedy to the victims? In light of all these concerns, one needs no further analysis to see the probable confusion that is likely to hamper Africa in its quest for justice through this legal framework.

This Protocol has unsurprisingly raised eyebrows, and some scholars refer to it as a rubberstamp to impunity. According to Abraham (2015, 14), for example, this Protocol:

"Represents a major setback in the advance of international criminal justice; in fact, it can only be construed to be in the interest of those African leaders fearful of an end to a culture of impunity".

Seemingly, the need to recognize immunity of heads of state and government and other state officials must have been a major driver in expanding the mandate of the African Court. Even though the political elites within the AU insist on the recognition of immunity for its state officials, some countries like Botswana have held differing opinions, especially where international crimes are alleged to have been committed (Kersten 2013; Clottey 2013). Yet again, some African jurisdictions have adopted the content of Article 27 of the Rome Statute

in their domestic legislation by absolutely denying immunity to their own state officials for international crimes.¹⁰³

In my opinion, African states are more interested in protecting the dignity of their state officials, especially heads of states, rather than furthering impunity for international crimes. Indeed, the AU has firmly reiterated its commitment to fighting impunity in the region, as reflected in Article 4(o) of the Constitutive Act of the African Union.¹⁰⁴

Imposing criminal accountability through the prosecution of sitting heads of states has so far proven to be an act of futility. If the Sudanese and Kenyan experiences are anything to go by, such leaders will always frustrate prosecution efforts either by exacerbating the conflicts or by refusing to cooperate with the prosecuting mechanisms, thus compromising any effective prosecution.¹⁰⁵ Given that international criminal mechanisms do not have a police force to execute their arrest warrants, and must depend on individual states to arrest suspects, enforcing such warrants becomes nearly impossible. Any legal framework on prosecuting international crimes must therefore be sensitive to these realities in order to avoid the current situation where the law seemingly exists in vain. As to whether introducing absolute immunities for sitting heads of states and all other state officers is the correct way to go for Africa remains the most controversial debate in international criminal law.

I agree with those scholars who insist that official immunity is a norm of customary international law (Papillon 2010), but acknowledge that, unlike *immunity rationae personae* which is absolute, immunity *rationae materiae* can only be ignored if the acts in question constitute international crimes, or on a waiver by the state concerned. This is because international crimes can never be deemed to be state functions. Although the prohibition of immunity for international crimes is itself neither an established custom nor a rule of *jus cogens*, states should be encouraged to hold accountable perpetrators of international crimes whether through prosecution or otherwise. Thus, in order to remove any obstacles to their accountability, a state should first remove from office a state official accused of an international crime to enable effective accountability measures to be taken against them, including possible prosecution.

¹⁰³ The Constitution of Kenya (2010), Art 50(2)(n). See also International Crimes Act of Kenya, Art. 27(1) (2008); The Implementation of the Rome Statute of the International Criminal Court Act of 27 of 2002 of South Africa, Sec. 4(2)(a); ICC Act of Uganda (2010), Art. 25(1); Burkina Faso, Loi 052-2009/AN du 03 December 2009, Art. 7.

¹⁰⁴ Art 4 (o) of the Constitutive Act of the AU provides that "The Union shall function in accordance with the following principles...respect for the sanctity of life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities". Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. I-37733 ("AU Constitutive Act"). Malabo Protocol, at Preamble Para 11 – 12; African Union, *Communique of the 142nd meeting of the Peace and Security Council*, PSC/MIN/Comm(CXLII), July 21, 2008, at Para. 2.

¹⁰⁵ International Criminal Court, *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Notice of Withdrawal of the Charges against Uhuru Muigai Kenyatta, December 5, 2014. In the Kenyan case, the prosecutor of the ICC was forced to withdraw her case due to lack of sufficient evidence resulting from frustration of her witnesses. The Sudanese and Kenyan cases can be compared with the historic indictment of Slobadan Milosevic by the ICTY while he was still the head of state of the Federal Republic of Yugoslavia and that of Charles Taylor while he was still the president of Liberia. In both cases, trials commenced after they had stepped down from power.

See http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-05-12-2014-2.aspx (accessed 4 August 2015).

4.3.3 The Principle of the Right to a Fair Trial

The general trend in international criminal justice has been to protect the rights of an accused person through doctrines ensuring a fair trial. The Nuremberg Charter, all the *ad hoc* international tribunals, and the ICC have all emphasized the right to a fair trial of an accused.¹⁰⁶ Protection of human rights standards, however, faces a lot of challenges, particularly when implementing universal jurisdiction in forum states. This is mainly informed by the fact that universal jurisdiction is not purely a domestic matter in the sense that a state is acting on behalf of the international community, and that the crimes over which it is asserting jurisdiction are determined by substantive international law. Yet, the procedural law that governs the exercise of this jurisdiction is purely domestic, and thus varies from one state to another. It is these variations that lead to numerous inconsistencies that in turn largely contribute to violations of fundamental rights. African states have particularly raised concern on the violation of the presumption of innocence, the doctrine of double jeopardy, and trials in absentia.

4.3.3.1 Violation of an Accused Person's Presumption of Innocence

The AU has condemned the practice of issuing warrants of arrest on an *ex parte* basis, as opposed to summons of appearance or similar measures not entailing arrest.¹⁰⁷ It argues that such warrants not only compromise the immunity of sitting state officials, but also undermine their dignity and that of their states,¹⁰⁸ and that such warrants could violate the fundamental right of an accused to be presumed innocent until proven guilty.¹⁰⁹

Article 11 of the Universal Declaration of Human Rights (UDHR) guarantees everyone charged with a penal offence “the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”. This legal guarantee is replicated in several human rights treaties.¹¹⁰ The ICC also recognizes the presumption of innocence as a key requirement for a fair trial;¹¹¹ the onus is on the prosecution to prove the guilt of an accused “beyond any reasonable doubt”.¹¹² The presumption of innocence:

“imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt,

¹⁰⁶ Nuremberg Charter, Art. 16; Rome Statute, Arts. 66 and 67; Statute of the ICTR, Arts. 19 and 20; Statute of the ICTY, Arts. 20 and 21.

¹⁰⁷ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 8672/1/09 Rev. 1, April 16, 2009 (“*AU-EU Expert Report*”), at para 36. Accessed August 14, 2016. http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ United Nations General Assembly, *International Covenant on Civil and Political Rights* 1966, 999 UNTS 171 (“*ICCPR*”), at Art 14 (2).

¹¹¹ Rome Statute, Art. 66.

¹¹² *Ibid.*

ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle”.¹¹³

Thus, authorities must refrain from influencing the outcome of a trial by affirming the guilt of an accused or treating the accused in a manner to suggest that they are dangerous criminals.¹¹⁴

Perhaps the AU has a point. Unlike a summons, an arrest warrant has the possibility of branding a person as a criminal, particularly to the average person who is unfamiliar with the procedures of the criminal justice system. This is especially so in the case of high-ranking state officers. International prosecutions should therefore embrace the use of summons as opposed to arrest warrants, especially where the national authorities are cooperative.

4.3.3.2 Trials in Absentia

Jurisdiction *in absentia* entails two steps: the investigative stage and the trial proper (Vajda 2010, 338). It is common practice that investigations are conducted in the absence of an accused person, and once sufficient evidence has been collected that can sustain a trial, a warrant of arrest or summons is issued to the accused to guarantee their presence for trial. Section 4(3)(c) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act) of South Africa, for example, adopts conditional universal jurisdiction based on the presence of an accused person on South Africa’s territory if the jurisdiction of a South African court is to be secured. This section provides that a person who commits a listed international crime outside South Africa “is deemed to have committed that crime in the territory of the Republic”. In her resounding interpretation of these legal provisions, Lilian Chenwi (2014, 40) argues that:

“The exercise of ‘enforcement jurisdiction’ is subject to the presence of an accused in South Africa, while the exercise of ‘prescriptive jurisdiction’ is not. This implies that while an investigation could be undertaken when an accused is not present in South Africa, prosecution before a judicial body can only take place when the accused is present.”

This was the reasoning underlying the decisions of the High Court, Supreme Court of Appeal and Constitutional Court in the SALC case¹¹⁵ where the Constitutional Court vacated the decision of the National Commissioner of the South African Police Service (SAPS) not to

¹¹³ Human Rights Committee General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights, CCPR/C/GC/32, August 23, 2007, at para 30.

¹¹⁴ Ibid.

¹¹⁵ *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* [2012] (10) BCLR 1089 (GNP); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* [2014] (2) SA 42 (SCA); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and another* [2015] (1) SA 315 (CC). The SALC Case; <http://www.saflii.org/za/cases/ZACC/2014/30.html> (accessed 7 January 2016);

institute an investigation into crimes against humanity of torture in Zimbabwe.¹¹⁶ The court found that SAPS not only has the power to investigate “but also a duty”,¹¹⁷ and that South Africa would be in breach of its domestic and international obligations if the allegations were not investigated.¹¹⁸ Chenwi (2014, 42-3) goes on to argue that such an investigation would have been important in the event that the relevant South African authority decided not to prosecute but have the matter referred to the ICC.

The very existence of the notion of extradition in international law presupposes investigations *in absentia* followed by requests for extradition (Chenwi 2014, 33), and investigations in the absence of the accused are an accepted practice that neither violates the rights of the accused person nor prejudices the fight against impunity. In fact, there is no state practice barring investigations *in absentia*;¹¹⁹ it is the absence of the accused at trial that is prohibited by human rights standards.¹²⁰ Notably, save in the unfortunate instance under the Nuremberg Principles,¹²¹ trials *in absentia* have no support in conventional international law¹²² or international customary law. This is mainly because trials *in absentia*, when undertaken pursuant to universal jurisdiction, not only have a likelihood of violating the fundamental rights of the accused, but also of creating confusion due to possible multiple suits. The decision of *R v Finta* in the Canadian Supreme Court best explains the confusion that accompanies universal jurisdiction trials *in absentia*.¹²³ In this case, Finta was prosecuted and convicted *in absentia* by a Hungarian court for “crimes against the people”.¹²⁴ His punishment was, however, statute-barred under Hungarian law and he later benefitted from a general amnesty.¹²⁵ The trial and conviction in Hungary was found to be a nullity under Canadian law and Mr Finta was subjected to another trial for war crimes and crimes against humanity by Canadian courts. The Canadian trial court acquitted him and the Court of Appeal dismissed the crown’s appeal against the acquittal. The Supreme Court subsequently dismissed a further appeal.¹²⁶ So, has Finta been convicted or not? Which decision prevails, his Hungarian conviction or Canadian acquittal? Trials *in absentia* risk subjecting the accused to multiple processes, thus undermining the fundamental rights of the accused. The other major challenge is the difficulty of enforcing a judgment

¹¹⁶ *SALC* case, paras 77 & 84.

¹¹⁷ *SALC* case, para 55

¹¹⁸ *SALC* case, para 80 (see also, generally, paras 71-81).

¹¹⁹ *Arrest Warrant case*, Separate Opinion of Judge van den Wyngaert, at p 143.

¹²⁰ ICCPR, Art 14(3)(d) provides for the right of the accused to be present during his or her trial.

¹²¹ International Law Commission, “Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”. *Yearbook of the International Law Commission*, Vol. 11 (1950) (“Nuremberg Principles”), at Art. 12, which allows trials in absentia as follows: “The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence”.

¹²² All the treaties that allow universal jurisdiction emphasize the need for the physical presence of the accused in the territory of the forum state. For example, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949; Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105, December 16, 1970, at Art 4(2); Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft, Montreal, September 23, 1971, 974 UNTS 177, at Art. 5(2).

¹²³ Supreme Court of Canada. *R. v Finta*, [1994] 1 S.C.R.701, March 24, 1994. Accessed August 14, 2016. http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Canada/RcFinta_SupremeCourt_24-3-1994-EN.pdf.

¹²⁴ *Ibid.* at 3.

¹²⁵ *Ibid.* at 3.

¹²⁶ *Ibid.* at 200.

extraterritorially (Chenwi 2014, 33). In the *Finta* case, for example, other than creating the confusion alluded to, it would be almost impossible for Hungary to enforce its conviction if Finta never returns there.

This necessitates some guarantee of the rights of the accused. For example, a state should only open investigations *in absentia* in order to ensuring the presence of an accused to stand trial. Although the Nuremberg Principles accept trials *in absentia* in some circumstances, they are now completely rejected by the ICC, and Article 63(1) of the Rome Statute makes the presence of an accused person mandatory during trial. This illustrates the unwillingness of the international community to allow trials *in absentia* for international crimes. In addition, though traditionally a common-law doctrine, trials *in absentia* are contrary to international human rights law.¹²⁷ Article 14(3)(d) of the ICCPR provides for the right of the accused to be present during his or her trial. Since this human rights norm has been incorporated into African human rights legal frameworks,¹²⁸ it would be expected that any regional mechanism prosecuting international crimes would follow suit.

4.3.3.3 The Prohibition against Double Jeopardy

Another right likely to be violated by foreign states exercising universal jurisdiction is the prohibition against double jeopardy, also known as *ne bis in idem*. As the *Finta* case shows, trials *in absentia* risk infringing the doctrine of double jeopardy and introduce the specter of hounding accused people from one court to another. This undermines the fundamental rights of the accused, and *Abbas Hijazi et al v Sharon* (the Sharon case)¹²⁹ further typifies this possibility. The Kahan Commission of Inquiry in Israel considered allegations of war crimes, crimes against humanity and genocide against Ariel Sharon, former Prime Minister of Israel.¹³⁰ Despite this, Belgium issued an indictment against Sharon under their universal jurisdiction statute. This could be taken as an indication that Belgium did not find the independent commission credible, or that it did not give much weight to the doctrine of double jeopardy.

The Rome Statute at Article 20 has adopted “*ne bis in idem*” as a cardinal principle:

- i. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
- ii. No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court.

¹²⁷ ICCPR, Art 14 (3)(d), provides for the right of the accused to be present during his or her trial.

¹²⁸ African Charter, Article 7, entitles everyone to have their cases heard.

¹²⁹ Cour de Cassation (Belgium), February 12, 2003, 127 ILR 110.

¹³⁰ The Kahan Commission of Inquiry, “Report into the Events at the Refugee Camps in Beirut”. February 8, 1983. Accessed January 6, 2016. www.jewishvirtuallibrary.org/jsourc/History/kahan.html.

iii. No person who has been tried by another court for conduct also proscribed under Article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Save in the exceptional circumstances set out in 3(a) and (b), an accused who has been tried by any tribunal (whether national or international) and either convicted or acquitted, shall not be tried again over the same criminal conduct. The jurisdiction of the ICC is, therefore, ousted where a person has been tried and acquitted or convicted by a national court save in the exceptional circumstances provided for under the Rome Statute. Likewise, a national court cannot try a person for a crime over which the ICC has jurisdiction and has entered a final decision.

Although one might be tempted to argue that the Rome Statute's prohibition against double jeopardy is limited to crimes under the Rome Statute, human rights treaty regimes also recognize this doctrine in relation to all crimes. Article 14 (7) of the ICCPR provides as follows:

“No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

In *Glaziou v. France*, the Human Rights Committee (HRC) failed to provide a comprehensive interpretation of this principle.¹³¹ The accused in this case pleaded, *inter alia*, a violation of the principle of *ne bis in idem*. France argued that Article 14 (7) of the ICCPR only applies to judicial decisions within a single state, and not decisions of different states and sought to rely on an earlier case, *A.P v. Italy*,¹³² in which the HRC held that Article 14 (7) prohibits double jeopardy only with regard to an offence adjudicated in a given state. Unfortunately, the HRC did not make its pronouncements with respect to the *ne bis in idem* principle, as it declared the matter inadmissible. Nevertheless, insofar as Article 20 of the Rome Statute is concerned, the principle of *ne bis in idem* is inviolable save in certain exceptional circumstances, thus recognizing the application of this doctrine in the international criminal justice system, regardless of whether the judicial decisions are from a single state or multiple states.

¹³¹ Human Rights Committee, *Communication 492/1991* (Fifty-first session, 1994), U.N. Doc. CCPR/C/51/D/452/1991.

¹³² Human Rights Committee, *Communication No. 204/86* (Thirty-fifth session, 1987) U.N. Doc. CCPR/C/31/D/204/1986.

There is no doubt that African states hold dear the principles that guarantee a fair trial. Article 7 of the African Charter on Human and People's Rights devotes itself to numerous aspects of fair trial, implying that any regional mechanism must adopt these principles.

4.3.4 The Principle on Superior Orders

Historically, the question as to whether superior orders provided a defense to members of the military alleged to have committed international crimes is fraught with controversies, and the inconsistent application of this principle in domestic and international practice does not help the situation much. Contrary to principles of individual criminal responsibility and the requirement that international crimes must not go unpunished, military discipline dictates that orders must be obeyed (Garraway 1999). In fact, early writers in international law argued that members of the military should not be punished for committing violations ordered by their commanders, but instead that the commander should be held responsible (Oppenheim 1906, 264). According to Van Sliedregt, the subordinate in the relationship is regarded as an instrument of the superior (2003, 33). The Nuremberg Charter was the first official document to articulate the doctrine of superior orders in the international arena in a manner that addressed these controversies. The Charter provides that:

“The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires”.¹³³

The Charter made members of the military criminally responsible, regardless of whether they were acting pursuant to superior orders. Indeed, “superior orders”, or the Nuremberg defense, was a recurrent defense in the post-World War II trials, and the international criminal tribunals created after World War II struggled to interpret this provision in the light of traditional doctrines of military command. This principle was thus interpreted at Nuremberg to hold that while members of the military were under an obligation to obey the orders of their superior, they were only bound to obey lawful orders.¹³⁴ In other words, a member of the military could not rely on the existence of superior orders as a defense where such orders violated international law. Other decisions by the IMT underscored the need to establish that the commander had knowledge of the criminal nature of their orders,¹³⁵ and other decisions equated superior orders to duress.¹³⁶

Both the ICTY and ICTR adopted the Nuremberg Principle on superior orders in its absolute sense.¹³⁷ The Rome Statute too had to deal with this issue. Under Article 33 of the Rome Statute, ‘superior orders’ offers no defense to a member of the military save in three

¹³³ Nuremberg Charter, Art. 8.

¹³⁴ International Military Tribunal, *United States v. Wilhelm List et al.* Trials of War Criminals, Vol. XI, p. 1236.

¹³⁵ *Ibid.*, Vol. IX, p. 511.

¹³⁶ International Military Tribunal, *United States v. Otto Ohlendorf et al.* Trials of War Criminals, Vol. IV, p. 411.

¹³⁷ ICTY Statute, Art 7(4); ICTR Statute, Art. 6(4).

cumulative circumstances. First, the accused must prove that they were under a legal duty to obey such orders. This implies that a moral duty is not sufficient. Second, the accused person must establish that they had no knowledge that such orders violated international norms. Finally, the accused must establish that such orders were not manifestly unlawful. According to Article 33(2) of the Statute, orders to commit genocide or crimes against humanity are deemed to be manifestly unlawful. It can however be argued that if all of the conditions are present, an accused may be able to use the defense of superior orders if accused of a war crime. The Rome Statute therefore combines two approaches to address the doctrine of ‘superior orders’: that of absolute liability with respect to genocide and crimes against humanity, and that of conditional or limited liability with respect to war crimes. This reconciles the long-standing controversy between the proponents of both schools of thought.

African leaders have not expressed any specific concerns with the doctrine of “superior orders”, and the AU has adopted this principle under its legal framework on prosecuting international crimes, reflecting the practice of the Nuremberg Charter, the ICTY and the ICTR Statutes:

“The fact that an accused person acted pursuant to the order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Court determines that justice so requires”.¹³⁸

Essentially, “superior orders” is not a defense. It can only be argued during mitigation after conviction. It remains to be seen how this provision will be interpreted once the Protocol becomes operational.

4.4 The Core International Crimes

The corpus of international crimes has evolved over time. The Nuremberg Principles listed crimes against peace, war crimes, and crimes against humanity as international crimes,¹³⁹ and the Rome Statute of the ICC expanded this list to include genocide.¹⁴⁰ It has also postponed the coming into force of jurisdiction for the crime of aggression, which is the modern equivalent of the crime against peace that was prosecuted at Nuremberg. The Malabo Protocol has expanded this list to include piracy, mercenarism, corruption, unconstitutional change of government, and terrorism.¹⁴¹

¹³⁸ Malabo Protocol, Article 22 (inserting article 46B(4)).

¹³⁹ Nuremberg Principles, Principle VI.

¹⁴⁰ Rome Statute, Art. 5.

¹⁴¹ Malabo Protocol, Article 14 (inserting article 28A).

4.4.1 Crimes against Humanity

The Nuremberg Charter formally codified crimes against humanity,¹⁴² although earlier efforts to develop international criminal law included similar concepts.¹⁴³ The Nuremberg Principles list the acts of “murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds” as crimes against humanity when carried out in connection with war crimes and crimes against peace.¹⁴⁴ According to the Nuremberg Principles, crimes against humanity only occur if the acts that are listed are committed in the course of war. This approach was adopted under the ICTY Statute, which lists multiple acts – murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, other inhuman acts – as amounting to crimes against humanity when “committed in *armed conflict*, whether international or internal in character, and directed against any civilian population”.¹⁴⁵ Thus, to prove an act qualifies as a crime against humanity within the ICTY regime, one has to prove one of the listed acts, committed in the context of an armed conflict, and directed against the civilian population. Subsequent ICTY jurisprudence has elaborated on the definition of a crime against humanity to include: the method used in perpetration (the widespread character); the context in which this method was used (the systematic character); and the status of the victims (any civilian population); all committed in an armed conflict.¹⁴⁶

The ICTR Statute adopted a slightly different definition of crimes against humanity. It defines them in a similar way to those cataloged under the ICTY statute “when committed as a part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”.¹⁴⁷ It omits the requirement that the acts must have been committed in an armed conflict. This was a sharp departure from the Nuremberg and ICTY approach, and at the same time a re-statement of the long-established principle of customary international law that crimes against humanity can be committed in the absence of an armed conflict (Mettraux 2002, 244).¹⁴⁸ Notable about the ICTR statute is its addition

¹⁴² Nuremberg Charter, Article 6(c). This Article defines crimes against humanity as “...murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Chamber, whether or not in violation of the domestic law of the country where perpetrated”.

¹⁴³ See, for example, the Martens clause of the Hague Convention of 1907 that refers to “the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience”. Second International Peace Conference (The Hague), *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land*, 1907, Preamble. Accessed 14 August 2016. <http://www.refworld.org/docid/4374cae64.html>. See also ICTY, *Prosecutor v. Tadic*, IT-94-1-T, May 7, 1997 at 221-222 on the general history of this crime. Adolf Eichmann was charged with offences under Nazi and Nazi Collaborators (punishment) Law, 5710/1950, Section I (b) of the said law defines crime against humanity as any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds. *Eichmann Appeal*, at 30.

¹⁴⁴ Nuremberg Principles, Principle VI(c).

¹⁴⁵ ICTY Statute, Art. 5 (emphasis added).

¹⁴⁶ ICTY, *The Prosecutor v Tihomir Blaškić*, IT-95-14-T, Trial Chamber, March 3, 2000, at para. 201.

¹⁴⁷ ICTR Statute, Art. 3.

¹⁴⁸ See ICTY, *Prosecutor v. Tadic*, IT-94-1-T, May 7, 1997, at para. 221.

of the discriminatory ground “national, political, ethnic, racial or religious grounds”. This can be justified given the unique circumstances then obtaining in Rwanda.¹⁴⁹

The Rome Statute improved on the definitions under the two *ad hoc* tribunal Statutes by expanding the scope of the crime. In addition to the acts listed in the ICTY and ICTR definitions, crimes against humanity under the Rome Statute includes apartheid and enforced disappearance.¹⁵⁰ Likewise, rape has been expanded to include “sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”.¹⁵¹ It also elaborates on specific acts that amount to crimes against humanity.¹⁵² In line with customary international law as well as the ICTR Statute, the Rome Statute does away with the armed conflict requirement. Thus, crimes against humanity under the Rome Statute are deemed to have occurred when relevant acts are “committed as part of a widespread or systematic attack directed against civilian population, with knowledge of the attack”.¹⁵³ The Malabo Protocol has borrowed the Rome Statute definition *verbatim*.¹⁵⁴

4.4.2 Crimes against Peace, Or the Crime of Aggression

While the Nuremberg Charter refers to crimes against peace, the Rome Statute and the Malabo Protocol refer to the crime of aggression. In principle, the Rome Statute definition and that of the Malabo Protocol are similar and each builds on the definition in the Nuremberg Charter which defines crimes against peace as:

“Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.¹⁵⁵

While under this definition it appears as though anyone can be prosecuted for crimes against peace, the Rome Statute and the Malabo Protocol specify that the accused must be “a person in a position to effectively exercise control over or direct the political or military action of a State, of an act of aggression”.¹⁵⁶ The Rome Statute requires that an act of aggression must be the act of a State, stating that the crime of aggression is the use of “armed force *by a State* against the sovereignty, territorial integrity or political independence of another State”.¹⁵⁷ The Malabo Protocol, however, introduces a small variation under which an act of aggression can be action of a state or an “organization,

¹⁴⁹ Magnarella (2005) gives a vivid explanation of protracted civil wars from 1960s to 1990s that later culminated in genocide in 1994, and how the same took an ethnic dimension.

¹⁵⁰ Rome Statute, Art. 7(1)(i) and (j).

¹⁵¹ Rome Statute, Art. 7(1)(g).

¹⁵² Rome Statute, Art. 7(2) and (3).

¹⁵³ Article 7 (1), Rome Statute, Art. 7(1).

¹⁵⁴ Malabo Protocol, Art. 14 (inserting article 28C).

¹⁵⁵ Nuremberg Charter, Art. 6(a).

¹⁵⁶ Rome Statute, Art. 8*bis*. Art 14, Malabo Protocol, Art. 14 (inserting article 28M).

¹⁵⁷ Rome Statute, Art. 8*bis* (emphasis added).

whether connected to the State or not”.¹⁵⁸ Thus, while the Rome Statute restricts the crime of aggression to states as both the aggressor and the victim, the Malabo Protocol does not, but also applies it to organizations, including those independent of any state.

One problematic issue that is likely to arise in this regard is who makes the determination on an act of aggression. Under the Rome Statute, a state referral or the prosecutor’s exercise of *proprio motu* powers in relation to crimes of aggression is allowed¹⁵⁹ but subject to the United Nations Security Council (UNSC) making such a determination.¹⁶⁰ The UNSC’s powers to make this determination stem from Article 39 of the UN Charter which authorizes it to:

“Determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.

Since the UNSC enjoys primary responsibility over matters of peace and security, one would correctly question whether such a determination will be required for cases before the African Court, or whether it will be the AU that makes such a determination.

The Malabo Protocol does not, however, make express provision on who should make a determination on an act of aggression. In defining the crime of aggression, the protocol acknowledges the primary role of the UN Charter and that of the Constitutive Act. Seemingly, in the African context, both the UNSC and the AU would have the same powers in relation to determining an act of aggression, which begs the question of what would happen were the AU to make such a determination in relation to cases before the African Court, and whether it would conflict with Article 39 of the UN Charter and the UNSC’s primary responsibility.

Clearly, there is an overlap of responsibility between the AU’s Peace and Security Council (PSC), and the UNSC with respect to acts of aggression.¹⁶¹ The PSC has a mandate to “examine and take such appropriate action within its mandate in situations where the national independence and sovereignty of a Member State is threatened by acts of aggression”,¹⁶² and the UNSC has a similar mandate under Article 39 of the Charter of the United Nations. Nonetheless, since the Malabo Protocol puts the two organs at par, it is expected that they will work in close collaboration towards adopting appropriate measures to restore international peace and security. This will also ensure that there is no overlap in

¹⁵⁸ Malabo Protocol, Art. 14 (inserting article 28M).

¹⁵⁹ Rome Statute, Arts. 13 and 15*bis*

¹⁶⁰ Rome Statute, Arts. 15*bis*(6) and (7).

¹⁶¹ Article 2 of the Protocol establishing the PSC provides that it is established pursuant to article 5(2) the Constitutive Act. African Union, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, reprinted in *African Journal of International and Comparative Law* 13:96-114 (“PSC Protocol”).

¹⁶² PSC Protocol, Art. 7(o).

the exercise of the mandate with respect to determination of acts of aggression in African cases.

It may also be validly questioned whether a UNSC determination would affect the independence of either the ICC or the African Court. With respect to the ICC, such a determination does not amount to a violation of the independence of the Court. If anything, the Rome Statute recognizes the importance of the ICC working hand in hand with the UNSC on international security matters. Not only does the Rome Statute allow referrals by the UNSC,¹⁶³ it also allows the UNSC its primary role of determining acts of aggression before the ICC exercises jurisdiction over crimes of aggression, where either states or the prosecutor makes a referral.¹⁶⁴

The position of the African Court is not so clear. Unlike the Rome Statute, the Constitutive Act does not expressly endow the UNSC with its primary role of determining acts of aggression. It can however be argued that since the Malabo Protocol defines crimes of aggression as a violation of the UN Charter, it is presumed that only the UNSC could determine acts of aggression arising out of a breach of the principles of the Charter. Thus, while the AU has a mandate to determine acts of aggression arising as a result of a breach of the principles of the Constitutive Act, the UNSC has similar mandate under the UN Charter. Given that the acts of aggression arising under the UN Charter are likely to be similar to those arising under the Constitutive Act, it is presumed that both the AU and the UNSC will work in collaboration, by consulting one another with regard to such a determination.

4.4.3 War Crimes

The Nuremberg Charter defines war crimes as “violations of the laws or customs of war”¹⁶⁵ and lists several acts as comprising these violations.¹⁶⁶ International criminal law has adopted this definition, albeit with detailed elaboration. In contrast to the Geneva Conventions and the ICTY Statute which adopt the Nuremberg Charter’s list of acts that amount to violations of the laws and customs of war, the Rome Statute introduces the requirement that the crime has to be “committed as part of a plan or policy or as part of a large-scale commission of such crimes”.¹⁶⁷ It also makes it clear that war crimes can be committed in armed conflicts both of an international and of a non-international character.¹⁶⁸ The list of acts that amount to war crimes is not exhaustive. The ICTY has previously held that such a list is inclusive of all laws and customs of war, whether listed or not.¹⁶⁹

¹⁶³ Rome Statute, Art. 13(b).

¹⁶⁴ Rome Statute, Article 15*bis* (7).

¹⁶⁵ Nuremberg Charter, Art. 6(b).

¹⁶⁶ *Ibid.*

¹⁶⁷ Rome Statute, Art. 82(1).

¹⁶⁸ Rome Statute, Art. 82(2).

¹⁶⁹ ICTY, *Delalić*, IT-96-21-A, Appeals Chamber, Judgment, February 20, 2001 (interpreting Article 3 of the ICTY Statute which lists acts that amount to a violation of the laws and customs of war).

The Malabo Protocol adopts the Rome Statute’s definition with minimal adjustments.¹⁷⁰ For example, informed by Africa’s history, it lists the following acts as war crimes if committed in an armed conflict of an international character: unjustified delayed repatriation of prisoners of war; apartheid and other inhuman and degrading practices based on racial discrimination; making non-defended localities and demilitarized zones the objects of attack; slavery; collective punishment; and despoliation of the wounded, sick, shipwrecked or dead.¹⁷¹ In relation to armed conflicts not of an international character, it also proscribes starvation of civilians and using civilians or other protected persons to render certain areas immune from military operations.¹⁷² Another significant addition under the Malabo Protocol is the characterization of the use of nuclear weapons or other weapons of mass destruction as a war crime.¹⁷³ Essentially, an understanding of war crimes within the African Court will parallel that of the ICC.

4.4.4 Genocide

The Nuremberg Charter does not include genocide as a crime, which was first defined under the Genocide Convention of 1948 as:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group”.¹⁷⁴

The subsequent *ad hoc* tribunals as well as the ICC have adopted this definition,¹⁷⁵ as has the Malabo Protocol with one addition: “acts of rape or any other form of sexual violence”.¹⁷⁶ This new addition may have been inspired by the ICTR decision in the *Akayesu* case, which held that torture included rape, thus confirming that rape can constitute a war crime or a crime against humanity.¹⁷⁷ The African Court is thus likely to follow the interpretation of genocide developed in other international criminal justice forums, with an increased emphasis on rape and sexual violence qualifying as genocide.

¹⁷⁰ Malabo Protocol, Art. 28D.

¹⁷¹ Ibid. Art. 28D (b) xxviii-xxxiii.

¹⁷² Ibid. Art. 28D (e) xvi-xxii.

¹⁷³ Ibid. Art. 28D (g).

¹⁷⁴ Genocide Convention, Art. 2.

¹⁷⁵ ICTR Statute, Art. 2(2); ICTY Statute, Art. 4(2); Rome Statute, Art. 6.

¹⁷⁶ Malabo Protocol, Art. 28B(f).

¹⁷⁷ ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgment, September 2, 1998, at para 597: “Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

Although the addition by the Malabo Protocol of “rape or any other form of sexual violence” must be applauded, it is likely to be problematic in the interpretation of its *mens rea* element. Experts have lamented the challenges of prosecuting sexual violence in a conflict situation (Kapur 2015) because, in genocide contexts, some offences related to acts of rape and other sexual violence are committed in the aftermath by peacekeeping troops. It therefore becomes almost impossible to prosecute all sexual offences as part of genocide due to the requirement of proving the *chapeau* elements of the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”. Yet, these troops are usually not part of the conflict. The only option left for accountability of these crimes is prosecution through domestic avenues, which are normally either unstable or complicit in the crimes. Nevertheless, the attempt by the Malabo Protocol to close the impunity gap in so far as sexual offences are concerned cannot be undervalued.

4.4.5 Unconstitutional Change of Government

Unconstitutional change of government through military coups has been a common phenomenon in post-independence Africa (Wachira 2014, 21), and Nkosi (2010, 23) provides data to the effect that all countries in West of Africa:

“with the exception of Senegal and Cape Verde have experienced from one to six successful coups (Benin; Ghana, Togo, Niger, Burkina Faso; Guinea Bissau; Guinea Conakry; Mauritania; and Nigeria). East Africa and the Horn of Africa, with 10 states, have experienced coups [...] in the Sudan, Uganda, Burundi and Ethiopia”.

Central Africa (Congo-Brazzaville, the Central African Republic, São Tomé and Príncipe) is no exception, and suffered a total of 14 successful coups between 1956 and 1984, and the African Islands too (Comoros and Madagascar) have seen 4 (ibid), the most recent in 2009 in Madagascar. Vunyingah (2011, 2) calculates that between 1961 and 1997, there were a total of 78 coups in Africa, and as recently as 2012, Mali and Guinea Bissau saw successful coups.¹⁷⁸ Unconstitutional change of government has therefore been a concern to both the OAU and the AU.¹⁷⁹ While this concern can be said to be informed by the need to transform African governments into democratic governments, some critics view this concern as an expression of the fear by:

“Most African leaders – some of whom had come to power through the barrel of a gun – thought that coups were a bigger threat to their regimes and thus merited greater attention” (Souaré 2009, 3).

¹⁷⁸ African Union, *Report of the Chairperson of the Commission on the Situation in Guinea Bissau, Mali and between The Sudan and South Sudan*, PSC/MIN/3, April 24, 2012.

¹⁷⁹ The African Charter on Human and Peoples' Rights provides for the right for every citizen to participate in their government either directly or through chosen representatives. African Charter, Art. 13(1). Organization of African Unity, *Decision on Unconstitutional Change of Government*, AHG/Dec. 142 (XXXV) 1999; Organization of African Unity, *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, AHG/Decl.5 (XXXVI) 2000 (“OAU Declaration”); Article 4 (p) of the AU Constitutive Act condemns and rejects unconstitutional change of government as one of the key principles guiding the AU.

The OAU *Declaration on the Framework on a Response to Unconstitutional Change of Government* (the “OAU Declaration”)¹⁸⁰ offers the first definition of situations that could be considered to be an unconstitutional change of government:

- i) military *coup d'état* against a democratically elected government;
- ii) intervention by mercenaries to replace a democratically elected government;
- iii) replacement of democratically elected governments by armed dissident groups and rebel movements; and
- iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.¹⁸¹

Article 23(5) of the African Charter on Democracy, Elections and Government introduces an additional criterion to this list: “amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of Governments”.¹⁸² This was a response to an emerging practice where African presidents altered their national constitutions or laws to either extend their presidential term, or declare themselves president for life.¹⁸³ Recently, after failing to secure a constitutional amendment extending his term limit, President Pierre Nkurunziza of Burundi decided nevertheless to run for office and won amidst great opposition and violence that led to over 70 deaths, and over 170,000 people fled as refugees.¹⁸⁴ Rwanda and the Republic of Congo Brazzaville have also signaled an intention to extend the presidential term by extending the constitutional term limits of their current presidents.¹⁸⁵

Initially, the AU responded to the problem of unconstitutional change of government through condemnation, suspension, and the imposition of sanctions.¹⁸⁶ Given the magnitude of unconstitutional change of government, or perhaps in response to criticisms of some

¹⁸⁰ Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI) para 12. http://www2.ohchr.org/english/law/compilation_democracy/lomedec.htm (accessed 4 October 2016).

¹⁸¹ OAU Declaration.

¹⁸² African Union, *African Charter on Democracy, Elections and Governance* (Eighth Ordinary Session of the Assembly), January 30, 2007. Accessed August 14, 2016. <http://www.achpr.org/instruments/charter-democracy/>

¹⁸³ In 1982, the Kenyan National Assembly declared the country a one party state and amended the constitution accordingly to reflect this declaration. This was the status until the government succumbed to pressure in 2002 and restored the multi-party regime through a subsequent constitutional amendment. Uganda has had a mixed reactionary approach: from a ‘no party’ regime to a multi-party regime. Although officially a multi-party State, it remains an effective one party state, as does Rwanda. For the Union Islands of Comoros, in 2007 the then president of the Autonomous Island of Anjouan, Colonel Mohamed Bacar, refused to relinquish power after finishing his term and declared himself president for an additional term.

¹⁸⁴ AFP, “Burundi, Rwanda and Now Congo: Another African President set to Change Term Limit Rules”. *Mail & Guardian Africa* July 18, 2015, accessed June 8, 2016. <http://mgafrica.com/article/2015-07-18-burundi-rwanda-and-now-congo-another-african-president-set-to-get-a-third-term-and-more>.

¹⁸⁵ Ibid; Agencies, “Update: 99% of Rwandan Lawmakers Vote for Changes to Allow Kagame Extend His 15 Years in Power,” *Mail & Guardian Africa* July 14, 2015, accessed June 8, 2016. <http://mgafrica.com/article/2015-07-14-rwandan-lawmakers-set-to-vote-changes-that-would-allow-kagame-extend-his-15-years-in-power/> With Rwanda’s general elections scheduled for 2017, the Rwandan Parliament voted with an overwhelming majority to hold a referendum on the proposed changes to the Constitution which have the effect of extending the term of the current president to a third term. Similarly, in Congo, the President, with the support of majority of the lawmakers, is seeking a constitutional change through a referendum to remove the presidential age limit as well as extend the number of terms that one should serve as president.

¹⁸⁶ AU Constitutive Act, Art. 23; PSC Protocol, Art. 7(1)(g); Charter on Democracy, Elections and Governance; Assembly of the African Union, Rule 37.4, Rules of Procedure of the Assembly.

scholars who describe AU interventions as impotent and paralyzed (Eriksson and Zetterlund 2013, 38), the AU has taken a firmer position against unconstitutional changes of government by establishing it as an international crime under the Malabo Protocol.

The Protocol adopts a definition that seeks to combine the definitions under the OAU Declaration and that of the Protocol establishing the Peace and Security Council (PSC). It expands these definitions by including political assassinations and alterations of electoral laws:

“Unconstitutional change of government’ means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:

- a) A putsch or coup d’état against a democratically elected government;
- b) An intervention by mercenaries to replace a democratically elected government;
- c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
- d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution; Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.¹⁸⁷

Unlike its preceding legal documents, the Malabo Protocol does not use permissive words like “could be” which can be interpreted to imply that some instances where the listed acts occur may not amount to an unconstitutional change of government. The Protocol further emphasizes “democratically elected government”, which risks excluding individuals who order or organize military coups against undemocratically elected governments. The current governments of Uganda, Ethiopia and Burkina Faso initially came to power through the power of the gun (Wangome 1985), and so this raises the question of what would happen to governments that first came to power through military coups but subsequently organized democratic elections. Do the subsequent elections legitimize the previous coup? If not, does this mean that the organizers of a subsequent coup by a different group cannot be punished under this provision?

An affirmative answer to the latter suggests the existence of “good coups”, as pointed out by Ikome (2007) and Sturman (2005)¹⁸⁸ whose identification of “good coups” seems to be in tandem with the French Declaration of the Rights of Man and Citizens and the American Declaration of Independence. These documents assert the right of citizens to resist tyrannical governments:

¹⁸⁷ Malabo Protocol, Art. 28(e).

¹⁸⁸ Sturman (2011) cites Ikome (2007) to identify good coups as those engineered against bad governance that has shut down peaceful and democratic methods of changing governments.

“The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are ... Resistance to Oppression”.¹⁸⁹

“That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness”.¹⁹⁰

Democratic governance scholars will, however, readily argue that the right to resist tyrannical government does not include the right to engage in a coup, but that resistance should be pursued using democratic means. The silence of international human rights discourse on any right to engage in coups seems to confirm the obligation to resist tyrannical governments only through peaceful means. The challenge, however, is that elections under such regimes are usually neither free nor fair, resulting in the re-election of the same tyrannical government.¹⁹¹ Kenya and Sudan are good examples of countries where tyrannical governments whose heads of state are or have faced ICC prosecution have continued to re-elect those same leaders amidst allegations of voting irregularities, while the leaders of Burundi, Uganda and the Comoros Island have sought re-election despite exhausting their constitutional terms. In Rwanda and Congo Brazzaville, the governments have proposed referendums to change the constitutional limit of the presidents. It would have made more sense if the crime of unconstitutional change of government included provisions regarding fraudulent elections, as that is the means by which most African leaders come to power, and should be treated as equivalent to a coup.¹⁹²

The mental element of this crime has a bearing on its definition. The prosecution has to prove that the person being accused of this crime either committed or ordered the commission of the said acts “with the aim of illegally accessing or maintaining power”.¹⁹³ The mental element of the crime is, therefore, the intention to either access or maintain power. Thus, a mere change of the constitution, however acrimonious, that does not have the consequence of either enabling the accused to access or maintain power, will not fall under this definition.

¹⁸⁹ Declaration of Human and Civic Rights of 26 June 1789, Art. 2. Accessed December 2, 2015. http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf.

¹⁹⁰ American Declaration of Independence, 4 July 1776, para 2. Accessed December 2, 2015. <http://www.ushistory.org/declaration/document/index.htm>

¹⁹¹ For further reading see Förander (2010, 52-4).

¹⁹² For example the Kenyan elections of 2007 and that of Zimbabwe in 2008.

¹⁹³ Malabo Protocol, Art. 28E(1).

4.4.6 Piracy

The Malabo Protocol defines piracy as:

“a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private boat, ship or a private aircraft, and directed:

- (i) on the high seas, against another boat, ship or aircraft, or against persons or property on board such boat, ship or aircraft;
- (ii) against a boat, ship, aircraft, persons or property in a place outside the jurisdiction of any State

b) any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft;

c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹⁹⁴

Although piracy is recognized by customary international law as a *jus cogens* international crime (Bassiouni 1996; Bassiouni 2001; Cassese 2003, 591),¹⁹⁵ the Nuremberg Charter and the *ad hoc* tribunals did not list it as one of the international crimes within their jurisdiction. Perhaps the nature and timing of these tribunals did not necessitate such jurisdiction. Surprisingly, the Rome Statute also fails to acknowledge this crime within its jurisdiction. The African Protocol therefore becomes particularly important, especially given that piracy is still rampant in Africa. Although international tribunals may not have expressly provided jurisdiction over piracy, this crime has largely been prosecuted under the doctrine of universal jurisdiction. In fact, it has been argued that the crime of piracy was the impetus for the development of the doctrine of universal jurisdiction in the 1600s (Garson 2007, 4; Coombes 2011; Chadwick 2009, 361-2, 380; Hoover 2011; Ireland-Piper 2013, 76; Sammons 2003, 126),¹⁹⁶ the perpetrators of which are considered *hostis humani generis*; the enemy of all mankind (Sammons 2003, 126). As an international crime, in the sense that the acts occur on the high seas and the state that captures may not be “the state of nationality of the pirate or of the flag of the attacked ships or of the victims” (Abi-Saab 2003, 600; see also Chadwick 2009, 362), piracy posed the challenge of lack of forum (Coombes 2011, 427; Arajärvi 2011, 8). This necessitated the need to enable all states to have jurisdiction through the doctrine of universal jurisdiction.

¹⁹⁴ Malabo Protocol, Art. 14 (inserting art. 28(f)).

¹⁹⁵ *AU-EU Expert Report*, supra note 56, para 9; ICTY, *Prosecutor v. Furundzija*, IT-95-17/1, Trial Chamber, December 10, 1998, at para 156; UK House of Lords, *Pinochet* Lord Browne-Wilkinson, March 24, 1999 in [1999] 2 All ER, para 837-838; United Nations General Assembly, *United Nations Convention on the Law of the Sea (“UNCLOS”)* provides at article 105 that “on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a private ship or aircraft...;” International Law Commission, *1996 Draft Code of Crimes against the Peace and Security of Mankind*, U.N.Doc. A/CN.4/L.532, at para 50.

¹⁹⁶ The UN Convention on the Law of the Sea provides that “All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State” UNCLOS, art. 100.

4.4.7 Mercenarism

International law prohibits the use of mercenaries.¹⁹⁷ According to the International Committee of the Red Cross, the prohibition of mercenarism is a norm of customary international law (Fallah 2006, 604; Henckaerts and Doswald-Beck 2005, 391-5). Mercenarism is not new to Africa, and it first outlawed mercenarism at a regional level in 1977, spurred to do so by international developments. It is not surprising that the OAU adopted the Convention for the Elimination of Mercenarism in Africa barely a month following the adoption of the 1977 Additional Protocols to the Geneva Convention. Additional Protocol I (AP I) and the 1989 UN Convention against the Recruitment, Use, Financing and Training of Mercenaries condemn mercenarism in elaborate terms. Additional Protocol I to the Geneva Conventions defines a mercenary as a person who:

- a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does, in fact, take a direct part in the hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e) is not a member of the armed forces of a Party to the conflict; and
- f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces¹⁹⁸

Although the UN Convention adopts a similar definition, it excludes the second condition.¹⁹⁹ This makes the definition of a mercenary more restrictive under AP I in the sense that a person must take direct part in the hostilities to qualify as a mercenary, while under the UN Convention proof of other factors suffices for one to be a mercenary regardless of whether or not they directly take part in hostilities.

The OAU sought to address this crime, albeit in a more diplomatic manner, in the *OAU Mercenaries Convention* by defining the crime of mercenarism as follows:

“A mercenary is a person who:

- a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does in fact take a direct part in the hostilities;

¹⁹⁷ Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (hereinafter Geneva Protocol I”) at Art. 47 (1);, Organization of African Unity, Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc CM/433/Rev.L, Annex 1 (hereinafter “OAU Mercenaries Convention”), at Arts. 3 and 16

¹⁹⁸ Article 47(2)

¹⁹⁹ United Nations General Assembly, International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989, 2163 UNTS 75 (hereinafter “UN Mercenaries Convention”), at Art. 1.

- c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
 - d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - e) is not a member of the armed forces of a party to the conflict; and
 - f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.
- [...]

Any person [...] who commits the crime of mercenarism as defined in paragraph 1 of this Article commits an offence considered as a crime against peace and security in Africa and shall be punished as such.²⁰⁰

The African Protocol seems to have been largely inspired by these earlier documents. Under the Protocol, a person commits the offence of mercenarism if s/he:

- (i) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (ii) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;
- (iii) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (iv) Is not a member of the armed forces of a party to the conflict; and
- (v) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

b) A mercenary is also any person who, in any other situation:

- i) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 1. Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;
 2. Assisting a government to maintain power;
 3. Assisting a group of persons to obtain power; or
 4. Undermining the territorial integrity of a State;
- ii) Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
- iii) Is neither a national nor a resident of the State against which such an act is directed;

²⁰⁰ OAU Mercenaries Convention, Arts 1(1) and (3).

- iv) Has not been sent by a State on official duty; and
- v) Is not a member of the armed forces of the State on whose territory the act is undertaken.²⁰¹

The OAU Convention adopted a more restrictive definition of a mercenary than the Malabo Protocol which adopts the elaborate definitions of the UN Convention. It also adds additional purposes to the definition: “assisting a government to maintain power” and “assisting a group of persons to obtain power”. Thus, to qualify as a mercenary, an individual does not need to either directly or indirectly take part in hostilities or engage in acts calculated to overthrow a government. The Malabo Protocol’s approach to mercenarism is therefore a great improvement over the OAU’s predecessor convention. It not only elaborately defines a mercenary, but also clarifies contentious areas under the OAU Convention. For example, unlike its predecessor, the Malabo Protocol clarifies the need to prove private gain in the form of material compensation as the motivating factor, the nationality and residence status of a mercenary, the status of the mercenary as a member of an armed force, and the status of the mercenary in relation to the sending state.

Notably, the Malabo Protocol does away with the UN Convention’s criterion of material gain being “substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces”.²⁰² Most likely, this was informed by the difficulty inherent in proving the exact compensation paid to a mercenary (Henckaerts and Doswald-Beck 2005, Rule 108). Like the UN Convention, the Malabo Protocol further offers two alternative definitions of a mercenary. In either case, the relevant factors have to be proved cumulatively.

4.4.8 Corruption

Corruption is not a phenomenon exclusive to Africa; it is a global phenomenon and problem, but Africa suffers from abominable levels of the vice. Transparency International’s (TI) Corruption Index Ratings (CIR) as well as African literature identifies corruption as being most prevalent in African countries (Mbaku 1998; Etuk 2003; Chweya *et al.* 2005).²⁰³ Referring to Nigeria, for instance, Achebe (Nnoruka 2003, 175) captures this in a more humorous sense:

“Nigeria has passed the alarming and entered the fatal stage; and Nigeria will die if we keep pretending that she is only slightly indisposed [...] corruption has grown enormously in variety, magnitude and brazenness [...] because it has been

²⁰¹ Malabo Protocol, Art. 28H(a) and (b).

²⁰² UN Mercenaries Convention, Art. 1(1)b.

²⁰³ See generally Transparency International, *Corruption Perception Index* (1995-2015), accessed June 23, 2016. <http://www.transparency.org/research/cpi/overview>.

extravagantly fueled by budgetary abuse and political patronage on an unprecedented scale”.

This statement could apply to most African states (Chweya *et al.* 2005). Attempts to fight corruption at the international level saw the UN adopt the UN Convention against Corruption²⁰⁴ which criminalizes: the bribery of national public officials; the bribery of foreign public officials of public international organizations; embezzlement, misappropriation or other diversion of property by a public official; trading in influence, abuse of functions, illicit enrichment, and bribery in the private sector; embezzlement of property in the private sector; laundering of proceeds of crime; concealment of proceeds of any of these acts; and obstruction of justice with respect to any of these acts.²⁰⁵ The AU Convention on Preventing and Combating Corruption includes a similar list of acts that constitute corruption,²⁰⁶ and the Malabo Protocol has adopted a similar approach.²⁰⁷ One notable feature of the Malabo Protocol definition of corruption is that it grants the court discretion to determine the seriousness of any act.²⁰⁸

4.4.9 Terrorism

Terrorism is the “willful killing” of civilians. Although the Nuremberg Principles do not expressly provide for the crime of terrorism, it can easily be found as a component of crimes against humanity: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war”.²⁰⁹ Crimes against humanity at Nuremberg required the existence of an armed conflict, and so acts of terrorism could not be prosecuted for acts committed either before or after the war. The Rome Statute also includes this form of terrorism within its definition of crimes against humanity.²¹⁰ The advantage of the Rome Statute definition is that it does not require the existence of an armed conflict, thus providing an increased likelihood of apportioning criminal responsibility for terrorism at the international level. Several other international treaties include this crime under their respective definitions of either war crimes or crimes against humanity.²¹¹

The UN was the first to articulate the offence of terrorism in an international legal instrument. Under the UN Convention:

²⁰⁴ United Nations General Assembly, *United Nations Convention Against Corruption* UN Doc. A/58/422, October 31, 2003.

²⁰⁵ *Ibid.*, Arts. 15-25.

²⁰⁶ African Union, *African Union Convention on Preventing and Combating Corruption*, July 11, 2003, at Art. 4. Accessed August 20, 2016. <http://www.refworld.org/docid/493fe36a2.html>.

²⁰⁷ Malabo Protocol, Art. 14 (inserting article 28I and 28Ibis).

²⁰⁸ Malabo Protocol, Art. 14 (inserting article 28Ibis(2))

²⁰⁹ Nuremberg Charter, Art. 6(c).

²¹⁰ Rome Statute, Art. 7.

²¹¹ See *Geneva Protocol I* at Arts. 51 and 52; *Draft Code of Crimes Against the Peace and Security of Mankind, 1996*, Article 20. These treaties make provision for protection of the civilian population, and prohibits willful killing or willfully causing great suffering or serious injury to body or health, making civilians the objects of attack or indiscriminate attack that affects civilians which acts embody the elements of the crime of terrorism.

“Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: with the intent to cause death or serious bodily injury; or with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss”.²¹²

Significantly, this convention includes incomplete acts of terrorism or attempted terrorism,²¹³ as well as the acts committed by accessories before and after the fact.²¹⁴ The Malabo Protocol adopts an extremely flexible and wide definition of the crime of terrorism taking into account all the earlier definitions. According to the Protocol, terrorism could mean any of the following acts:

A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

- (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
- (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
- (iii) create general insurrection in a State.

B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to (3).

C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

D. The acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.

²¹² United Nations General Assembly, *International Convention for the Suppression of Terrorist Bombings*, UN Doc. A/RES/52/164, December 15, 1997, at Art. 2(1).

²¹³ *Ibid.* at Art. 2(2).

²¹⁴ *Ibid.* at Art. 2(3).

Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defense against a terrorist act.²¹⁵

Unlike the Nuremberg Charter, the Malabo Protocol does not require the existence of an armed conflict. While international law instruments focus mostly on protecting the civilian population by prohibiting ‘attacks against civilians and their objects’ and the willful killing or causing serious bodily harm to civilians, the broader definition under the Malabo Protocol makes it possible to hold to account acts of terror whose target is the military. The Protocol does not distinguish between the military and civilians. It uses the terms “any person” and “any number or groups of persons”. This protects everyone including the military so long as the acts committed are prohibited under domestic, regional or international law.

4.5 Conclusion

This Chapter set out to analyze the legitimacy of the Nuremberg Principles through the lens of African conceptions of justice, and has established that all the Nuremberg Principles have a place in African conceptions of justice. The Principle on the irrelevance of the official position of an accused, however, remains controversial within Africa. What African critics of this Principle are asking for is nonetheless not new to international criminal justice. According to Steffen Wirth (2001, 432), immunity *ratione personae* for heads of states are immunity *erga omnes*; in other words it is an immunity that all states are obligated to observe. Most scholars also accept the absolute nature of personal immunities (Cassese 2005, 119; Akande 2004, 410-11). This implies that as long as a head of state is in office, every jurisdiction is under an obligation to respect their immunity. The ICJ has also maintained that there is no international customary law exception to the doctrine of immunity in cases of inter-state exercise of jurisdiction for alleged international crimes.²¹⁶ The current controversy on this aspect could easily be resolved through sound judicial interpretations once the proposed African criminal court becomes operational. In some instances, as with the right to fair trial, this chapter has established that Africa has improved on some of the shortcomings of the Nuremberg Principles by, for example, prohibiting trials *in absentia* which were allowed under the Nuremberg Charter. Similarly, in response to contextual differences, Africa has further expanded its conception of international crimes and also slightly varied the definition of some of the crimes.

²¹⁵ Malabo Protocol, Art 14 (inserting article 28G).

²¹⁶ Arrest Warrant case, at para 58.

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5 Reflections on the Need for Some Degree of Harmonization Between the International Normative Framework of *Ius Cogens* Crimes and Transitional Justice Special Attention to Criminal Proceedings and Truth Commissions

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5.1 Introduction

Unlike the well-established legal regime regulating *ius cogens* crimes under international law²¹⁷ elaborated upon in the so-called “Nürnberg principles”,²¹⁸ there is no normative framework that regulates the application of the mechanisms of transitional justice under

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²¹⁷ See below, section V.

²¹⁸ The principles contained in the 8 August 1945 London Charter of the International Military Tribunal (known as the “The Nürnberg Tribunal”) were approved by the United Nations General Assembly in its Resolution 95 (I) of 11 December 1945 on the *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*. Two years afterwards, once the Nürnberg Tribunal handed down its judgment (known as the “Nuremberg Judgment”), the United Nations General Assembly in its Resolution 177 (II) of 21 November 1947 on the *Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, directed the International Law Commission (“ILC”) to “(a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal; and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in subparagraph (a) above”. The ILC adopted its final formulation of the Nürnberg Principles at its second meeting held between 5 June and 29 July 1950, and submitted them to the UN General Assembly. The Nürnberg Principles are reproduced in full at Yearbook of the International Law Commission, 1950, vol. II. According to the 1950 ILC Report, the following seven principles had been identified by the Commission: Principle I: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” Principle II: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.” Principle III: “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.” Principle IV: “The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.” Principle V: “Any person charged with a crime under international law has the right to a fair trial on the facts and law.” Principle VI: “The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i). (b) War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. (c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.” Principle VII: “Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.” Vid. INTERNATIONAL LAW COMMISSION, Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316), UN DOC. A/CN.4/34. Pp. 374-377. See also, UNITED NATIONS GENERAL ASSEMBLY, Resolution 488 (V), *Formulation of Nürnberg Principles*, 12 December 1950.

general or conventional international law. Definitions of transitional justice can only be found in instruments of soft law, such as the 23 August 2004 Secretary General's Report on the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*,²¹⁹ and in the work of transitional justice theorists and practitioners, including the *Belfast Guidelines on Amnesty and Accountability*.²²⁰

These soft law sources underscore the lack of consensus on the specific content of transitional justice. (Olasolo *et al.* 2016a) According to the 2004 UN Secretary General's report, the justice component of any transitional process seeking to leave behind situations of large scale human rights abuses comprises;

[...] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.²²¹

As the UN Special Rapporteur for transitional justice has highlighted, beyond this general definition there is little consensus about the nature, purpose, scope and content of each of its elements. (De Greiff 2012, p. 32) Benavides provides one explanation for this lack of consensus, noting that the concept transitional justice applies equally to (i) transitions from authoritarian governments to democracy; and (ii) transitions from armed conflict to peace - thereby being part of both transition to democracy studies and peace studies. (Benavides 2013, p. 9)

A number of authors with a liberal approach to transitional justice, such as Arthur (2009), Dicklitch and Malik (2010), Little (1999), Lundi and McGovern (2008), Rubli (2012), and Waldorf (2102), equate the notion of large-scale human rights abuses with serious violations of civil and political rights (including, where appropriate, grave breaches of international humanitarian law). As a result, they put the emphasis on (i) the abandonment of those forms of socio-political organization that impede the satisfaction of civil and political rights due to their structural features; (ii) the promotion of the rule of the law; (iii) the establishment of formal mechanisms of democratic representation; and (iv) the "right balance" between retributive and restorative justice.

Arbour (2007), De Greiff (2102), Fuller (2012), Osterveld (2009), Roth (2004) and Miller (2008) disagree with this position because, in their view, in situations involving large-scale

²¹⁹ United Nations Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN. Doc. S/2004/616, 23 August 2014, paragraph 8.

²²⁰ Mallinder, L. & Hadden, T., *Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster 2013

²²¹ United Nations Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN. Doc. S/2004/616, 23 August 2014, paragraph 8.

abuses of civil and political rights there are simultaneously other forms of rights violations, including those caused by socio-economic, gender and ethno-cultural violence. In turn, McAuliffe (2015), Nagy (2014), Thomason (Thomason 2014) and Young (Young 2011, 52) consider that the existence of large-scale human rights abuses is the symptom through which structural violence or injustice is manifested. This inevitably has an impact on the understanding of the causes of situations of large-scale human rights abuses, the determination of the goals of transitional justice, and the choice of the specific measures to be implemented to reach such goals.

From this perspective, Reátegui (Reátegui 2011, 36) affirms that the challenges and responsibilities that societies emerging from authoritarianism or armed conflict face are not only those relating to achieving an effective transition in terms of political institutions; they are also, and primarily, those relating to the provision of justice for victims of human rights violations, the determination and collective acknowledgment of past events, and ultimately, the establishment of political, social, economic and cultural conditions for sustainable peace. Accordingly, as Galain (Galain 2016) and Benavides (Benavides 2013) highlight, transitional justice is comprised of a number of political, social, economic and cultural components that go far beyond the scope of law.

In light of the absence of a legal framework for transitional justice under international law, any program of transitional justice must be compatible with the existing international law concerning *ius cogens* crimes.²²² Hence, the existing international normative framework requires that transitional justice measures that further truth finding and the fight against impunity with respect to *ius cogens* crimes must be compatible with (i) the enforcement of international criminal responsibility for such crimes, (ii) the States' duties to investigate, prosecute and punish the alleged perpetrators; and (iii) the victims' rights to truth and justice.²²³ This means that criminal proceedings for *ius cogens* crimes must, in any case, be a necessary component of any transitional process (Olasolo *et al.* 2016a).

²²² Colombia is, in this respect, an emblematic case in Latin America, as evidenced by the so-called "Legal Framework for Peace", approved by Legislative Act 01 of 2012, which introduced in the Colombian Constitution two transitory provisions (articles 66 (bis) and 67 (bis)). These two provisions contain a whole transitional justice strategy, including (i) the creation of a truth commission; (ii) and the granting of powers to the Colombian Congress to: (a) order the Colombian General Attorney not to prosecute those responsible for genocide, crimes against humanity and war crimes, who fall into the category of those "most responsible"; (b) adopt selection and prioritization criteria for the investigation and prosecution of those most responsible for the said crimes; (c) establish alternative penalties, including the suspension of the execution of any imprisonment sentence imposed on those most responsible for genocide, crimes against humanity and war crimes (this option was finally declared unconstitutional by the Colombian Constitutional Court), or serving such sentences under special detention regimes (such as, home detention); and (d) establish an administrative, non-judicial, reparations regime. The ICC Office of the Prosecutor and the Inter-American Court of Human Rights have reiterated their concern with the 2012 Legal Framework for Peace, because several features of it, including the treatment of those most responsible for genocide, crimes against humanity and war crimes, do not comply with the existing international regulation of *ius cogens* crimes. See, ICC OFFICE OF THE PROSECUTOR, *Situation in Colombia, Interim Report*, 12 November 2012, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Situation-in-Colombia-Interim-Report>; and Inter-American Commission Of Human Rights, *Country Reports: Colombia, Truth, Justice and Reparation*, 2014, Chapter III on "Constitutional and Legal Framework", in particular pp. 185-194, available at: <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf>.

²²³ This chapter does not deal with States' duties and victims' rights to integral reparations for *ius cogens* crimes.

Hafner (Hafner *et al.*, 111), O'Connor (O'Connor 1999), and Scharf (Scharf 1999) consider that this is the right approach, because, in their view, judicial proceedings are irreplaceable for the following reasons: (i) truth commissions do not uphold civil and criminal liabilities arising from large scale human rights abuses, and thus fail to comply with International Human Rights Law ("IHRL"), International Humanitarian Law ("IHL"), and International Criminal Law ("ICL"); (ii) leaving unpunished those most responsible for *ius cogens* crimes weakens confidence in the rule of law, and fosters disdain for the political system as a whole; and (iii) new democratic systems require credibility and legitimacy through fair and transparent processes for establishing what happened and who are responsible (this can only be achieved through judicial proceedings characterised by the application of strict rules on admission of evidence, a beyond reasonable doubt standard, the rights of the defence and the presumption of innocence) (Bassioni 1996; Jackson 1945, 184).²²⁴

Nevertheless, the current international regulation of *ius cogens* crimes does not address many of the concerns raised by transitional justice theorists and practitioners. For example, regarding the debate on criminal proceedings and extrajudicial truth commission, Akhavan (Akhavan 1996, 271), Hayner (Hayner 2011), Minow (Minow 2014), and Wiebelhauss-Brahm (Wiebelhauss-Brahm 2010) consider truth commissions to be more effective in expressing social condemnation of large-scale human rights abuses. In their view, truth commissions offer the following advantages over criminal proceedings: (i) publicly identifying individual and organizational perpetrators; (ii) strengthening the role of victims by listening to their stories, publicly acknowledging their suffering and searching for ways to restore their dignity; (iii) promoting individual and collective reparations (both monetary and symbolic), educational programs, memorials and projects that strengthen democratic institutions; (iv) providing a broader view of those social, political and economic patterns that contributed to a high level of social degradation; and (v) fostering a collective memory and a cultural commitment to condemn past human rights abuses (in particular, murder, extermination, torture, sexual violence and other international crimes) (Roht-Arriaza 1995).

These advantages lead Vacas (2013) to favour a higher degree of political manoeuvrability in the design of transitional justice mechanisms in light of the specific needs of each situation of large-scale human rights abuses. This would mean, for instance, that those negotiating transitional processes should be provided with more leverage to decide whether to resort to criminal proceedings, truth commissions, or a combination of both or neither. The same position is taken by Murphy (2014), who observes that the special features of the theory of punishment in transitional situations justify greater flexibility in deciding what are the most appropriate mechanisms to enforce international criminal liability for *ius cogens* crimes.

²²⁴ See also UN SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS IN CHILE, Report *Prepared by the Special Rapporteur on the Situation of Human Rights in Chile*, U.N. GAOR, 38th Sess., Annex, Agenda Item 12, p. 341, U.N. Doc. A/38/385 (1983); and UNITED NATIONS COMMISSION ON HUMAN RIGHTS, *Report on the Consequences of Impunity*, U.N. Doc. E/CN.4/1990/13.

In this context, transitional justice theorists and practitioners have largely chosen not to take into account the requirements arising out of the existing international normative framework of *ius cogens* crimes, hoping to force a change in its content through a policy of *fait accompli*. This practice has taken place with particular intensity in recent years in the design of transition mechanisms in Colombia, as evidenced by the ICC Prosecutor's reaction to the 2012 Legal Framework for Peace and its treatment of those most responsible for genocide, crimes against humanity and war crimes - including the power granted to the Colombian National Congress to legislate on: (i) alternative imprisonment sentences without any mandatory minimum length; (ii) serving such alternative sentences under special regimes, such as home detention; and (iii) suspending the execution of the alternative sentences (this last measure was subsequently declared unconstitutional by the Colombian Constitutional Court).²²⁵ The recommendations made to Colombia in 2014 by the Inter-American Commission of Human Rights to amend the Legal Framework for Peace and its statutory laws, so as to make them compatible with international human rights standards, constitute a further example of this situation.²²⁶

Several aspects of the Integrated System of Truth, Justice, Reparation and Non-Repetition ("SIVJRNR"), provisionally agreed to on 15 December 2015 between the Government of Colombia and the FARC-EP, raise similar concerns. For example, the SIVJRNR provides for (i) the exemption of criminal responsibility through a blanket amnesty for those who have held the Presidency of Colombia; (ii) a maximum sentence of twenty years imprisonment for those most responsible for genocide, crimes against humanity and war crimes (i.e. *ius cogens* crimes) who refuse to acknowledge their criminal liability and decide not to cooperate with judicial authorities; and (iii) a maximum sentence of five to eight years of community work or restriction of liberty (which consists of a prohibition to leave a given municipality or department during such time period) for those most responsible for *ius cogens* crimes who acknowledge their criminal liability and cooperate with the judicial authorities.²²⁷

Unilateral *de facto* initiatives such as those undertaken in Colombia are not the best way to further the dialogue between supporters of the current international normative framework

²²⁵ ICC Office of the Prosecutor, *Situation in Colombia, Interim Report*, November 12, 2012, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Situation-in-Colombia-Interim-Report>. The concerns expressed by the ICC Prosecutor in this report, are reiterated in subsequent preliminary examination reports in relation to the situation in Colombia. See, ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2013*, November 25, 2013, available at <https://www.icc-cpi.int/Pages/item.aspx?name=report-on-preliminary-examination-activities-2013>; ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2014*, December 2, 2014, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pre-exam2014>; and ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2015*, November 12, 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-pe-activities-2015>. See also Olasolo 2014a.

²²⁶ Inter-American Commission Of Human Rights, *Country Reports: Colombia, Truth, Justice and Reparation*, 2014, Chapter III on "Constitutional and Legal Framework, in particular pp. 185-194, available at: <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf>.

²²⁷ Colombian Government and Farc-Ep, *Borrador Conjunto: 5. Acuerdo sobre las Víctimas del Conflicto: "Sistema Integral de Verdad, Justicia, Reparación y No Repetición", incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos*, December 15, 2015, available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/documentos-y-comunicados-conjuntos/Documents/acuerdo-victimas.pdf>, pp. 26 and 40.

of *ius cogens* crimes and transitional justice theorists and practitioners. With a particular focus on the debate on criminal trials and truth commissions, this chapter explores the need to strengthen such dialogue to seek a certain degree of harmonization between the regulation of *ius cogens* crimes under international law, and the needs arising out of the application of transitional justice to specific situations of large scale human rights abuses.

To do so, this chapter is divided into five sections, in addition to this introduction. In sections 2 and 3, the reach and limitations of criminal proceedings and truth commissions are studied. Section 4 addresses the question on whether it is possible to overcome such limitations by resorting jointly to criminal proceedings and truth commissions. Section 5 looks into the current normative framework under international law. Finally, section 6 highlights the need to harmonize the international regulation of *ius cogens* crimes with some of the demands arising out of transitional processes, which aim at overcoming situations of large-scale human rights abuses.

5.2 Reach and Limitations of Criminal Proceedings: The Symbolic Nature of the Application of International Criminal Law and Its Focus on “Those Most Responsible”

Some supporters of truth commissions consider regional and international judicial bodies established by IHRL and ICL, in particular the International Criminal Court, as “symbolic” and “ineffective” (Minow 2014, 208). Nevertheless, the ICC does not appear to be significantly less effective than other international criminal tribunals with jurisdiction over a single crisis situation (ex-Yugoslavia, Rwanda, Sierra Leone or Cambodia),²²⁸ or other public international

²²⁸ In its November 2015 report, the International Criminal Tribunal for the former Yugoslavia (ICTY) reported that between 1994 and 2015 it conducted criminal proceedings against 161 accused persons. By November 2015, only 3 appeals (concerning 10 persons) and 4 trials were pending. See ICTY, *Assessment and Report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council Resolution 1534 (2004) covering the period from 16 May 2015 to 16 November 2015*, issued on November 16, 2015, p. 2, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_874.pdf. The International Criminal Tribunal for Rwanda (ICTR) explained in its final report, issued on November 17, 2015, that, between 1995 and 2015, it had completed trial proceedings against 93 accused persons, and appeal proceedings against 55. The ICTR expected to complete its last pending appeal by December 2015. See, ICTR, *Report on the Completion of the Mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015*, issued on November 17, 2015, p. 4, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_884.pdf. The Special Court of Sierra Leone (SCSL) stated in its final report that between 2003 and 2013 it had completed trial and appeal proceedings in relation to four cases concerning ten most responsible persons. See, SCSL, *Eleventh and Final Report of the President of the Special Court for Sierra Leone*, December 31, 2013, pp. 11-17, available at <http://www.rscsl.org/Documents/AnRpt11.pdf>. Finally, the Extraordinary Chambers of the Courts of Cambodia (ECCC) have finalised between 2004 and 2015 the case against the director of the S-21 prison, Kaing Guek Eav, alias *Duch*. Today, three other cases against most responsible persons of the Republic of Kampuchea (1975-1977) are still pending. See, SCCC, *The Court Report of the Extraordinary Chambers in the Courts of Cambodia*, Num. 94, February 2016, available at: <http://www.eccc.gov.kh/sites/default/files/publications/Court%20Report%20on%20February%202016.pdf>. At the end of War World II, the International Military Tribunal (Nürnberg Tribunal), established by the United States, France, the United Kingdom and the Soviet Union pursuant to the Treaty of London of August 8, 1945, tried, between November 20, 1945 and October 1, 1946, twenty-four political, military, economic and ideological leaders of the national socialist regime that ruled in Germany between 1933 and 1945. Several organizations were also prosecuted by the Nürnberg Tribunal. See, <http://avalon.law.yale.edu/imt/judgen.asp>. In turn, the International Military Tribunal for the Far East (Tokyo Tribunal), set up on January 19, 1946 by an administrative decree of the Supreme Commander of the Allied Forces in the Pacific (General Douglas MacArthur), tried between May 3, 1946 and November 12, 1948, the Japanese Prime Minister, Hideki Tojo, and twenty-four members of the Japanese government and senior officials of the Japanese armed forces. In order to facilitate the transition from war to peace in Japan, General Mc Arthur exempted Emperor Hirohito, Head of the Japanese Imperial State, from any of the proceedings. He was not even called to testify. See Majima 2013. See also International Military Tribunal for the Far East, *Judgment of 4 November 1948*. <http://werle.rewi.hu-berlin.de/tokio.pdf>.

law jurisdictional bodies,²²⁹ at least as measured by the number of individuals indicted and prosecuted.

Furthermore, international criminal law is not only enforced by international criminal tribunals, but is also enforced by national jurisdictions - in particular, by those national jurisdictions of (i) States in which *ius cogens* crimes are committed; (ii) States of which the alleged perpetrator is a national; and (iii) States acting under the principle of universal jurisdiction. (Bassiouni 1999) As a result, most trials for genocide, crimes against humanity and war crimes carried out since 1995²³⁰ have taken place before national jurisdictions, as shown by the cases of Argentina,²³¹ Bosnia and Herzegovina,²³² Colombia²³³ and Rwanda,²³⁴ and a number of heads of State or Government have been subject to investigation and/or prosecution.²³⁵

²²⁹ The International Court of Justice (ICJ) has indicated that between May 22, 1947 and March 28, 2016, 161 cases have been registered in the General List of Cases. See, <http://www.icj-cij.org/docket/index.php?p1=3>. The ICJ has also received 26 requests for advisory opinions. See: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4>.

²³⁰ Prior to 1995, there are approximately 900 cases tried in Germany (mostly by German tribunals) concerning crimes committed during the National Socialist regime, including those conducted by British, French, US and Russian military commissions pursuant to Law No. 10 of the Allied Control Council. Nevertheless, it is surprising the tenacity with which the tribunals of the Federal Republic of Germany, unlike those of the Democratic Republic of Germany, opposed systematically to enter convictions for crimes against humanity, even in the most blatant cases of extermination, due to a very rigid and formalistic interpretation of the principle of legality. See in this respect, the excellent work by Lawrence Douglas (2013). See also Olasolo (2013). The situation was very different in Japan, where, after the judgment of the International Military Tribunal for the Far East, no further trials were conducted by Japanese tribunals - although in foreign countries occupied by Japan during World War II some criminal proceedings against occupation authorities took place. This happened, for instance, in the Yamashita case, in which a US Military Commission tried the commander-in-chief of the Japanese occupation forces in the Philippines, Gen. Tomoyuki Yamashita. Finally, in Italy, very few criminal proceedings against civilian and military authorities of Mussolini's fascist regime (1922-1943) took place. In addition, extradition requests from African and European countries were systematically denied by Italian authorities. As Nino (1996) has highlighted, ultimately, the Minister of Justice approved an amnesty law, turning any attempts to conduct criminal prosecutions into a parody. Only a small number of extremely cruel cases of torture were excluded from the amnesty law. As a result, most civil servants, who had been exonerated by the amnesty law, were reinstated to their positions, and the confiscation of the economic gains obtained during the fascist regime came abruptly to an end.

²³¹ Since the judgment of the Supreme Court of Argentina in the Simon case, issued on July 14, 2005 (in which the 1986 laws on *Obediencia Debida* and *Punto Final* were declared unconstitutional), a total of 2,354 persons (including 70 civilians) have been indicted for crimes against humanity in Argentina. 669 of them have already been convicted in 156 cases. 370 additional cases are pending. The former Head of the III Corps, Luciano Benjamin Menendez, was one of those convicted and subjected to twelve sentences, ten of which are for life imprisonment. As for the civilians, out of 70 defendants, only four have been convicted so far: two entrepreneurs, Emilio Felipe and Juan Manuel Mendez, and two former state officials, Victor Brusa (in the central province of Santa Fe) and Manlio Martinez (in the northern province of Tucuman). There are currently 13 on-going trials, including: (i) the trial concerning the crimes committed in the clandestine detention centers of the Higher Mechanic School of the Navy (ESMA) in Buenos Aires (59 defendants are tried in this case for having allegedly committed 789 acts of kidnapping, torture and killing in the ESMA, including 8 pilots accused of "death flights" in which detainees were thrown to the river Plate); (ii) the trial regarding the clandestine detention center of La Perla - Córdoba, involving 52 defendants and 417 victims; and (iii) the trial concerning the so-called "Plan Condor", under which the South American dictatorships coordinated the systematic exchange of information on political opponents and the transfer of politically-motivated prisoners. See El País 2016.

²³² By the end of 2015, over 500 people have been formally charged in Bosnia and Herzegovina for war crimes committed during the conflict that ravaged the country between 1992 and 1995. 140 of them have already been convicted. See Balkan Transitional Justice 2015.

²³³ In Colombia more than 600 members of the army and the security forces have been convicted since 2008, and several thousands are under investigation, for the systematic extrajudicial killings of, at least, 3,000 civilians, committed by several Colombian army brigades throughout the country between 2000 and 2008. See, Maseri 2016; El País 2015. Furthermore, between 2006 and 2016, Colombian tribunals: (i) have convicted around 60 senators and congressmen, as well as 15 governors, for ties to paramilitary groups; (ii) have convicted, or indicted, 43 out of the 46 highest living paramilitary leaders; (iii) are trying, through the special jurisdiction for Justice and Peace, nearly 3,000 demobilized paramilitaries; and (iv) have issued numerous judgments against members of the country's two main guerrillas (FARC and ELN), including those who are part of their respective Secretariats. See, ICC Office Of The Prosecutor, *Situation in Colombia, Interim Report*, November 12, 2012, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Situation-in-Colombia-Interim-Report>. See also, Olasolo (2014).

²³⁴ Before resorting to community justice (*gacaca*), Rwanda conducted around 1,300 genocide trials in national tribunals between 1995 and 2001. See Tirrell 2014, 243.

²³⁵ Between 1990 and 2009, a number of Heads of State and Heads of Government were prosecuted for *ius cogens* crimes. These cases, with a particular focus on the trial for *ius cogens* crimes of Augusto Pinochet (Chile), Alberto Fujimori (Peru), Slobodan Milosevic (former Yugoslavia), Charles Taylor (Liberia) and Saddam Hussein (Iraq), are studied in Lutz and Reiger 2009. From 2009

Nevertheless, even in the most active national jurisdictions, the number of those investigated and prosecuted for *ius cogens* crimes barely reaches 1 percent of all responsible persons.²³⁶ This reinforces the view that the application of ICL, whether at the national or international level, has an undeniable symbolic nature, which is strengthened by its traditional focus on “the most responsible persons.”²³⁷

Zolo (2009), Margalit (2010) and Jeangène Vilmer (2011) are concerned with the symbolic reach of ICL application and its focus on those most responsible, given its potential for political manipulation. Zolo is especially leery of the limitations of the investigations and prosecutions conducted by the Nuremberg and Tokyo Tribunals to War World II German and Japanese leadership. He believes that something similar may be happening with the new wave of international criminal tribunals established in the context of a single political and military superpower in the 1990s.²³⁸ In turn, Jeangène Vilmer refers to numerous documents (including several statements by former ICTY and ICTR Prosecutor, Carla del Ponte) to show a notable degree of dependence of international criminal tribunals on the cooperation of the most influential States in the international society (Jeangène Vilmer 2011, 99-109).

Furthermore, Guembe and Olea (2006), as well as former ICC Prosecutor Luis Moreno-Ocampo (2005), stress, in light of the Colombian and Ugandan situations, the difficulties in successfully concluding peace deals between parties to an armed conflict that have not been militarily defeated. In their view, such peace deals become almost impossible if the leaders of the negotiating parties view their choice as between continuing the war or being subject to prosecution and punishment for *ius cogens* crimes committed by their subordinates.

on, the ICC has conducted criminal proceedings against the following Heads of States or Government: Omar Al-Bashir (Sudan), Muammar El Gaddafi (Libya), Said Al Islam Gaddafi (Libya), Uhuru Kenyatta (Kenya) and Laurent Gbagbo (Ivory Coast).

²³⁶ For example, the 140 convicted persons, and the almost 400 additional persons that have been charged, by the Bosnia and Herzegovina War Crimes Chamber, are only a small fraction of those responsible for the forced displacement of half of the population of the country (two out of four million inhabitants) between 1992 and 1995. Similarly, in Colombia, where there are about seven million displaced persons and tens of thousands of cases of sexual violence, only a few dozens of judgments concerning these crimes have been handed down so far. See, ICC Office of the Prosecutor, *Situation in Colombia, Interim Report*, November 12, 2012, available at: <https://www.icc-cpi.int//Pages/item.aspx?name=Situation-in-Colombia-Interim-Report>. These conclusions are reaffirmed in subsequent ICC Prosecutor reports on the preliminary examination of the situation in Colombia. See, ICC Office Of The Prosecutor, *Report on Preliminary Examination Activities 2013*, November 25, 2013, available at <https://www.icc-cpi.int//Pages/item.aspx?name=report-on-preliminary-examination-activities-2013>; ICC Office Of The Prosecutor, *Report on Preliminary Examination Activities 2014*, December 2, 2014, available at <https://www.icc-cpi.int//Pages/item.aspx?name=pre-exam2014>; and ICC Office Of The Prosecutor, *Report on Preliminary Examination Activities 2015*, November 12, 2015, available at <https://www.icc-cpi.int//Pages/item.aspx?name=otp-rep-pe-activities-2015>. Concerning Rwanda, Tirrell (2014, 243) reminds us that the cases prosecuted in national criminal courts are less than 1 percent of the 130,000 detainees who had been sent back to the community justice of the *gacaca* to avoid a collapse in the justice system. With regard to the *ius cogens* crimes committed during World War II, Douglas (2013) reminds us that those cases tried in Germany did not even affect 1 percent of the 500,000 persons who were part of the National Socialist Party in the 1940's. Hence, it is in Argentina, where, in light of the relatively high number of prosecutions, and low number of victims, the highest percentage of the total alleged responsible persons has been brought to trial.

²³⁷ See ICC Office Of The Prosecutor, “Policy Paper on Preliminary Examinations”, November 1, 2013, available at: https://www.icc-cpi.int//Pages/item.aspx?name=otp-policy-pe-11_2013; ICC Office Of The Prosecutor, “Draft Policy Paper on Case Selection and Prioritisation”, February 29, 2016, available at: <https://www.icc-cpi.int//Pages/item.aspx?name=Draft-Policy-Paper-on-Case-Selection-and-Prioritisation>; and United Nations Security Council Resolution 1534, concerning the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), United Nations Security Council, Resolution S/RES/1534, March 26, 2004, paras 5-6,

²³⁸ In support of this statement, Zolo points what he describes as the ICTY's excessive focus on crimes committed by Serbs and Bosnian Serbs, and the forgetfulness of the international society with regard to the tens (or even hundreds) of thousands of persons killed by the Rwandan Patriotic Front upon seizing control of Rwanda in July 1994.

But, if international criminal proceedings against the most responsible persons are problematic because of their potential for political manipulation, or the need for their contribution to overcome situations of large-scale human rights abuses, what should then be the scope of application of international criminal law, given its aim to provide protection against the gravest attacks to the most fundamental values of the international society?

5.3 Reach and Limitations of Truth Commissions

Minow (2014, 208-211) and Nagy (2014, 223) argue that truth commissions are better equipped than criminal proceedings because they put victims at the centre of the process, provide for a broader understanding of the social, political, economic and cultural factors that brought about large scale human rights abuses, and allow a glimpse into the past without threatening the leadership of the parties to the conflict. Nevertheless, Lawther (2014b), Rotondi and Eisikovits (2014) remind us that truth commissions usually avoid looking thoroughly into the past, and do not necessarily make the parties' leadership feel safe.

Jolly (2001), Rehn and Sirleaf (2002) also remind us that many truth commissions do not address the patterns of structural injustice, particularly with regard to (i) gender violence;²³⁹ and (ii) the socio-economic effects of the violence, which are "legalized" through transitional processes that leave them hidden in the background (transitional processes rarely reverse systematic and large-scale acquisitions of property obtained through violence and coercion).²⁴⁰ For Mamdani (1996) and Nagy (2014), the South African Truth and Reconciliation Commission is a paradigmatic example of self-restraint in its analysis of violence as it tried, at all times, to focus on individual, isolated, acts of violence that took place against the backdrop of apartheid, rather than the systemic violence of apartheid itself.²⁴¹

Moreover, even when these issues are addressed, there are very few truth commissions that describe the critical role of foreign States in the large-scale commission of human rights abuses. (Nagy 2014, 223)²⁴² One notable exception was the East Timorese Commission that examined the 1974-1999 Indonesian occupation supported by Australia, USA, Japan and the United Kingdom. Indeed, out of more than forty extrajudicial truth commissions that have been operative in the last twenty years,²⁴³ Hayner (2011, 75-6) and Nagy (2014, 224-6) point out that only a handful of them, including Chad, Chile, East Timor, El Salvador and

²³⁹ As Nagy (2014, 224-225) points out, the Sierra Leone Truth and Reconciliation Commission has been an exception because it has dealt with gender violence in an usual systematic manner. See also Sierra Leone Truth And Reconciliation Commission, *Witness to Truth: Final Report of the TRC*, available at: <http://www.sierraleonetr.com/index.php/view-the-final-report>.

²⁴⁰ A similar view is held by Olasolo (2016b).

²⁴¹ They reach this conclusion even acknowledging the positive aspects of the sectorial hearings held by the TRC on the role of business, medical, legal, religious and prison staff communities. The value of these sectorial hearings has been highlighted by Dyzenhaus (1998), Boraine (2000), and Rolston (2002).

²⁴² See also, Comissao De Acolhimento, Verdade E Reconciliacao De Timor-Leste, *Chega! The Report of the Commission for the Reception, Truth and Reconciliation for Timor-Leste (CAVR)*, 2005, available at: <http://www.cavr-timorleste.org/en/cheгаReport.htm>.

²⁴³ A historical account of the tens of truth commissions established since 1990, can be found in Ibañez Najar 2014.

Guatemala, have thoroughly analysed the fundamental role of foreign states (particularly, those most influential in the international society) on the structural injustice that is at the root of *ius cogens* crimes (Hayner 2011, 75-6).

In light of the cases of Spain, Northern Ireland and Mozambique, Lawther (2014b), Rotondi and Eisikovits (2014) reject the proposition that truth commissions allow for a glimpse into past human rights abuses without posing a threat to the leadership of the parties to the conflict. They acknowledge the lack of studies on the correlation between the amount and nature of the information disclosed by truth commissions and the degree of threat experienced by major players in those negotiations in which transitions are designed. Nevertheless, they assert that truth commissions highlight, as “a powerful intuition”, the belief that the level of threat experienced by the leadership of the parties involved is proportional to the level of systematicity and depth in the truth commissions’ analysis of the following questions: (i) the structural injustice that generated the social degradation in which *ius cogens* crimes were committed; (ii) the socio-economic effects of the violence, and the risk of their "legalization" through transitional mechanisms; and (iii) the fundamental role in the violence of the most influential States of the international society.

Concerning the situation in Northern Ireland, Hamber (1998), Lundy (2010), and Lawther (2014b) point to the extensive and controversial debate held within the transitional institutions (the Northern Ireland Affairs Committee²⁴⁴ and the Consultative Group on the Past)²⁴⁵ and civil society on whether or not to establish a general mechanism for truth-seeking to overcome the political violence experienced in Northern Ireland since the late 1960s.²⁴⁶ If, as Ignatieff (1998) suggests, the ultimate goal of recovering the truth is to divide responsibilities and expose the false myth of the absence of guilt for large-scale human rights abuses on any of the adverse parties, and taking into account that influential actors in Northern Ireland hold completely different views of the causes and responsibilities for the violence, it is not surprising that the process of truth recovery looks more like a sectarian battle for memory than an instrument for furthering reconciliation with the past (Lawther 2014a).

Transitional processes in Northern Ireland (Eames and Bradley 2008) and Spain (Aguilar 2001) also illustrate strong resistance to acknowledging the "dark truths" of state institutions and the paramilitary groups supported by them. This has caused many victims not to proceed with their requests for truth and recovery of the bodies of their disappeared relatives. A paradigmatic example of this situation is the suspension, after an attempted military coup on February 23, 1981, of the 1979 programme of exhumations of unidentified bodies buried in mass graves in Spain between 1936 and 1975. (Jerez-Farran and Amago) A

²⁴⁴ Northern Ireland Affairs Committee, *Ways of Dealing with Northern Ireland's Past: Interim Report – Victims and Survivors*, The Stationary Office, London, 2005.

²⁴⁵ Consultative Group On The Past, *Report of the Consultative Group on the Past*, Belfast, 2009.

²⁴⁶ See also Healing Through Remembering, *Making Peace with the Past: Options for Truth Recovery Regarding the Conflict in and about Northern Ireland*, Belfast, 2006.

similar programme has not been set into motion since then, even though, according to the June 2, 2014 Report on Spain of the Working Group on Enforced or Involuntary Disappearances (para. 6):

“In Spain there were committed serious and massive violations of human rights during the Civil War (1936-1939) and the dictatorship (1939-1975). To date there is no official figure for the number of missing persons since Spain does not have a centralized database on the subject. According to the criminal investigation conducted by the Penal Investigative Tribunal No. 5 of the *Audiencia Nacional*, the number of victims of forced disappearances from July 17, 1936 to December 1951 amount to 114,226. Since this criminal investigation was, for all practical effects, paralyzed or broken up, the number could not be determined reliably by a judicial inquiry.”

The gravity of this situation is manifest when compared with the 39,000 disappearances recorded by the Center for Historical Memory (2013) with regard to the fifty-year long Colombian armed conflict, the 10,000 to 30,000 disappearances in Argentina between 1976 and 1983 (National Commission on the Disappearance of Persons 1984), and the 3,400 disappearances in Chile between 1973 and 1989 during the dictatorship of Augusto Pinochet (Chilean National Commission on Truth and Reconciliation 1991). In some Spanish regions, such as La Rioja, the number of alleged missing persons per hundred thousand inhabitants (643) is approximately eight times higher than the average in Colombia (81.5).²⁴⁷

In light of this situation, Leebaw affirms that the tension between the goal of ending denial and exposing the extent of State complicity on the one hand, and the importance of protecting political compromises on the other, is inherent to transitional justice. (Leebaw 2008) In the same vein, Lawther (2014b, 37) recounts the political, sociological and practical reasons that justify opposition to the truth recovery process, underlining in particular "the competing notions of victimhood; the impact of a continued legacy of mistrust; the importance of honouring past sacrifices; and from a practical peace-making perspective, the need to maintain political and social stability." As a result, Roht-Arriaza (2006) argues that truth commissions are much better equipped to look into what happened than to generate common understanding, reconciliation and social change.

²⁴⁷ According to the Government of La Rioja, on July 1, 2015 there was a population in La Rioja of 312,624 persons. See: <http://www.larioja.org/larioja-client/cm/estadistica/images?idMmedia=731286>. According to the criminal complaint filed with the *Audiencia Nacional* on October 16, 2008, the number of alleged disappeared persons in La Rioja is 2,007 (Working Group on Enforced or Involuntary Disappearances 2014). As result, the *ratio* of alleged disappeared persons per each hundred thousand inhabitants in La Rioja amounts to 643.

5.4 Is It Possible To Overcome The Limitations Of Criminal Proceedings And Truth Commissions By Resorting To Them Jointly?

The question arises as to whether the combination of national and/or international criminal proceedings, together with truth commissions, can cover some of the concerns referred to in the previous two sections. The cases of Peru, Sierra Leone and East Timor, as well as the 15 December 2015 provisional agreement between the Colombian Government and the FARC-EP on a comprehensive system of truth, justice, reparation and guarantees of non-repetition (i.e. the SIVJRNR),²⁴⁸ provide some evidence for an affirmative answer to this question. Likewise, Tejan-Coley (2003), Schabas (2006, 38-40), Horowitz (2006, 54-5), Burgess (2006, 200-201), Cueva (2006, 85-89), Lutz (2006, 325-327) and Minow (2014, 210-211) emphasize the need to coordinate the overall goals, actions and procedures for the exchange of information between criminal proceedings and truth commissions.

Criminal proceedings and truth commissions can follow one another, as in the Peruvian case in which a truth commission collected documents that were subsequently used in national criminal proceedings. (Cueva 2006, 85-89) Both mechanisms may also act simultaneously. For instance, in Sierra Leone, criminal proceedings against the most responsible persons were conducted at the same time that a truth commission undertook its work. (Horowitz 2006, 54-5) In turn, in East Timor, a clear demarcation was set up between the enforcement of criminal liability through criminal proceedings, and the overall goals of the truth commission to promote the restoration of the dignity of victims, and foster reconciliation through a broader articulation of the social, political, economic and cultural causes of the large scale human rights abuses (Burgess 2006, 200-1).

The provisional agreement on the establishment of transitional mechanisms (the SIVJRNR) in Colombia raises concern, since it includes a court process (the Special Jurisdiction for Peace) and a truth commission (the Commission for Truth, Reconciliation and Non-Repetition), without a clear division of functions between both truth-seeking mechanisms.²⁴⁹ Furthermore, the information received or produced by the truth commission may not be transferred *proprio motu*, or even at the request of any judicial authority, for use in judicial proceedings during the life of the truth commission.²⁵⁰ Moreover, it leaves unresolved the question of whether the information generated by the truth commission during its very

²⁴⁸ Colombian Government and FARC-EP, *Borrador Conjunto: 5. Acuerdo sobre las Víctimas del Conflicto: "Sistema Integral de Verdad, Justicia, Reparación y No Repetición"*, incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos, December 15, 2015, pp. 26 and 40, available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/documentos-y-comunicados-conjuntos/Documents/acuerdo-victimas.pdf>.

²⁴⁹ Colombian Government and FARC-EP, *Borrador Conjunto: 5. Acuerdo sobre las Víctimas del Conflicto: "Sistema Integral de Verdad, Justicia, Reparación y No Repetición"*, incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos, December 15, 2015, pp. 26 and 40, available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/documentos-y-comunicados-conjuntos/Documents/acuerdo-victimas.pdf>, p. 11.

²⁵⁰ *Id.*

limited mandate of three years can later be accessed by the Special Jurisdiction for Peace, or any other judicial authority, after the commission has finished its work.²⁵¹

The combination of criminal proceedings and truth commissions can certainly facilitate the restoration of the dignity of victims, help to prevent grave breaches of IHRL, IHL and ICL, and promote complementarity between: (i) a judicial truth on individual liabilities, which is obtained through criminal proceedings that offer greater protection to the accused persons; and (ii) a significantly broader historical and contextual account on the causes of the violence by truth commissions.

Nevertheless, the combination of both truth-seeking mechanisms does not necessarily cover the main concern shown by Lawther (2014b), Rotondi and Eisikovits (2014), Hamber (1998) and Lundy (2010): the opposition to such mechanisms by influential socio-political actors (in particular, the leadership of the parties involved in the commission of *ius cogens* crimes), who may see in the recovery of the truth a considerable threat to their position.

Likewise, such combination does not necessarily overcome the objections raised by Hayner (2011, 75-6) and Nagy (2014, 224-6) concerning the insufficient analysis in the recovery of the truth of: (i) the structural injustice that generated the social degradation in which *ius cogens* crimes were committed; (ii) the socio-economic effects of the violence, and the risk of their "legalization" through transitional mechanisms; and (iii) the fundamental role in the violence of the most influential States of the international society.

Although the presentation of evidence on the contextual elements of crimes against humanity (the existence of a widespread and systematic attack against a civilian population in furtherance of a State or organisational policy) and war crimes (existence of an international or non-international armed conflict) could provide a good opportunity to overcome these deficiencies, Minow (2014, 208-11) highlights that the type of documentary or expert evidence used for these purposes in national and international criminal proceedings add very little to the information that can be obtained by truth commissions. As a result, criminal proceedings could, at best, serve as a palliative in those cases in which truth commissions are reluctant to entertain in sufficient depth the kind of historical and contextual analysis for which they are actually better equipped.

Furthermore, in relation to the role played in the violence by the most influential states of the international society, the contribution that can be reasonably expected from the application of international criminal law is limited, in light of the concerns highlighted by Zolo (2009), Margalit (2010), and Jeangène Vilmer (2011) about the considerable degree of dependence of international criminal tribunals on the actual cooperation of such States.

²⁵¹ Id. It leaves also unresolved the issue of the probative value of such information. According to the provisional agreement, such information will not have any probative value during the three years mandate of the truth commission. However, it is unclear whether this lack of probative value is limited to this three years period, or it extends beyond it.

5.5 The Current Normative Framework under International Law

As seen in previous sections, criminal proceedings and truth commissions have strengths and weaknesses. The latter can be minimized, but not fully overcome, when both truth-seeking mechanisms are jointly resorted to. Nevertheless, this analysis does not take into account the existing normative framework under international law.

For Elster (2004), none of the components of transitional justice, including criminal investigations and prosecutions for *ius cogens* crimes, are mandatory under international law, because transitional justice, which aims at guiding the design of the justice element in transitional processes, has a non-binding descriptive nature. Hence, transitional processes must exclusively implement the will of the negotiating parties, which cannot be subject to any limitation by international law standards. Accordingly, it will be up to the negotiating parties to decide on the establishment of criminal proceedings, truth commission, both or none of them (Elster 2004).

Nagy's (2014, 215) critique of the trend in international society to impose decontextualized, technocratic and monolithic solutions ("one size fits all") is in line with Elster's approach. Corradetti, Eisikovits and Rotondi (2014, 5) also take this view, when - on the basis of political experiences and sociological practices in transitional processes in Spain, Northern Ireland and Mozambique - they stress that there are at least three types of situations where stating the binding nature of criminal proceedings and truth commissions is problematic: (i) post-conflict societies that show a cultural ambivalence towards policies of enforcement of responsibility for past abuses (Mozambique); (ii) post-conflict societies in which there is a complex division of blame between the different parties (Northern Ireland); and (iii) post-conflict societies in which insisting on truth recovery and liability enforcement poses a serious risk of reactivating violence or conflict (Spain in the late 1970s and early 1980s).

Teitel (2000) disagrees with this view. She affirms the binding nature under international law of the notion of transitional justice and its various components. For her, forgetting the past without establishing what happened and enforcing those responsibilities arising therefrom, impedes the development of real transitions and generates greater division between victims and perpetrators.

With regard to the specific international legal regime of the core *ius cogens* crimes (genocide, crimes against humanity and war crimes), the 1950 Nuremberg principles, as elaborated upon by the International Law Commission, affirm that those who commit, or participate in the commission of, any of these crimes incur international criminal liability.²⁵²

²⁵² See *supra* n. 2.

In turn, the jurisprudence of the international criminal tribunals, particularly the ICTY, has stressed the *ius cogens* nature of the said crimes.²⁵³

The Preamble of the ICC Statute also recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”²⁵⁴ In the same vein, the Human Rights Committee, in its General Observation 31 (2004), affirms that, as part of the States Parties’ obligations “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights” provided for in the ICCPR,²⁵⁵ they must investigate, prosecute and punish all violations that amount to international crimes.²⁵⁶ In the Committee's view, this also means prohibiting all exemptions of criminal liability as part of transitional processes.²⁵⁷

Moreover, although the jurisprudence of the International Court of Justice and the European Court of Human Rights has not been as vocal in this regard the Inter-American Court of Human Rights has affirmed the *ius cogens* nature of the prohibition addressed to States to undertake systematic or widespread violence against the civilian population (Olasolo *et al.* 2016b). Furthermore, in the cases *Almonacid Arellano et al.*,²⁵⁸ *Miguel Castro Castro Prison*,²⁵⁹ and *La Cantuta University*,²⁶⁰ the Inter-American Court has also stated the *ius cogens* nature of the international norms which (i) provide for the individual criminal liability of those involved in crimes against humanity; and (ii) impose on those States where such crimes are committed the duty to investigate them, to prosecute the alleged responsible persons, and to punish those who are convicted. The Inter-American Court has also affirmed in these cases the *ius cogens* nature of the international norms establishing the non-applicability of any statute of limitations and prohibiting any amnesty laws for crimes against humanity.

²⁵³ ICTY, *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic and Drogan Papic*, Case No. IT-95-16-T, Trial Chamber, Judgment, January 14, 2000, paragraph 520; and ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Appeals Chamber, Judgment, July 15, 1999, paragraph 296, quoting United Nations Secretary-General, *Report pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN. Doc. S/25704, May 3, 1993, paragraph 34. With regard to the crime of torture as a crime against humanity and as a war crime, see ICTY, *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21-T, Trial Chamber, Judgment, November 16, 1998, paragraph 454; ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vokovic*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber, Judgment, February 22, 2001, paragraph 466; and ICTY, *Prosecutor v. Anto Furundzija*, Case No. IT-95-7/1-T, Trial Chamber, Judgment, December 10, 1998, paragraphs 153-157. See also SCSL, *Prosecutor v. Augustine Gbao*, Case No. SCSL-2004-15-AR72 (E), Appeals Chamber, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, May 25, 2004, paragraph 9.

²⁵⁴ ICC Statute, Preamble, paragraph 5.

²⁵⁵ ICCPR, Article 2 (1).

²⁵⁶ Human Rights Committee, *General Comment 31, Nature of General Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), paragraph 18.

²⁵⁷ *Id.*

²⁵⁸ Inter-American Court Of Human Rights, *Case of Almonacid Arellano et al. vs. Chile*, Series C, Num. 154, Judgment (Preliminary Exceptions, Merits, Reparations and Costs), September 26, 2006, at paragraph 114.

²⁵⁹ Inter-American Court Of Human Rights, *Case of Miguel Castro Castro Prison vs. Peru*, Series C, Num. 160, Judgment (Merits, Reparations and Costs), November 25, 2006, at paragraphs 402 and 404.

²⁶⁰ Inter-American Court Of Human Rights, *Case of La Cantuta vs. Peru*, Series C, Num. 162, Judgment (Merits, Reparations and Costs), November 29, 2006, at paragraphs 168 and 225.

In application of this normative framework, the Human Rights Committee, in its August 14, 2015 Report on Spain, expressed its concerns about: (i) “the State party’s decision that the 1977 Amnesty Act, which hinders the investigation of past human rights violations, particularly crimes of torture, enforced disappearance and summary execution, should remain in force;”²⁶¹ (ii) “the shortcomings and deficiencies in the regulation of search, exhumation and identification procedures, in particular by the fact that the localization and identification of disappeared persons are left to the initiative of families, and by the resulting inequalities for victims due to regional differences;”²⁶² and (iii) “the difficulties in access to archives, in particular military archives.”²⁶³

As a result, the Human Rights Committee, “reiterate[d] its recommendation that the Amnesty Act should be repealed or amended to bring it fully into line with the provisions of the Covenant.”²⁶⁴ It also recommended that Spain: (i) “actively encourage investigations into all past human rights violations;”²⁶⁵ (ii) “ensure that, as a result of these investigations, the perpetrators are identified, prosecuted and punished in a manner commensurate with the gravity of the crimes committed;”²⁶⁶ and (iii) “ensure that redress is provided to the victims.”²⁶⁷ Furthermore, the Human Rights Committee urged Spain to “review its legislation on the search for, exhumation and identification of disappeared persons,”²⁶⁸ “establish a legal framework at national level for its archives,”²⁶⁹ and “allow the opening of archives on the basis of clear, public criteria, in accordance with the rights enshrined in the Covenant.”²⁷⁰

Three days after issuing its report on Spain, the Human Rights Committee issued its report on Great Britain and Northern Ireland in which it expressed concern “about the quality and pace of the process of promoting accountability in relation to ‘the Troubles’ in Northern Ireland and about the absence of a comprehensive framework for dealing with conflict-related serious human rights violations.”²⁷¹ As a result, the Human Rights Committee

²⁶¹ Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Spain*, CCPR/C/ESP/CO/6, August 14, 2015, at paragraph 21.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* In this respect, the Human Rights Committee urged Spain “to implement the recommendations of the Committee on Enforced Disappearances contained in its recent concluding observations (CED/C/ESP/CO/1, paragraph 32).”

²⁶⁹ Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Spain*, CCPR/C/ESP/CO/6, August 14, 2015, at paragraph 2.

²⁷⁰ *Id.*

²⁷¹ Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7, August 17, 2015, at paragraph 8. The Human Rights Committee had already expressed this concern in its previous report on Great Britain and Northern Ireland of May 30, 2008, CCPR/C/GBR/CO/6, at paragraph 9. The Human Rights Committee also “note[d] with concern (a) the multiple independence and effectiveness shortcomings alleged in relation to the Police Ombudsman’s ability to investigate historical cases of police misconduct; (b) that the Legacy Investigation Branch established within the Police Service of Northern Ireland to carry out the work of the closed Historical Enquiries Team may [have] lack[ed] sufficient independence and adequate resources; (c) delays in the functioning of the Coroner’s inquest system in legacy cases; (d) the retention in the Inquiries Act 2005 of a broad mandate for government ministers to suppress the publication of inquiry reports and the lack of safeguards against abuse of those executive powers; and (e) that the review relating to the murder of Patrick Finucane (i.e. the de Silva Review) d[id] not appear to satisfy the effective investigation standards under the Covenant.” Furthermore, the Human Rights Committee, “while welcoming the proposed establishment of an Historical Investigations Unit to

recommended that Great Britain *inter alia*: (i) [e]nsure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in Northern Ireland with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims;”²⁷² (ii) “[e]nsure, given the passage of time, the establishment and full operation of the Historical Investigations Unit as soon as possible; guarantee its independence, by statute; secure adequate and sufficient funding to enable the effective investigation of all outstanding cases; and ensure its access to all documentation and material relevant to its investigations;”²⁷³ (iii) “[e]nsure that the Legacy Investigation Branch and the Coroner’s Court in Northern Ireland are adequately resourced and are well positioned to review outstanding legacy cases effectively;”²⁷⁴ and (d) “[r]econsider its position on the broad mandate of the executive to suppress the publication of inquiry reports under the Inquiries Act 2005.”²⁷⁵

The existing normative framework that obligates States to investigate, prosecute and punish acts of genocide, crimes against humanity and war crimes is of great significance because, as Osiel (2000, 121) has pointed out, such crimes are made up of a sum of atrocities. Likewise, Luban (2004, 90) considers that such crimes represent the worst threat to our well-being, and even to our very survival because “they are the limiting case of politics gone cancerous.”²⁷⁶ Otherwise, it is difficult to explain the reasons behind the design and implementation of campaigns of violence which aim to destroy national, ethnic, racial or religious groups (genocide), to attack the civilian population in a systematic or large scale manner (crimes against humanity), or to harm those persons and objects that are protected during armed conflict due to their vulnerability (war crimes). This means that in all those situations in which these crimes are committed, it will, sooner or later, be necessary to undertake a transitional process to put an end to political regimes characterized by large scale human rights abuses or to move away from armed conflict.

In light of the above-mentioned,²⁷⁷ it is not permitted under current international law for the negotiating parties to design transitional processes that do not provide for national or international criminal proceedings for genocide, crimes against humanity and war crimes, as one of its core components (Olasolo 2014b). The same conclusion is reached by Espindola (2014) after critiquing the arguments put forward by Carl Schmitt in favour of amnesties, and

deal with outstanding cases related to the conflict in Northern Ireland, [was] concerned that the quality of investigations to be conducted may be affected by the passage of time, given that the unit would become fully operational only in 2017 (arts. 2 and 6).” Vid. Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7, August 17, 2015, at paragraph 8.

²⁷² Id.

²⁷³ Id.

²⁷⁴ Id.

²⁷⁵ Id.

²⁷⁶ According to Luban, “[p]recisely because we cannot live without politics, we exist under the permanent threat that politics will turn cancerous and the indispensable institutions of organized political life will destroy us.”

²⁷⁷ For a deeper analysis, on the existing normative framework on crimes against humanity under international law, see Olasolo *et al.* (2016b).

tracing the evolution of international law since the promulgation of the Nuremberg principles (including the development of the principle of universal jurisdiction, and the entry into force of the ICC Statute) to outlaw amnesty laws. Uprimny and Saffon also embrace this view when claiming that victims' rights to truth and justice under international law constitute an inescapable mandatory minimum which is not negotiable, and thus poses a credible threat for those who might engage in genocide, crimes against humanity and war crimes (Uprimny and Saffon 2009, 209).

5.6 Conclusion: The Need To Harmonize The Existing Normative Framework Of *Ius Cogens* Crimes Under International Law With The Demands Arising Out Of Transitional Processes Which Aim At Overcoming Situations Of Large Scale Human Rights Abuses

Resistance to the application of the international regulation of *ius cogens* crimes is nothing new. The resistance to this regulatory scheme has its roots in the transformation inherent in the prohibition against *ius cogens* crimes because, unlike national criminal law and transnational criminal law,²⁷⁸ international criminal law targets in particular those leaders who have traditionally been above the law. Applying Arendt's (1963) categories, such leaders are those "dogmatists" (who deal with their anguish of living with uncertainty by pursuing an ideal to the end by all available means) and those "nihilistic" (who do not believe in anything but themselves, and do whatever is necessary to meet their ambitions for social advancement and political and economic power), who use the power structures that they control to make "ordinary citizens" carry out uncritically the most horrific atrocities against their peers. As the ICC Prosecutor has put it, what this ultimately means is that international criminal law is particularly concerned with those persons who are "most responsible" for *ius cogens* crimes.²⁷⁹

Nevertheless, this does not mean that all concerns expressed by transitional justice theorists and practitioners must be dismissed. On the contrary, what is most needed is to put an end to the "dialogue of the deaf" that, for more than two decades, has characterized the relationship between those interacting in overlapping fields of application. Reactivation of communication between transitional justice theorists and practitioners on the one hand, and those who support the current normative framework concerning *ius cogens* crimes on the other, should lead to a process that harmonizes the legal content of a states' duty to

²⁷⁸ Latest developments in core transnational crimes, such as terrorism, have been based, to a large extent, on the so-called "penal law for the enemy". See Jakobs and Meliá (2006), and Vervaele (2005). For a critical approach to these developments, see Bustos Ramírez (2004, 407); Zaffaroni *et al.* (2000, 17) Muñoz Conde (2004), and Olasolo and Pérez Cepeda (2008, Ch. II).

²⁷⁹ ICC Office Of The Prosecutor, "Policy Paper", September 1, 2003, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-paper-2003>; ICC Office Of The Prosecutor, "Policy Paper on the Interests of Justice", September 1, 2007, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-int-just>; ICC Office Of The Prosecutor, "Policy Paper on Preliminary Examinations", November 1, 2013, available at: https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11_2013; and ICC Office Of The Prosecutor, "Draft Policy Paper on Case Selection and Prioritisation", February 29, 2016, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=Draft-Policy-Paper-on-Case-Selection-and-Prioritisation>.

investigate, prosecute and punish those responsible for *ius cogens* crimes (and the correlative victims' rights to truth and justice), with the need to design transitional processes that are suitable to overcome situations of large-scale human rights abuses.

Leaving for future works the elaboration of a comprehensive proposal on how this harmonization process should be conducted, it can be stated that it should be based on two basic principles.²⁸⁰ First, it is necessary for transitional justice theorists and practitioners to make an effort to achieve a minimum degree of consensus on the nature, purpose, scope and content of each of the elements of transitional justice. (De Greiff 2012, 32) Second, supporters of the current international normative framework of *ius cogens* crimes need to acknowledge the symbolic nature of international criminal law, its traditional focus on those most responsible, and the limitations in applying it beyond them. This is shown by the fact that only a few hundred cases have been dealt with by international criminal tribunals since 1995. Furthermore, even in the most active national jurisdictions, the number of those subject to investigation and prosecution for genocide, crimes against humanity and war crimes reaches barely 1 percent of all personas allegedly involved in their commission.

It is also important to consider the ever-increasing relevance of community justice mechanisms (such as *gacaca* in Rwanda (Tirrell 2014, 243), community assemblies in the Quechua-speaking Andean region of Peru (Theidon, 153-7), or *jirgas* in Afghanistan (Newton 2013), to name just a few examples). Tirrell (2014, 243) underlines this trend by explaining how out of all of those involved in the 800,000 murders committed during the Rwandan genocide in 1994, the ICTR has handled 93 cases in the twenty years between 1995 and 2015, Rwandan criminal courts processed about 1,300 cases between 1995 and 2001, and the vast majority of the 130,000 persons arrested in connection with the genocide have been sent to the *gacaca* process in order to avoid the collapse of national and international judicial bodies.

Similarly, those justice mechanisms created by civil society in light of states' inaction must be taken into consideration. A paradigmatic example in this regard is the International Tribunal for Restorative Justice in El Salvador, set up in 2009 by the Centro-American University (UCA) in light of the refusal by the Salvadorian Government to annul the 1993 Amnesty Law and start the investigation, prosecution and punishment of those responsible for *ius cogens* crimes committed during the civil war in El Salvador (1980-1993). (Frisso 2016) This refusal continued even after the 2012 decision of the Inter-American Court of Human Rights in the case of the *El Mozote Masacre*, which ordered El Salvador to annul the Amnesty Law.²⁸¹ It

²⁸⁰ A comprehensive proposal will be made on the basis of the work that will be conducted in the next five years in the Research Network on Ibero-American Epistemological Approach to Justice. This research network was set up in June 2015 and is coordinated by the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice ("IIH"). Further information on the research network can be found on: www.iberoamericaninstituteofthehague.org.

²⁸¹ Inter-American Court Of Human Rights, *Case of The Massacres of El Mozote and Nearby Places v. El Salvador*, Series C, Num. 252, Judgment (Merits, Reparations and Costs), October 25, 2012, at pp. 123-124, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf.

was only in July 2016 that the Salvadorian Constitutional Court declared the 1993 Amnesty Law unconstitutional.²⁸²

Some efforts have already been made in this direction, including the decision of the ICC Office of the Prosecutor to concentrate its efforts on those persons most responsible for crimes within the jurisdiction of the ICC, the UN Security Council resolutions limiting the ICTY and ICTR personal jurisdiction to those persons with the “greatest responsibility,”²⁸³ and the current work of the Sixth Committee of the UN General Assembly on the determination of guiding criteria for the application of the principle of universal jurisdiction.²⁸⁴ Nevertheless, such efforts, though constituting a good starting point, are still very limited when compared with the process of dialogue and harmonization that should be carried out in the coming years.

²⁸² Constitutional Cour of El Salvador, Case Num. 44-2013/145-2013, Judgment, July 2016.

²⁸³ United Nations Security Council, Resolution S/RES/1534, March 26, 2004, paragraphs 5 and 6, available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1534\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1534(2004)). In this Resolution, the UN Security Council *inter alia*: (i) “[c]alls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003); and (ii) [r]equests each Tribunal to provide to the Council, by 31 May 2004 and every six months thereafter, assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; and expresses the intention of the Council to meet with the President and Prosecutor of each Tribunal to discuss these assessments.”

²⁸⁴ *The Scope and Application of the Principle of Universal Jurisdiction*, United Nations General Assembly, A/RES/69/124, December 18, 2014 available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/124.

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6 Complementarity in Kenya: An Analysis of the Domestic Framework for International Crimes Prosecution

Thomas Obel Hansen

6.1 Introduction

This Chapter sets out to examine the legal and institutional framework for prosecution of international crimes in Kenya, focusing on whether it provides a credible basis for accountability at the domestic level and corresponds with international standards relating to such accountability processes, including witness protection and victims' rights.

In the context of the International Criminal Court's (ICC) investigation into the 2007/8 post-election violence (PEV), there has been sustained debate about creating a framework for prosecuting international crimes in Kenyan courts. Citing the ICC's complementarity principle, Kenyan leaders have sought to frame this as an alternative to international prosecution of PEV crimes, whereas civil society groups, citing the same principle, have tended to advocate that a domestic accountability process should only supplement international justice.²⁸⁵

Kenya ratified the Rome Statute on 15 March 2005 and it entered into force on 1 June 2005. Kenya domesticated the Statute by adopting the International Crimes Act (ICA), which came into force on 1 January 2009.²⁸⁶ The ICA provides the foundation for giving effect to the Rome Statute within Kenyan law, including the principle of complementarity, as it gives Kenyan courts jurisdiction to prosecute these crimes; provides the foundation for Kenyan authorities to provide the ICC with requested information, transfer to the Court persons against whom the ICC has issued arrest warrants and otherwise cooperate with the ICC; and lays down provisions permitting the ICC to operate within the country.

Following talks concerning the establishment of a Special Tribunal or a Special Division of the Kenyan High Court to prosecute international crimes committed in the context of the 2007/8 PEV, in January 2015 the Kenyan Judiciary confirmed that it will establish an International and Organized Crimes Division (IOCD) within the High Court. The Judiciary has stated that the IOCD is currently being developed in partnership with stakeholders from other state agencies and international partners under the supervision of a Judicial Service Commission

²⁸⁵ On civil society attitudes and advocacy relating to the ICC and domestic accountability mechanisms, see Thomas Hansen and Chandra Sriram (2015) and Christine Bjork and Juanita Goebertus (2011).

²⁸⁶ International Crimes Act, 2008 (Kenya), ISN No. KEN-2008-L-82568. Available at http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf.

(JSC) committee. The IOCD is intended to have jurisdiction over international crimes as defined by the Rome Statute, as well as transnational crimes such as organized crime, piracy, terrorism, wildlife crimes, cybercrime, human trafficking, money-laundering and counterfeiting (Wayamo Foundation 2014).

The decision to establish a specialized division of the Kenyan High Court to prosecute international and transnational crimes has been lauded by some as an important step towards promoting accountability and has received substantial international support (Ambach 2015). However, the IOCD is unlikely to prosecute PEV-related crimes, and there are more broadly significant challenges giving effect to the principle of complementarity in Kenya, if understood to involve a framework whereby “the Court and States should work in unison – by complementing each other – in reaching the Statute's overall goal [...] to fight against impunity” for Rome Statute crimes.²⁸⁷

Notable challenges include the lack of investigatory and prosecutorial capacity; challenges relating to the protection of witnesses and victims; and, most profoundly, lack of political will to prosecute the perpetrators of international crimes, particularly those committed in the context of the PEV. However, the debate over creating a domestic framework for prosecuting Rome Statute crimes cannot be separated from developments relating to the Kenyan ICC cases, including steps taken by the Government to end or undermine the ICC process. As all of the PEV-related ICC cases have now collapsed,²⁸⁸ supporters have lost leverage for promoting domestic PEV prosecutions.

6.2 The Principle of Complementarity and Its Application to the Kenyan Situation

The principle of complementarity, whereby national courts are given priority in the prosecution of international crimes, has often been pointed to as the cornerstone of the Rome Statute (Benzing 2003; Stahn and El Zeidy 2010). The principle is most clearly articulated in Article 17(1)(a) of the Rome Statute, which provides that the ICC shall determine that a case is inadmissible where the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.

The Appeals Chamber has clarified that Article 17 of the Rome Statute entails a two-stage test, whereby it must first be determined whether national proceedings exist relating to the same suspects and “substantially the same conduct” as investigated by the ICC, before

²⁸⁷ ICC, *Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11-547-Anx 2, Dissenting Opinion of Judge Anita Ušacka, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013, “Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi”, May 21, 2014, at para 57.

²⁸⁸ The last case against William Ruto and Joshua Sang was terminated in April 2016. ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-2027-Red-Corr., Trial Chamber V(a), Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal, June 16, 2016.

turning to an examination of a state's potential unwillingness or inability to prosecute the crimes.²⁸⁹

It was on the basis of this test that the Pre-Trial Chamber II and later the Appeals Chamber rejected an admissibility challenge filed by the Government of Kenya (GoK) on March 31, 2011, holding that there was a situation of investigatory and prosecutorial inactivity in Kenya.²⁹⁰ Although the GoK accepted that national investigations must involve the same overall conduct (in this case the PEV) which is being investigated by the ICC, it claimed that a case is inadmissible as long as this conduct is attributed to "persons at the same level in the hierarchy being investigated by the ICC".²⁹¹ The Appeals Chamber rejected these submissions, noting that, for a case to be inadmissible under Article 17(1)(a) of the Rome Statute in connection with an application filed under Article 19 with respect to ongoing ICC cases, "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court", which the Chamber found not to be the case in Kenya.²⁹²

The GoK also made reference to ongoing judicial reforms, which it was argued meant that investigations of PEV crimes would soon progress, and promised "progress reports" to the Court. However, while Pre-Trial Chamber II "welcome[d] the express will of the Government of Kenya to investigate the case *sub judice*, as well as its prior and proposed undertakings", it made clear that for an admissibility challenge to succeed, investigations at the national level must be *ongoing*, as opposed to citing a potential future investigation, and stated that "concrete evidence of such steps" must be provided to the Court at the time of filing the admissibility challenge.²⁹³ The Appeals Chamber agreed with these findings, noting that:

"To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing".²⁹⁴

²⁸⁹ See ICC, *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", August 30, 2011 (hereinafter "Muthaura Admissibility Appeal"), at para 39; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, Appeals Chamber, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", August 30, 2011 (hereinafter "Ruto Admissibility Appeal"), at para 40. For a critique of the Court's practice, see Kevin Heller (2016).

²⁹⁰ ICC, *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-19, Application on Behalf of the Government of The Republic of Kenya Pursuant to Article 19 of the ICC Statute, March 31, 2011.

²⁹¹ *Ibid.*, para 32.

²⁹² Muthaura Admissibility Appeal, at para 39; Ruto Admissibility Appeal, at para 40.

²⁹³ ICC, *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-96, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, May 30, 2011, at paras 41, 59-60; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-101, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, at paras 45, 63-64.

²⁹⁴ Muthaura Admissibility Appeal, at para 61; Ruto Admissibility Appeal, at para 62.

Accordingly, the GoK did not succeed in challenging the admissibility of the ICC cases with reference to national proceedings. As will be explained below, the admissibility challenge must be viewed in the context of a broader campaign aimed at ending or undermining the ICC cases which must be taken into account in order to understand the challenges related to giving effect to the principle of complementarity in the country.

6.3 Kenya's Domestication of the Rome Statute

Kenya ratified the Rome Statute on March 15, 2005, and the Statute entered into force for Kenya on June 1, 2005. On January 1, 2009 the Statute was domesticated with the passage of the ICA. Kenya has a monist legal system, so the Rome Statute itself also currently forms part of Kenyan law.²⁹⁵ Because the substantive law of the Rome Statute forms part of Kenyan law irrespective of the ICA, the ICA's main function in the current constitutional order is to create procedures making possible the prosecution of Rome Statute crimes in Kenyan courts, and to provide a legal basis for national authorities' cooperation with organs of the ICC.

6.3.1 ICA Crimes

Article 6(4) of the ICA stipulates:

“‘Crime against humanity’ has the meaning ascribed to it in Article 7 of the Rome Statute and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the Rome Statute or in this Act [emphasis added]

‘Genocide’ has the meaning ascribed to it in Article 6 of the Rome statute

‘War crime’ has the meaning ascribed to it in Article 8(2) of the Rome Statute”.

The ICA's reference to customary international law means that the Act provides for a broader definition of crimes against humanity compared to the Rome Statute, as the existence of a state or organizational policy – as mentioned in Article 7(2)(a) of the Rome Statute – is not a requirement under customary international law (Hansen 2011a).

The ICA also criminalizes offences against the administration of justice, including corrupting ICC officials, giving false testimony or fabricating evidence in ICC cases, intimidating ICC witnesses, and in other ways obstructing justice at the ICC (Articles 9-17), and gives Kenyan court's jurisdiction to try these crimes (Article 18).

²⁹⁵ However, this is only the case since 2010 with the adoption of a new Constitution. Article 2(5) of the 2010 Constitution states that “the general rules of international law shall form part of the law of Kenya”, and Article 2(6) that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.

6.3.2 Criminal Liability and Procedures for Prosecuting Rome Statute Crimes in Kenyan Courts

Article 7(1) of the ICA specifies that, for the purposes of national proceedings concerning the Rome Statute crimes spelled out in Article 6 of the ICA, Article 25 of the Rome Statute relating to principles of individual criminal responsibility (modes of liability) and Article 28 relating to the responsibility of commanders and other superiors “shall apply, with any necessary modifications”.

It is not clear what these “necessary modifications” could refer to, since Article 7(2) of the ICA states that the modes of liability and other general principles under Kenyan criminal law are only applicable in the context of ICA proceedings to the extent they are not inconsistent with the Rome Statute rules mentioned in Article 7(1) of the ICA, including the rules relating to criminal liability under Article 25 and 28 of the Rome Statute.²⁹⁶

Other than the specific provisions of the Rome Statute outlined in Article 7(1) of the ICA relating to criminal liability, principles of interpretation to be applied to the definition of crimes, the required mental elements to the crimes, and a limited number of other rules, Article 7(2) of the ICA states that the rules and principles of Kenyan criminal procedure otherwise apply to proceedings relating to ICA crimes.

Article 8 of the ICA gives the Kenyan High Court jurisdiction to try the crimes under the ICA.²⁹⁷

6.3.3 Witness Protection

The ICA does not include a detailed scheme for witness protection. However, the ICA entails a number of provisions relevant to the protection of witnesses in ICC cases. Article 105(1) and (2) of the ICA, which concerns ICC requests for Kenyan authorities to provide assistance under Article 93(1)(j) of the Rome Statute for the protection of victims and witnesses involved in ICC proceedings, provides that the Attorney-General (AG) shall give authority for such request to proceed if satisfied that the request relates to an investigation being conducted by the ICC Prosecutor or any proceedings before the ICC, and the assistance

²⁹⁶ Article 7(2) provides that for the purposes of ICA proceedings, the provisions of Kenyan law and the principles of criminal law applicable to the offence under Kenyan law shall apply and a person charged with the offence may rely on any justification, excuse, or defence available under the laws of Kenya or under international law, provided that in the event of any inconsistency between the provisions of the Rome Statute and the provisions and principles in Kenyan law, the provisions specified in the Rome Statute shall prevail.

²⁹⁷ The jurisdiction extends to situations where (a) the act or omission constituting the offence is alleged to have been committed in Kenya; or (b) at the time the offence is alleged to have been committed—

(i) the person was a Kenyan citizen or was employed by the Government of Kenya in a civilian or military capacity; (ii) the person was a citizen of a state that was engaged in an armed conflict against Kenya, or was employed in a civilian or military capacity by such a state; (iii) the victim of the alleged offence was a Kenyan citizen; or (iv) the victim of the alleged offence was a citizen of a state that was allied with Kenya in an armed conflict; or (c) the person is, after commission of the offence, present in Kenya.

sought is not prohibited by Kenyan law.²⁹⁸ Article 16 provides that a person who unlawfully takes action to compel another person to abstain from doing anything that the person has a lawful right to do in relation to any proceedings of the ICC, or causes the person to fear for the safety of themselves or persons they know, is guilty of an offence and liable for imprisonment for up to five years. Article 17(1) further provides that a person who, by act or omission, does anything against a person or a member of the person's family in retaliation for the person's having given testimony before the ICC, is guilty of an offence and liable for imprisonment for up to five years.²⁹⁹

The ICA is silent with respect to witnesses in proceedings before Kenyan courts. However, in 2006, Kenya passed the Witness Protection Act – which was as amended in 2010 and again in 2012 – which generally applies to proceedings before Kenyan courts and hence also to potential ICA proceedings.³⁰⁰ Article 3(1) of the Act defines a witness as “a person who needs protection from a threat or risk which exists on account of his being a crucial witness”, who:

“(a) has given or agreed to give, evidence on behalf of the State in

(i) proceedings for an offence; or

(ii) hearings or proceedings before an authority which is declared by the Minister by Order published in the Gazette to be an authority to which this paragraph applies;

(b) has given or agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence against a law of Kenya;

(c) has made a statement to—

(i) the Commissioner of Police or a member of the Police Force; or

(ii) a law enforcement agency, in relation to an offence against a law of Kenya;

(d) is required to give evidence in a prosecution or inquiry held before a court, commission or tribunal outside Kenya—

(i) for the purposes of any treaty or agreement to which Kenya is a party; or

(ii) in circumstances prescribed by regulations made under this Act”.

Article 3(2) further stipulates that a person shall be “a protected person for the purpose of this Act” if that person qualifies for protection:

²⁹⁸ Article 105(3) further provides that if the Attorney-General gives authority for such requests to proceed he shall take such steps as he thinks appropriate in the particular case and forward the request to the appropriate Kenyan agency and that agency shall, without delay ‘use its best endeavours to give effect to the request’.

²⁹⁹ Article 17(2) further states that a person who conspires or attempts to commit, or is an accessory after the fact in relation to, or counsels in relation to, an offence under subsection (1) is guilty of an offence and liable on conviction to imprisonment for up to five years.

³⁰⁰ The Act as amended in 2010 and 2012 is available at <http://www.wpa.go.ke/resources/downloads/34-acts>.

- (a) by virtue of being related to a witness; or
- (b) on account of a testimony given by a witness; or
- (c) for any other reason which the Director may consider sufficient.

The Act established a Witness Protection Agency (WPA) to provide:

“the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies”.³⁰¹

The WPA is tasked with establishing and maintaining a witness protection program; determining the criteria for admission to and removal from that program; determining the type of protection measures to be applied; advising any Government Ministry, department, agency or any other person on the adoption of strategies and measures on witness protection; and performing such other functions as may be necessary for the better carrying out of the purpose of the Act.³⁰² Article 4(2) stipulates that the witness protection program may provide, among other actions: (a) physical and armed protection; (b) relocation; (c) change of identity; or (d) any other measure necessary to ensure the safety of a protected person. Article 4(3) further provides that the WPA may request the courts to implement protection measures such as: (a) holding *in camera* or closed sessions; (b) the use of pseudonyms; (c) the reduction of identifying information; (d) the use of video link; or (e) employing measures to obscure or distort the identity of the witness. Articles 5 and 6 spell out the criteria and process for inclusion in the witness protection program, and Article 9 allows for temporary protection pending full assessment.

Article 31(1) of the Act establishes a Victims Compensation Fund which, among other things, is intended to offer restitution to “a victim, or to the family of a victim of a crime committed by any person during a period when such person is provided protection under this Act”.

Whereas the Act seems to provide a solid framework for the protection of witnesses involved in ICA proceedings, many observers have emphasized observed that witness protection remains a serious challenge in the country. For example, the International Commission of Jurists (Kenya Section) (2010) notes that the bodies set up under the Act lack independence from other government agencies, including the police; that there are no clear provisions for external funding; and that the Act is only applicable to prosecution, not defense, witnesses. With respect to witness protection in potential international crimes cases before Kenyan courts, the lack – or perceived lack – of independence from other government agencies would likely present a serious challenge for witnesses’ willingness to

³⁰¹ WP Act, Article 3(b)(1).

³⁰² WP Act, Article 3C(1).

testify and to be enrolled in the witness protection program. The Judicial Service Commission's (JSC) report of October 2012 on the creation of an international crimes division expressed similar concerns. The JSC noted the inadequacy of the WPA in its state at the time, acknowledged the importance of an effective witness protection agency to the successful prosecution of international and transnational crimes, and recommended that "the government should fully fund and make operational the existing Witness Protection Agency" (Judicial Services Commission 149).³⁰³ Human Rights Watch (2011) has also noted that "the government has allocated only a fraction of the funding requested by the agency, not even enough to cover basic operations" and that:

"in order to address post-election violence within the Kenyan judicial system, funding the Witness Protection Agency is an obvious priority. But many Kenyans question the agency's ability to adequately protect witnesses at all, given Kenya's history of attacks on witnesses that are attributed to the very security agencies that in principle should play a role in protecting them".

6.3.4 Victims' Rights and Participation

The ICA does not include any provisions relating to victim participation in proceedings before the Kenyan High Court in ICA cases, nor does it address the question of how the rights of victims should be addressed by the High Court in such proceedings.

Accordingly, the applicable rules are to be found in Kenya's Criminal Procedure Code (CPC) as well as the newly enacted Victims Protection Act (VPA).³⁰⁴ The CPC includes a number of provisions relating to the rights of victims:

- Article 137(d) lays down a right for victims to be heard with regard to the contents of a possible plea agreement;
- Article 329(C)(1) (cf. Articles 329(D)(1) and 137(I)(1)) allows the Court to request a victim "impact statement" which can be taken into account in sentencing convicted offenders;³⁰⁵
- Article 175(2)(b)) allows the Court to order compensation to victims in the context of the criminal proceedings if it is found that "the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person";
- Article 177 authorizes the Court to order stolen property restored to the person from whom it was stolen; and

³⁰³ Kenyans for Peace Truth and Justice (KPTJ) notes that the WPA is seriously underfunded. In financial year 2013/2014, it received only Ksh 196 million (\$2.2 million) of the Ksh 500 million (\$6 million) that it requested. KPTJ also notes that "witness protection in Kenya seems to lack the political support necessary to make it effective because it is viewed in the light of the ICC and the efforts to hold high profile politicians accountable" (KPTJ 2014, 10).

³⁰⁴ The Acts are available at <http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%2075> and <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/VictimProtectionAct17of2014.pdf> respectively.

³⁰⁵ See similarly Article 12(1) of the Victims Protection Act, discussed just below, which elaborates further on this.

- Article 176 stipulates that in all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

In addition to the CPC, in October 2014 the VPA entered into force. The Act defines a victim as “any natural person who suffers injury, loss or damage as a consequence of an offence”, and provides for a variety of rights for victims. The Act requires relevant authorities to undertake a preliminary assessment of every victim, including in situations of acts of terrorism, internal civil unrest, war or “any other activity that is likely to cause mass victimization” (Article 6(4)). The Act further provides victims, *inter alia*, with the right to:

- i. Privacy (Article 8);
- ii. Be present at their trial either in person or through a representative of their choice (Article 9(1)(a));
- iii. Have the trial begin and conclude without unreasonable delay (Article 91(1)(b));
- iv. Give their views in any plea bargaining (Article 91(1)(c));
- v. Have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law (Article 91(1)(d));
- vi. Be informed in advance of the evidence the prosecution and defense intends to rely on, and to have reasonable access to that evidence (Article 91(1)(e));
- vii. Have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial (Article 91(1)(f)); and
- viii. Be informed of the charge which the offender is facing in sufficient details (Article 91(1)(g)).

Using language similar to that found in Article 68(3) of the Rome Statute, Article 9(2) of the VPA states that where the “personal interests of a victim have been affected” the Court shall: “(a) permit the victim’s views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and (b) ensure that the victim’s views and concerns are presented in a manner which is not prejudicial to the rights of the accused or inconsistent with a fair and impartial trial”.

Again drawing on the language used in the Rome Statute, Article 9(3) of the VPA provides that the victim’s views and concerns “may be presented by the legal representative acting on their behalf”.

The VPA also guarantees the victim’s right to security, including obliging authorities to place vulnerable victims in a place of safety and provide medical treatment (Articles 10-11); a right

and a choice as to whether the victim wants to take part in restorative justice processes, with provisions that should an agreement for restoration or other redress be agreed between the victim and the offender it shall be recorded and enforced as an order of the Court (Article 15); and the right to receive information necessary for the realization by the victim of their rights under the Act (Article 19). Article 23 provides that a victim has a right to restitution or compensation from the offender and the enforcement thereof in accordance with the Act, including for economic loss occasioned by the offence; loss of or damage to property; loss of use of the property; personal injury; costs of any medical or psychological treatment; and costs of necessary transportation and accommodation suffered or incurred as a result of an offence. Article 24 states that the court may award compensation, and such compensation may include financial compensation for expenses incurred as a result of the loss or injury resulting from the offence complained of which shall be charged from a Victim Protection Trust Fund created by the VPA. The Act sets out the mandate of the Trust Fund, including its funding (Article 28); the composition of its Board of Trustees (Article 30); and the Victim Protection Board, which is mandated to “advise the Cabinet Secretary on inter-agency activities aimed at protecting victims of crime and the implementation of preventive, protective and rehabilitative programs for victims of crime” (Article 32).

However, legal experts in Kenya consulted by this author point out that the VPA is not yet fully implemented, is rarely applied by the courts, and that there is little awareness of the Act among relevant stakeholders. In practice, therefore, victims have not yet benefitted from the rights they are entitled to under the Act. While the ICC’s victim participation and reparation regimes face numerous challenges, especially in highly sensitive and politicized cases such as the Kenyan, (Hansen 2016) it is unlikely that they will receive the same level of protection under potential domestic proceedings.

6.3.5 Is The ICA Applicable To PEV Crimes?

One central issue in terms of giving effect to the principle of complementarity in Kenya is whether the ICA is applicable to PEV crimes. Since the ICA came into force on January 1, 2009, and thus after the PEV crimes were committed in late 2007 and early 2008, the starting point is that the principle of legality, specifically the prohibition of retroactive application of the law, means that the ICA cannot provide the legal basis for prosecuting PEV crimes.

The JSC report observes that while the ICA cannot “apply to the post-election violence crimes, as this would be in conflict with the non-retrospectivity principle enshrined in the Constitution at the domestic level”, the 2010 Constitution “allows for prosecution of conduct that at the time it was committed was criminalised under international law even though the act or omission did not constitute an offence under the National law”. Accordingly, the JSC argues that PEV crimes can be prosecuted in Kenyan courts relying on substantive law of the Rome Statute (JSC (Kenya) 2012, 88-95).

However, even if Article 50(2)(n) of the 2010 Constitution explicitly exempts international crimes from the prohibition on retroactive application of the law, this does not fully solve issues pertaining to prosecuting PEV crimes as international crimes in Kenyan courts. According to the doctrine of strict legality, there must be an applicable written law, passed by Parliament, that makes an act criminal and punishable for it to be punished in national courts. Because the rules in international law are not implemented in national law that applies to events in 2007/8, and because the Rome Statute does not spell out the procedures to be used by a Kenyan court, it seems necessary to amend the ICA so that it applies to the events in 2007/8. Doing so would neither violate the Constitution nor international standards, since international human rights law exempts international crimes from the ban of retroactive application of the law (KPTJ 2014, 20-23).

6.4 Proposals to Set Up a Domestic Mechanism to Prosecute International Crimes

6.4.1 Overview of the Debate about a Domestic Accountability Mechanism to Prosecute PEV and Other International Crimes

Following the 2007/8 PEV, a Commission of Inquiry on Post-Election Violence (CIPEV) was created to investigate the PEV and to make recommendations on how to address the crimes. CIPEV recommended that a Special Tribunal for Kenya, composed of Kenyan and international judges, be established to try those most responsible. The Commission also handed over to Kofi Annan, who had chaired the group of mediators involved with resolving the crisis, a sealed envelope with the names of those it deemed most responsible, which was to be forwarded to the ICC if the GoK failed to act on the recommendation. The tribunal was not created, the envelope was handed over to the ICC Prosecutor, and on March 31, 2010 the ICC formally announced the opening of an investigation into the Kenyan situation (Sriram and Brown 2012; Hansen 2011b).

Since then, numerous attempts have been made to create a platform for prosecuting PEV (and other international crimes) within the Kenyan legal system. However, as is evident from the following outline, these attempts have been half-hearted and many seemingly aimed at using the complementarity principle to bring to an end the ICC process.

In December 2008, then President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement stipulating that a Cabinet Committee would draft a bill on the Special Tribunal.³⁰⁶ In February 2009, the Constitution of Kenya Amendment Bill 2009, drafted by then Justice Minister Martha Karua, proposed to create a Special Tribunal, but was voted down in Parliament, with many parliamentarians arguing that accountability for the PEV should instead be pursued by the ICC (Human Rights Watch 2009; Warigi 2009). In July 2009, the

³⁰⁶ Government of Kenya, State House, "Special Tribunal to Be Set Up", December 17, 2008, available at <http://www.statehousekenya.go.ke/news/dec08/2008171202.htm>.

Cabinet, citing its decision to establish a Truth, Justice and Reconciliation Commission (TJRC) to “deal with PEV perpetrators”, refused to table in Parliament a second bill on a Special Tribunal, drafted by then Justice Minister Mutula Kilonzo with input from civil society.³⁰⁷ In November 2009, in another attempt to enact the Special Tribunal, a revised Constitutional Amendment Bill was tabled but not passed because quorum was not met in Parliament (only 18 out of 222 parliamentarians were present) (Human Rights Watch 2011).

In December 2010, immediately after then-ICC Prosecutor Moreno-Ocampo announced the names of the six Kenyans he intended to prosecute for their alleged involvement in the PEV, Kibaki stated that “the government is fully committed to the establishment of a local Tribunal to deal with those behind the PEV, in accordance with stipulations of the new Constitution”,³⁰⁸ and soon thereafter the GoK announced that a Special Division of the High Court would be established to try PEV cases, but no concrete action was taken to this effect (Namunane 2011). During the early months of 2011, in the run-up to the ICC suspects’ first appearance in The Hague in April 2011, several Kenyan politicians again proposed that a local accountability mechanism should be created, making reference to the principle of complementarity when stating that the purpose of doing so should be to “bring the [ICC] cases home” (Leftie 2011). In early 2012, following the ICC confirmation of charges decision, the GoK again stated its intention to “bring the cases home”, simultaneously arguing that the ICC suspects should be prosecuted in national courts, the East African Court of Justice (EACJ), or the African Court of Justice and Human Rights, notwithstanding that the Rome Statute does not entail provisions for “transferring” cases to a potential regional criminal court and the government’s admissibility challenge had already been rejected by the Court (Hansen 2012). In May 2012 the JSC set up a working committee to study and make recommendations on the viability of establishing an International Crimes Division (ICD) in the High Court of Kenya and delivered its first report on the topic in October 2012 (JSC (Kenya) 2012).

In November 2013, Kenya's Chief Justice, Willy Mutunga, stated the ICD would soon become operational (Obara 2012), and in February 2014, a meeting held in Naivasha, involving members of Kenya’s judiciary and other legal sector bodies as well as civil society groups, adopted a resolution on the formation of the ICD, noting that the ICD should have jurisdiction to address PEV crimes (CapitalFM 2014). In January 2015, the Kenyan Judiciary confirmed that it would establish an International and Organized Crimes Division (IOCD) within its High Court in the first quarter of 2015 (Wayamo Foundation 2014), and in April 2015 that the IOCD would be established before the end of 2015, (Ambach 2015, 5-6) but as of July 2016 the IOCD is yet to become operational.

³⁰⁷ Government of Kenya, Office of Public Communications, *Cabinet Decides on TJRC*, July 30, 2011, available at <http://www.communication.go.ke/media.asp?id=940>.

³⁰⁸ Republic of Kenya, Office of Public Communications, *Statement by His Excellency the President Hon Mwai Kibaki*, December 15, 2011, available at <http://www.communication.go.ke/media.asp?id=1246>.

The continued reference to “bringing the ICC cases home”, coupled with the absence of concrete action, gives weight to Susanne Mueller’s conclusion that the overall goal of Kenyan decisions-makers has been to “use as many delaying tactics as possible to ensure that no one would ever be held accountable for the PEV”, and that a domestic accountability mechanism has been viewed as one such tactic (Mueller 2014).

6.4.2 Actual Investigation and Prosecution of International Crimes within the Ordinary Court System to Date

To date, very few PEV crimes have been prosecuted in the Kenyan courts, and the Director of Public Prosecution (DPP) has stated that no further cases will be brought as they are reportedly not prosecutable. The following provides a brief outline of the investigation and prosecution of PEV cases in Kenya as well as statements made with regard to them.

In 2008, then-Minister of Internal Security, George Saitoti, drew up a list of PEV cases to be handled urgently, ordered the police to speed up investigations and prosecutions of remaining cases, and directed the police to rank the cases according to their gravity so that suspects of the most serious crimes could be charged quickly (Mukinda 2008; Human Rights Watch 2011). Shortly thereafter, the AG instructed the DPP to appoint a team of State Counsel to identify all PEV cases filed (Human Rights Watch 2011). In March, 2011, Police Spokesperson Eric Kiraithe said that PEV files had been prepared implicating up to 6,000 individuals, and that the police were awaiting the establishment of a Special Tribunal or a Special Division of the High Court to see these cases prosecuted (Mukinda 2008). The police also stated that it had opened files and had been questioning the Kenyan ICC suspects in connection with their alleged involvement in the PEV (Mathienge 2011).

In a March 2011 progress report, forwarded to the ICC in connection with the admissibility challenge, the DPP stated that almost 3,400 PEV cases were “pending under investigation”, and further claimed that there had been 94 convictions for PEV related crimes.³⁰⁹ However, after examining these cases, Human Rights Watch found that “[t]he actual number of known PEV convictions is significantly lower than the report indicated”, concluding that of the 47 PEV-related cases that had actually reached the courts, only eight had resulted in convictions and none of them involved police officers, politicians, government officials or other senior figures alleged to have financed, planned and incited the violence (Human Rights Watch 2009, 29-42; 45-46).

In February 2012, the multi-agency taskforce established by the DPP to review PEV cases and make recommendations to the DPP on how to deal with them, became operational (KPTJ 2013a). Following a series of statements that the PEV cases would prove difficult to

³⁰⁹ Government of Kenya, *A Progress Report to the Hon Attorney General 2011*, March 2011, Annex 3 of *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-64, Filing of Annexes of Materials [sic] to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, at pp. 70-72. <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-64> See further Human Rights Watch 2009, pp. 25-27.

prosecute due to lack of evidence (Maliti 2012), in February 2014 the DPP made it clear that no further PEV cases would be prosecuted before Kenyan courts, noting that “[t]he sad and painful truth... is that at present there are no cases arising out of the 2007-08 post-election violence that can be prosecuted before the ICD” (Koech 2014). This has since remained the position of the DPP, and in March 2015 President Kenyatta affirmed this approach, stating that no further efforts would be made to pursue accountability for PEV crimes, but that a fund would be established to assist victims of the violence instead (Leftie 2016).

6.4.3 The IOCD Proposal

In May 2012 the JSC set up a working committee to study and make recommendations on the viability of establishing the IOCD within the High Court of Kenya. The committee issued its report in October 2012, which forms the basis for the current considerations to establish the Division (JSC (Kenya) 2012). The report proposes that the IOCD shall have jurisdiction over the Rome Statute crimes mentioned in Article 6 of the ICA as well as transnational crimes, including drug trafficking, human trafficking, money laundering, cybercrime, terrorism and piracy, and any other international crimes as may be proscribed under any international instrument to which Kenya is a party (JSC (Kenya) 2012, 65-66). As Gondi and Basant (2016) note, the report itself does not explain why transnational crimes are being linked to the core international crimes, and “a case is not being made why these crimes should be handled by the IOCD”. Some organizations have argued that:

“giving the proposed IOCD the mandate to prosecute both categories of crimes also runs the risk of the court being kept busy with the prosecutions of drug traffickers and terror suspects, while never seriously addressing the more politically sensitive cases of post-election violence” (KPTJ 2014, 9).

The Report further observes that the Kenyan Constitution stipulates that the High Court of Kenya has unlimited original jurisdiction on civil and criminal matters, and that Article 8(2) of the ICA provides that the crimes proscribed in the Act shall be tried in the High Court of Kenya.³¹⁰ It also noted that Article 5 of the Judicial Service Act gives the Chief Justice administrative power to exercise general direction and control over the Judiciary, including establishing special divisions of the courts. The report recommends that the ICD should apply special rules of procedure, practice and evidence in its operations and conduct of trials (KPTJ 2014, 7). More specifically, it proposes that the IOCD should be modeled on the standards of the ICC, with the same rules, practices and procedures being adopted. However, as noted by KPTJ (2014, 8), it is not clear how the ICD can adopt the rules,

³¹⁰ However, appeals from the IOCD will be handled within the ordinary system, first by the Court of Appeal and ultimately the Supreme Court. As noted by KPTJ (2013b, 17), “whilst the JSC proposal states that a selected bench within the Court of Appeal will be trained on matters of international criminal law and required to hear appeals from the ICD, it does not adequately develop the procedural logistics for such a bench within the Court of Appeal and is silent on how further appeals would be treated at the Supreme Court”.

practices and procedures of the ICC “since the latter’s rules are an amalgam of both common law and civil law traditions while Kenya is a purely common law country”.

In terms of structure, the report recommends that seven judges be appointed to the Division to sit on two panels of three judges (with one extra judge in case of a judge’s unavailability). The report envisages that once the judges have been identified, they should undergo rigorous training in international criminal law and related subjects. The seat of the IOCD will be in Nairobi, but it can also operate by circuit and may sit and conduct proceedings in any other place in Kenya as directed by the Chief Justice (KPTJ 2014, 8).

In terms of prosecutorial set-up, the report recommends that there should be a special prosecution unit established within the office of the DPP to deal exclusively with international crimes. At the same time, however, it recommends that Parliament should enact legislation under Article 157(12) of the Constitution to provide for the appointment of a Special Prosecutor who would work independently of the DPP. As KPTJ argues, “these two recommendations are confusing as they are contradictory” (2014, 7-8). The DPP has recently established a special office to deal with international crime cases, but this office is embedded within its established system and is thus not independent from the DPP, who has made it clear that no additional PEV cases will be prosecuted in Kenya.³¹¹

Chief Justice Willy Mutunga has warned politicians and individuals involved in political violence that the IOCD will be used to prosecute them:

“The IOCD is a Kenyan solution to a local problem. Over many years, we have Kenyans who, through organized political violence and organized crime, have undermined our society...The IOCD promises to borrow smart and best practices from the world over to try these cases. In a real sense, this is implementing the Constitutional imperative: to domesticate international law in ways that are useful in terms of substantive law” (Lucheli 2015).

The absence of reference to PEV prosecution in Mutunga’s statement indicates that what was initially conceptualized as an accountability mechanism complementary to the ICC has transformed into something different. No one any longer expects the IOCD to prosecute PEV-related crimes, and the Division may well end up focusing on transnational crimes as opposed to Rome Statute crimes. Actors, such as the Wayamo Foundation, which has been intimately involved in the work of creating the IOCD, now admit that the prospects of the 2007/2008 PEV being investigated and prosecuted by the IOCD have “diminished”, while emphasizing the importance of dealing with transnational crimes in Kenya (Ambach 2015, 4).

³¹¹ The website is <http://www.odpp.go.ke/index.php/international-crimes-division.html>.

6.5 Contextual Analysis and Conclusions

There are significant challenges to giving effect to the principle of complementarity in Kenya. The GoK has engaged in an anti-ICC campaign, which has contributed to the collapse of the ICC cases arising out of the situation, and more broadly demonstrated a lack of will to advance accountability principles. Both the former administration, established by a power-sharing arrangement following the 2007/8 PEV, and the current administration, headed by Kenyatta who was until recently a suspect before the ICC, have used significant resources in undermining the ICC process and more broadly accountability for the international crimes committed in the context of the election violence in 2007/8.

Notably, the GoK has made various attempts to obtain a UN Security Council (UNSC) deferral of the cases, claiming that criminal accountability for the PEV undermines peace and security in the country. Spearheaded by then-Vice President Musyoka, in early 2011 the GoK launched a diplomatic offensive to convince other countries that the UNSC should defer the ICC cases, efforts which the African Union supported (Rugene 2011).³¹² Although the GoK made a formal deferral request to the UNSC, this request was never formally considered by the Council.³¹³ However, another request for a deferral made in 2013 was formally voted on, but with seven votes in favor and eight abstaining the request was not approved.³¹⁴

The GoK has failed to fully cooperate with the ICC with respect to requests for evidence. The ICC Prosecutor argues that the GoK's failure to provide her Office with requested records "has had a severe adverse impact" on the cases.³¹⁵ Although the Court has not formally sanctioned Kenya thus far,³¹⁶ in a ruling of December 3, 2014, Trial Chamber V(b) held that "the approach of the Kenyan Government [...] falls short of the standard of good faith cooperation required under Article 93 of the Statute", and considered that "this failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute".³¹⁷

³¹² Assembly of the African Union, Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), A.U. Doc. Assembly/AU/16, January 30-31, 2011, at para. 6.

³¹³ Letter from Macharia Kamau, Kenya's Permanent Representative to the U.N. in New York, to the President of the Assembly of State Parties to the Rome Statute, February 28, 2011. <http://news2.onlinenigeria.com/news/general/81922-Kenyas-letter-ICC-President.html>.

³¹⁴ United Nations Security Council, Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining, SC/11176, November 15, 2013. <http://www.un.org/press/en/2013/sc11176.doc.htm>.

³¹⁵ ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the status of the Government of Kenya's cooperation with the Prosecution's investigations in the Kenyatta case, December 4, 2014. <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014>.

³¹⁶ The Trial Chamber is yet to make a final determination of the matter following the Appeals Chamber's decision to remand it for the Trial Chamber to determine afresh whether Kenya had failed to comply with the cooperation request in a way that had prevented the Court from exercising its functions and powers under the Statute. See ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-1032, Appeals Chamber, Judgement on the Prosecutor's Appeal against Trial Chamber V(B)'s "Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute", August 19, 2015.

³¹⁷ ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-982, Trial Chamber V(b), Decision on Prosecution's Application for a Finding of Non-Compliance under Article 87(7) of the Statute, December 3, 2014, at para 78. The decision not to refer Kenya to the ASP was based, *inter alia*, on the understanding that in the specific case "a referral might result in further uncertainty and potential delay for the proceedings". *Ibid* at para 82.

Even if no clear link to the GoK has been established, the ICC Prosecutor, civil society organizations and academics have asserted that persons associated with the suspects have bribed, threatened and in some cases killed witnesses, resulting in a significant number of key witnesses being unwilling or unable to testify, and contributing to the collapse of the cases (Journalists for Justice 2016).

The GoK has also on several occasions threatened that the country will withdraw from the Rome Statute, and lobbied other African countries to do the same, seemingly using these threats both to obtain concessions and to express its dissatisfaction with the Court pursuing cases against its president (Kenyatta) and deputy president (Ruto) (AFP 2016).

As evidenced in this Chapter, the Government has also sought to end the ICC cases citing the principle of complementarity, thus highlighting how this principle can be used by states that aim at undermining, rather than promoting, accountability. Although the ICC rejected Kenya's admissibility challenge, continued debate about establishing a domestic framework for international crimes prosecution has been largely driven by a desire among decision-makers to undermine or discredit the ICC process. Now that the last ICC cases have collapsed, it seems increasingly unlikely that the IOCD, if ever established, will be used to prosecute international crimes cases.

This brings into question when we should conceptualize domestic accountability mechanisms within a "complementarity" framework. As Sriram and Brown argue, "there is a risk [...] that states seeking to evade ICC scrutiny may use the concept of positive complementarity to delay through the creation of sham tribunals" (Sriram and Brown 2012, 230). This Chapter has demonstrated how domestic justice initiatives can be portrayed within a complementarity framework, thereby potentially affording them increased legitimacy and international support, notwithstanding that they are not equipped nor intended to pursue accountability for those who orchestrate international crimes.

As "international crimes divisions" of domestic courts proliferate, often with substantial support from international donors, more engaged research is needed as to what these institutions can actually achieve under different circumstances and how they may impact and correlate with justice processes at the international level. As Kersten argues, in recent years, "there has been something of a 'complementarity turn', a subtle but evident shift towards focusing on 'positive complementarity' – the ICC's role and ability to catalyze domestic prosecutions" (Kersten 2016). Yet, more knowledge is needed concerning whether and when the ICC's complementarity regime actually works to galvanize justice at the domestic level, and how States may harness this regime to undermine, rather than reinforce, the spirit of the Rome Statute.

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7 Complementarity And Cooperation In The Congo

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This article explores the ICC's impact on domestic judicial reform and the rule of law in the Democratic Republic of Congo (DRC). Drawing on empirical research, it assesses to what extent domestic normative, institutional and judicial practices have adjusted to international standards. The following variables are considered: (1) substantive criminal law, including witness and victim protection norms; (2) domestic criminal procedure, including modes of liability; (3) judicial practice, especially rates of domestic prosecutions for international crimes; (4) judicial and institutional capacity-building; and (5) contextual elements that influence cooperation and complementarity. Against the backdrop of the ICC's intervention in the DRC, the article critically assesses assumptions about the ICC's complementarity regime and its ability to foster respect for the rule of law at the national level.

7.1 Introduction

Established in 2002, the International Criminal Court (ICC) is the only permanent judicial body with a mandate to prosecute the "unimaginable atrocities that shock the conscience of humanity".³¹⁸ With 124 states parties, the ICC Prosecutor currently has investigations open in ten "situations", including preliminary examinations in a further nine countries. Four trials have been completed and four more are underway at the Court's headquarters in The Hague.³¹⁹

Although it has generated a rich literature on institutional and doctrinal aspects of international criminal law (ICL), relatively little is still known about the ICC's impact on countries where it intervenes (Jurdi 2011, xxi; Vasilev 2015). Building on empirical findings from one ICC "situation country", this article explores how the ICC has influenced domestic judicial reform and the rule of law in the Democratic Republic of Congo (DRC). It assesses to what extent domestic normative, institutional and judicial practices have adjusted to international standards with respect to the following five variables: (1) substantive criminal law, including witness and victim protection norms; (2) domestic criminal procedure, in particular modes of liability; (3) judicial practice, especially rates of domestic prosecutions

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³¹⁸ UN General Assembly, *Rome Statute of the International Criminal Court*, 1998, 2187 UNTS 90. [hereinafter "ICC Statute"].

³¹⁹ The latest data about the ICC's investigations and trials are available online at: www.icc-cpi.int.

for international crimes; (4) judicial capacity; and (5) contextual elements that hinder or facilitate cooperation and complementarity. By comparing how the Congolese legal system has accommodated and resisted top-down reform in the wake of the ICC Prosecutor's intervention, the article tests assumptions about the ICC's jurisdictional regime and queries its effectiveness in catalyzing the rule of law.

This research draws on fieldwork conducted in the DRC over several years.³²⁰ It relies on primary and secondary sources, including government documents, parliamentary debates and court judgments, as well as qualitative interviews with Congolese and international judicial, governmental and civil society actors.³²¹ Untangling the causes behind domestic developments in post-conflict environments remains a complex and contentious undertaking, and this article should be understood as an attempt to cast light on these processes rather than a conclusive statement about the interactions between the ICC and the Congolese judicial sphere. Notwithstanding the difficulties of establishing causality between international intervention and domestic processes, this research suggests that the ICC's impact in the DRC has been mediated primarily by local civil society actors and non-governmental organizations (NGOs), while the ICC's organs have influenced developments only indirectly in specific and isolated instances.

7.2 Complementarity and Cooperation in the Congo

After signing the ICC Statute on September 8, 2000, the DRC formally became an ICC state party on March 30, 2002.³²² Two years later, the then ICC Prosecutor, Luis Moreno-Ocampo, initiated investigations into potential crimes committed in Congolese territory. Ocampo was acting pursuant to a self-referral by the Congolese President, Joseph Kabila, who, in a letter dated March 3, 2004 explained that:

“...because of the specific situation in my country, the competent authorities are unfortunately not capable of investigating [international] crimes or undertaking the required inquiries without the participation of the International Criminal Court”.³²³

Although scholars have drawn attention to the self-serving nature of Kabila's invitation as well as the selectiveness of Ocampo's subsequent investigations in the DRC, it is now generally accepted that such self-referrals are permitted under the ICC statute's principle of

³²⁰ The author worked on judicial and security sector reform in the DRC between 2010 and 2011. In addition to desk research, follow-up visits to the country were made in 2015 and 2016.

³²¹ Information obtained through interviews was cross-checked with other sources to enhance accuracy, but what follows is necessarily a partial reconstruction of the various causal factors that contributed to judicial reform in the DRC between 2004 and today.

³²² This fact is widely reported in books and online, although the UN treaty database has no record of the DRC's act of ratification. Likewise, one Congolese attorney has observed that there is actually no material proof of President Kabila's act of ratification of the ICC Statute on March 30, 2002 (Author interview with Congolese attorney, 1 April 2011).

³²³ Kabila's letter is reprinted in Musila (2009, Annex II).

complementarity.³²⁴ Described as a cornerstone of the ICC Statute, complementarity refers to the principle that domestic tribunals have priority in adjudicating international crimes, whereas the ICC Prosecutor intervenes if and when national jurisdictions fail to exercise jurisdiction over perpetrators.³²⁵

Misleadingly simple in theory, the scope and nature of this principle has generated rich discussion among scholars and ICC observers.³²⁶ Though disagreements and misunderstandings persist, what is important for the purpose of this chapter is that complementarity can be understood not only as a legal rule grounded in Article 17 of the ICC Statute, but also as a wider systemic principle (Nouwen 2013, 14-21). What that means is that various actors imbue complementarity with aims that are only loosely tied to the ICC Statute, two of which deserve brief mention here. First, it is argued by some that states not only have priority in prosecuting international crimes, but also a concomitant *duty* to do so. Advocated by civil society actors and victim support groups, this interpretation of complementarity imposes a *legal obligation* on states to provide criminal accountability (as opposed to, or in addition to, other forms of justice, for instance restorative justice or truth-seeking).³²⁷ Second, the ICC Prosecutor has endorsed a policy of “positive complementarity”, whereby domestic criminal prosecutions, rather than international trials, should be encouraged. In line with this reading of complementarity, international actors should support national legal systems to develop their domestic prosecutorial capacities and thereby contribute to the ICC’s mission of ending impunity (Nichols 2014, 29-43).

Although these two understandings of complementarity are not grounded in the actual text of the ICC Statute (Articles 1, 17-19), they need to be borne in mind when assessing the ICC’s domestic impact. It has even been suggested that the extra-legal iterations of complementarity, described as the “big idea of complementarity” by one prominent scholar, have superseded the original legal iteration of the rule and wield the greatest influence on the fight against impunity at the national level (Nouwen 2013, 11).

7.3 Assessing the ICC’s Impact

With this multi-faceted understanding of complementarity in mind, this section explores to what extent the Congolese legal system has changed following the ICC’s intervention, which – at the time of writing – was still on-going twelve years after the Prosecutor initiated

³²⁴ For a critical discussion of the legality and legitimacy of self-referrals, see William Schabas (2008a) and Paola Gaeta (2004). In contrast Claus Kress (2004) and Giorgio Gaja (2008) argue that self-referrals are permissible.

³²⁵ ICC Statute, Articles 17-20.

³²⁶ Contrary to popular belief, the ICC does not determine the admissibility of a case by simply assessing whether the national judicial system is “unwilling or unable” to exercise jurisdiction. In fact, the “unable and unwilling” shorthand is only part of the admissibility assessment, which also includes gravity (Robinson 2010; Stahn 2015).

³²⁷ There is indeed a *duty* to prosecute *certain* international crimes, for instance genocide (1948 Genocide Convention, Art. 1), torture (1987 UN Convention against Torture, Art. 7) or grave breaches of international humanitarian law (1949 Geneva Conventions). However, these duties stem from those treaties directly and not the ICC Statute as such. These distinctions are legally significant, for it means that two out of the ICC Statute’s three crimes in Article 5, namely war crimes and crimes against humanity, are not actually covered by the duty of states to prosecute (war crimes in the ICC Statute are distinct from the Geneva Conventions’ grave breaches regime, though there is significant overlap). Payam Akhavan (2014) provides an overview of these important technical distinctions.

investigations in the DRC. It begins by analyzing the ways in which the ICC Statute has influenced national legislation and procedure, and then discusses domestic judicial practice, the international community's efforts to develop domestic capacity to prosecute international crimes, and – lastly – the various contextual factors influencing the ICC's intervention in the DRC.

7.3.1 Normative Impact

Before the 2000s, domestic laws criminalizing war crimes, crimes against humanity and genocide were uncommon in most states. More importantly, even where such domestic legislation existed, domestic courts usually did not enforce these norms. However, the establishment of the ICC brought about significant change in this area (Amnesty International 2010).

As a multilateral convention with binding obligations for its members, the ICC Statute requires states parties to align their national laws with specific requirements of the Statute (Kress and Lattanzi 2000). For instance, laws preventing extradition of nationals or enshrining immunity for certain individuals must be amended (Duffy and Huston 2000, 35-50). In addition to these legal obligations, the ICC has inspired wider efforts to strengthen the fight against impunity at the national level, of which the movement to incorporate the ICC Statute's definitions of crimes into domestic law is the most prominent example. While there is no legal obligation to domesticate the ICC's crimes (ibid, 31-32), various international and national actors have succeeded in creating a tacit expectation that national governments who become ICC states parties will, in practice, also incorporate the ICC's definitions of international crimes into domestic law.³²⁸

This trend has also been observed in the DRC. With the support of local civil society groups and international actors, the Congolese parliament has made repeated efforts over the years to domesticate the ICC Statute, in particular its definitions of genocide, crimes against humanity, and war crimes.³²⁹ Implementing legislation was proposed and discussed on five separate occasions: in 2001, 2003, 2005, 2008 and 2012 (Labuda 2015). After more than a decade of lobbying and political horse-trading, the ICC Statute finally became part of the Congolese legal order on 2 January 2016, when President Kabila promulgated four legislative bills known collectively as *la loi de mise en oeuvre du Statut du Rome* (the ICC implementation law).³³⁰

³²⁸ An instructive example is the website of Parliamentarians for Global Action (pgaction.org), which incorrectly states, on multiple occasions, that states have a legal obligation to domesticate the ICC Statute. Kleffner (2003) provides an intellectual defense of the minority view that there is an obligation to domesticate the ICC Statute.

³²⁹ Drafts of the ICC implementation law in the DRC have all referenced this non-existent "obligation" in their preambles, which speaks to the power of civil society to shape the debate in many states.

³³⁰ The ICC implementation law was initially one piece of legislation (2001, 2003, 2005, 2008, 2012 drafts). It was broken up into four separate pieces of legislation to avoid constitutional and other legal obstacles: Loi modifiant et completant le decret du 6 aout 1959 portant Code de procedure penale; Loi organique modifiant et completant la loi No. 023-2002 du 18 novembre portant Code judiciaire militaire. Loi modifiant la loi no. 024-2002 du 18 novembre 2002 portant code penal militaire; Loi modifiant et completant le decret du 30 janvier 1940 portant Code penal.

A milestone in the DRC's fight against impunity, the ICC implementation law has five main aims: 1) incorporating the definitions of genocide, crimes against humanity and war crimes into domestic law;³³¹ 2) domesticating the Congolese authorities' obligations to cooperate with the ICC, in particular by providing immunities to ICC staff and clarifying which national organs should liaise with the ICC;³³² 3) strengthening the rights of the accused in domestic trials;³³³ 4) providing guarantees for victims, witnesses and intermediaries,³³⁴ and lastly 5) addressing unresolved jurisdictional conflicts between the Congolese civilian and military courts.³³⁵

Several normative impacts of the ICC implementation law need to be emphasized. In line with complementarity, the law reaffirms that national courts have primacy over all international crimes, with the ICC intervening only as a subsidiary judicial body (*à titre subsidiaire*).³³⁶ At the same time, the law explicitly recognizes the possibility of self-referrals by the Congolese Council of Ministers, which raises (perhaps even foreshadows) the possibility of further requests for ICC intervention in the future.³³⁷

It should also be noted that, rather than introducing them for the first time, the ICC implementation law merely adjusted the existing definitions of international crimes in the domestic legal order. Genocide, crimes against humanity and war crimes were already recognized as separate and distinct offenses under the 1972 Code of Military Justice (CMJ) and the 2002 Military Criminal Code (MCC).³³⁸ However, serious concerns were raised by local and international actors about the compatibility of the MCC's definitions with international standards (ICTJ 2015, 6-7), which in turn created difficulties for Congolese

³³¹ Loi no. 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Art. 4 modifiant Art. 221-223 du code pénal ordinaire. The ICC Statute's definitions are incorporated verbatim, with one significant and two minor adjustments: first, crimes against humanity do not require a policy element (Art. 222 CP in relation to Art. 7 (2) (a)); second, the crime against humanity of persecution can also be based on tribal affiliation whereas the ICC Statute does not recognize tribal groups as a protected category (Art. 222 (9) CP in relation to Art. 7 (1) (h), ICC Statute); and third, the war crimes of directing attacks against a humanitarian mission and making improper use of protected emblems extend to AU peacekeeping and other international organizations (art 223 (2) (c) and (g) CP in relation to Art. 8 (2) (b) (iii) and (vii), ICC Statute). Moreover, the ICC implementation law contains two embarrassing typographic mistakes in Art. 223 of the revised Penal Code, which distorts the scope of application of war crimes (Art. 223 (4) in relation to Art. 8 (2) (c) (iv), ICC Statute as well as the two paragraphs following Art. 223 (5) (l) CP, which are incorrectly transcribed from the ICC Statute and thus contradict the scope of application of international humanitarian law in non-international armed conflict). These typographic mistakes will presumably be rectified by analogy.

³³² Loi no. 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 6 août 1959 portant Code de procédure pénal, Art. 2 ajoutant Art. 21 bis – 21.31 CPC.

³³³ *Idem*, Art. 2 ajoutant Art. 26 bis CPC; Loi no. 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Art. 1 ajoutant Art. 1 bis CP. The 2006 Constitution (Art. 17 and 18) already recognizes these rights, but this is the first time they are explicitly recognized in domestic criminal law and procedure.

³³⁴ *Idem*, Art. 2 ajoutant Art. 26 ter CPC.

³³⁵ Proposition de loi organique modifiant et complétant la loi no. 23-2002 du 18 novembre portant code judiciaire militaire. Though the law was adopted on 31 December 2015 together with the other ICC implementation bills, it has still not been officially promulgated.

³³⁶ Loi no. 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 6 août 1959 portant Code de procédure pénal, Art. 2 ajoutant Art. 21 octies CPC.

³³⁷ *Idem*, Art. 2 ajoutant Art. 21, 10 CPC.

³³⁸ It should be highlighted that the definitions of war crimes, crimes against humanity and genocide in the 1972 and 2002 codes diverged considerably from the ICC Statute's definitions. See Articles 502, 505 and 530, Ordonnance-loi no. 72/060 du 25 septembre 1972 portant institution d'un Code de justice militaire. See Art. 164-166, 169-171, 173 MCC.

military judges (as will be seen below) and inspired national efforts to domesticate the ICC Statute's definitions of crimes as part of the ICC implementation law.³³⁹

One of the most controversial aspects of the ICC implementation law over the years was the issue of punishments, especially whether the death penalty should be abolished as part of the legislative package that would domesticate the ICC Statute (Human Rights Watch 2014). Though a moratorium on the death penalty has been in place in Congo since 2003, formal abolition has encountered fierce resistance, with negative consequences for the regional fight against impunity (Labuda 2016a; ICTJ 2015, 13). Some human rights organizations declined to support the ICC law if the death penalty were to be retained for war crimes, crimes against humanity and genocide, even though the ICC Statute does not exclude this possibility.³⁴⁰ Notwithstanding their intense lobbying, it proved impossible to abolish the death penalty due to resistance from within the Congolese parliament. In fact, the ICC implementation law does the opposite in that it explicitly broadens the scope of applicability of the death penalty in cases of accomplice liability for international crimes.³⁴¹ As a result, despite the advocacy of human rights groups, the ICC Statute's normative impact in the area of punishments runs counter to the overall tendency observed at other international criminal tribunals which eliminated the death penalty for international crimes (Horovitz 2013).

Aside from the death penalty, the obstacles to enacting the ICC implementation law were mostly political.³⁴² As draft bills lingered in parliamentary committees during the 2000s, Congolese legislators had to resort to piecemeal reform to support the fight against impunity. Two significant normative changes occurred in 2006, when Parliament passed a special law on sexual violence. It criminalized some forms of rape and sexual exploitation at the national level for the first time,³⁴³ which in turn opened the door to prosecutions for these types of offenses, both as international and ordinary domestic crimes. The law also introduced victim and witness protection measures as amendments to the 1959 Code of Criminal Procedure. Though the legislature did not reference international norms directly, Article 68 of the ICC Statute may have been influential in passing this amendment (this link is henceforth explicit in the ICC implementation law).³⁴⁴

Despite these reforms, witness and victim protection remains one of the weakest aspects of the domestic judicial system. At the time of writing, there is still no state mechanism providing victim and witness protection. Support comes from international actors and

³³⁹ Further to the ICC implementation law, genocide, crimes against humanity and war crimes are criminalized by the ordinary (i.e. non-military) penal code. Loi modifiant et complétant le décret du 30 janvier 1940 portant Code pénal.

³⁴⁰ ICC Statute, Art. 80.

³⁴¹ Loi no. 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Art. 2 modifiant Art. 21 quater CP last sentence.

³⁴² See the section on contextual factors below.

³⁴³ Horovitz (2012, 45) quotes an ICC official who claimed this law's definitions had been "inspired" by the ICC Statute (though it was not identical).

³⁴⁴ Article 74 *bis*, 1959 Code of Criminal Procedure. Art. 26 *ter* of CPP amended by ICC implementation law, Art. 2 of the law modifying CPP (Moffett 2014, 247).

domestic NGOs, which provide logistical and financial assistance to victims on an *ad hoc* basis, especially as part of the mobile courts program in eastern Congo (International Bar Association 2009, 26-7).³⁴⁵ That being said, the military judicial system has shown sensitivity to the concerns of victims and witnesses appearing in international crimes trials. Despite the absence of a legislative mandate, military judges have allowed victims and witnesses to testify with their faces hidden so as to provide a minimum of anonymity (Sudetic 2011). This has proven particularly important in sexual violence cases, where there is a considerable risk of social stigmatization and retribution for victims (Sudetic 2011).

These improvisations notwithstanding, nearly fifteen years after the ICC's intervention the Congolese normative framework is not compliant with minimum international standards in the area of victim and witness protection. This is problematic since many suspects in the DRC come from within the state security apparatus, especially the Congolese armed forces (FARDC) and the police (PNC). People willing to testify against state agents risk retaliation, which is one reason why the ICC and the UN's peacekeeping mission in the Congo (MONUC/MONUSCO)³⁴⁶ have expressed reluctance to cooperate with the Congolese authorities (Clark 2014). Moreover, despite binding court orders, the Congolese state has to date failed to pay any compensation to victims, who – under Congolese law – participate in proceedings as *partie civiles* (Moffett 2014, 245-248). The cumulative effect is that, despite the best efforts of local and international NGOs, Congolese victims are dissuaded from coming forward to testify.

Another longstanding normative concern in the DRC is the military's jurisdiction over civilians (Wetsh'okonda 2009, 9-10). According to international standards, civilians should not be tried before military tribunals, which – by their very nature – do not provide the same level of fair trial guarantees as civilian courts.³⁴⁷ However, under Congolese military law dating back to 1972, the military has had exclusive jurisdiction over international crimes, even if suspects were civilians (Wetsh'okonda 2009, 9-10). Especially problematic is the Congolese military's wide interpretation of its jurisdiction over civilians, which encompasses not just rebels (who remain civilians under international humanitarian law) but also ordinary domestic crimes that are connected to the commission of international crimes (Horovitz 2012, 27). To make matters worse, the military has a troubled history of resorting to extraordinary "specialized tribunals", which do not answer to constitutionally-mandated civilian authorities (Office of the High Commissioner for Human Rights 2010, 408-409).

Shifting jurisdiction over international crimes to civilian courts was a key reform proposal in early drafts of the ICC implementation law (Labuda 2015; ICTJ 2015, 10-11). However, domestication efforts faced stiff political resistance, so the Congolese Parliament formally divested the military of its jurisdiction over international crimes in a separate and unrelated

³⁴⁵ See the discussion on capacity building below.

³⁴⁶ Mission de l'Organisation des Nations Unies pour la Stabilisation en République Démocratique de Congo.

³⁴⁷ Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), Principle 5.

organic law on the organization of the judicial system.³⁴⁸ Though it was initially feted as a major breakthrough, this legislative reform has hitherto proved largely symbolic for two reasons.

First, by the time the organic law was adopted in 2013, the military justice system had accumulated years of valuable expertise in investigations, prosecutions and adjudication of international crimes. By contrast, the Congolese civilian courts had no comparable experience dealing with such complex cases, so it proved impossible to implement these changes at the stroke of a pen (ICTJ 2015, 10). Second and more importantly, there remain legal obstacles to divesting the military of its powers. Under the 2006 Constitution, the military and police are entitled to jurisdictional privileges, so the military justice system continues to *de jure* assert jurisdiction over soldiers and police officers suspected of international crimes (ICTJ 2015, 10-11).³⁴⁹ Despite complaints from civil society, military judges continue to interpret their jurisdictional powers broadly to encompass trials of civilians, including rebels. The ICC implementation law appears to preserve the military's jurisdictional powers over the military, police, and civilians,³⁵⁰ which suggests that the compatibility of Congolese standards with international law will remain a contentious issue (ICTJ 2015, 9-10).³⁵¹

These shortcomings notwithstanding, the ICC's greatest normative impact in the DRC may lie elsewhere. Broad national amnesties were granted on several occasions in the last fifteen years, but amnesty for war crimes, crimes against humanity and genocide has always been excluded.³⁵² Even if it has sometimes proven difficult for judges to distinguish legitimate "acts of war" (eligible for amnesty) from international crimes (ineligible), a clear consensus appears to have emerged in the DRC that the most serious violations must be prosecuted (Soares 2015). Although the direct impulse for excluding international crimes from the ambit of national amnesty laws probably lies with the UN, not the ICC *per se*, this remains a significant development that speaks to the broader impact of the international criminal justice system.³⁵³

³⁴⁸ Art. 91, Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire.

³⁴⁹ Art. 156, 2006 DRC Constitution.

³⁵⁰ Proposition de loi organique modifiant et complétant la loi no. 23-2002 du 18 novembre portant code judiciaire militaire, Art. 1 modifiant Art. 115 and 119 MJC.

³⁵¹ The ICC implementation law is probably a *de facto* recognition that it will not be possible to deprive the military of its powers (unless the Constitution is changed). The law explicitly validates the military's jurisdiction over its own soldiers, which is problematic given that some of the FARDC's key commanders are suspected of committing serious violations of human rights (Office of the High Commissioner for Human Rights 2010).

³⁵² Pretoria Peace Agreement 2002, Section III, point 8; Le Décret-Loi n° 03-001 du 15 avril 2003 portant amnistie pour faits de guerre, infractions politiques et d'opinion, Art. 1; Loi No. 05/023 du 2005 portant amnistie pour faits de guerre, infractions politiques et d'opinion, Art. 3; See *generally* Horowitz 2012, 20-21.

³⁵³ The ICC's impact is clear in the ICC implementation law, which bans amnesties for international crimes in Art. 34 *bis* of the 1940 Criminal Code. See Loi no. 15/022 du 31 décembre modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Art. 2 modifiant Art. 34 *bis*.

7.3.2 Procedural Law and Modes of Liability

In addition to the ICC's broader normative impact, one area that deserves special attention is domestic criminal procedure, including modes of liability. The 2006 Constitution recognized and, in some cases introduced for the first time, a series of procedural rights for suspects in criminal trials: the principle of legality, the principle of non-retroactivity of the law, the principle of non-retroactivity of punishments, individual criminal responsibility, the presumption of innocence, the right to be informed of the charges, the right to counsel, the right to a speedy trial, the prohibition of self-incrimination, the right to a public trial, and the right to appeal.³⁵⁴ In theory, many of these fair trial guarantees could also be found in international treaties to which the DRC adhered well before 2006, but in practice the right to a fair trial remains more an aspiration than a reality.

Congolese domestic criminal law and procedure are still grounded in legislative texts that pre-date the emergence of international human rights law (the 1940 Penal Code (CC) and the 1959 Code of Criminal Procedure (CPC)), and thus have not explicitly recognized these guarantees. Moreover, these procedural shortcomings are exacerbated by the *modus operandi* of the military justice system. Independent and impartial investigations are hindered by the military's vertical command structure, which requires strict obedience to orders from superiors (Office of the High Commissioner for Human Rights 2010, 425-547). A problem in its own right in civilian proceedings, military prosecutors often acknowledge receiving binding "instructions" on the desirability or prioritization of certain investigations (Wetsh'okonda 2009, 71-78). At the time of writing, a legislative proposal that would overhaul the entire criminal justice system was not before Parliament, despite well over a decade of work on a new and comprehensive Criminal Code by the Permanent Commission on the Reform of Congolese Law.

Judicial reform in this area remains fragmentary at best, although the ICC has arguably played a role in catalyzing domestic and international activity. As already noted above, the ICC implementation law amends some provisions in the 1940 CC and the 1959 CPC relating to fair trial rights. However, the ICC Statute's impact is particularly noteworthy with respect to modes of liability.

Until recently, Congolese military law recognized only a limited form of superior responsibility. Under the 2002 MCC, a military commander would be prosecuted only if his subordinates were also prosecuted and – even then only as an accomplice or co-perpetrator.³⁵⁵ In other words, unlike under international law, superior responsibility was conditional upon the prosecution of low-level suspects. It was not possible to charge a military commander as the main perpetrator, and only military commanders – but not

³⁵⁴ Art. 17-21, 2006 DRC Constitution.

³⁵⁵ 2002 MCC, Art. 175: "Lorsqu'un subordonné est poursuivi comme auteur principal d'un crime de guerre et que ses supérieurs hiérarchiques ne peuvent être recherchés comme co-auteurs, ils sont considérés comme complices dans la mesure où ils ont toléré les agissements criminels de leur subordonné".

civilian leaders – could be held responsible. Congolese military judges have struggling to reconcile the MCC’s provisions with the ICC Statute and the *ad hoc* tribunals’ case law, reaching starkly diverging decisions on the issue of individual criminal responsibility, especially with respect to high-level perpetrators (Avocats Sans Frontières 2009, 64-75).

Responding to criticisms from human rights groups, the ICC implementation law brings this aspect of domestic criminal law into line with international standards. It recognizes that superiors can be prosecuted as direct perpetrators, and that this rule applies to military and civilian superiors equally. The law goes further in that it integrates *verbatim* the ICC’s rules on individual criminal responsibility into the 1940 CC, in particular the ICC Statute’s complex provisions on principal liability (Art. 25 (3) (a)) and accessory liability (Art. 25 (3) (b) – (d)), and grounds for excluding criminal liability.³⁵⁶ It remains to be seen how Congolese magistrates will translate these elaborate international principles into the vernacular of domestic criminal justice, but at least the procedural safeguards are formally in place to ensure that justice is delivered regardless of status and rank (International Bar Association 2009, 29-30).

In that regard, the ICC implementation law explicitly recognizes that official capacity does not constitute a bar to prosecution for international law crimes.³⁵⁷ While this too is a direct incorporation of the ICC Statute’s rules (Art. 27), two issues stand out: first, it is unclear how this rule will be reconciled with the Congolese Constitution’s provision on immunities of heads of state.³⁵⁸ Second, military justice requires soldiers and police to be tried by judges who are of equal or higher rank to the suspect. In the past, even the High Military Court in Kinshasa lacked generals among its judges, so this rule was a very real procedural obstacle to holding high-level military perpetrators responsible. The conviction of General Jérôme Kakwavu in 2014 shows that nominating high-ranking judges to the bench can be a temporary solution (Radio Okapi 2014). However, the rule remains on the books, so the problem of *de facto* immunity for high-ranking military suspects may resurface in the future (Witte 2011, 21-23).

7.3.3 Judicial Practice

These changes to the legal, procedural and institutional framework in the DRC are reflected to varying degrees in Congolese judicial practice. While various aspects of domestic criminal proceedings have arguably changed since 2004, the single most important development in the DRC is the increased rate of prosecutions for international crimes at the national level.

³⁵⁶ Loi no. 15/023 du 31 décembre 2015 modifiant la loi 024/2002 du 18 novembre 2002 portant code pénal militaire, Art. 1 modifiant Art. 1 MCC (*verbatim* incorporation of 28 (a) (i) and (ii)); Loi no. 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Art. 2, ajoutant Art. 21 bis CP (*verbatim* incorporation of Art. 25 (3) ICC Statute), Art. 2 ajoutant Art. 22 bis CP (*verbatim* incorporation of Art. 28 (b) (i)-(iii)). The ICC’s rules on excluding criminal responsibility (Art. 31-33 ICC Statute) are not incorporated in their entirety, *see*); Loi no. 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Art. 2 ajoutant Art. 23 bis – quinquies CP.

³⁵⁷ Loi no. 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Art. 2, ajoutant 20 quater CP.

³⁵⁸ Art. 107, 163-164 2006 DRC Constitution.

Although no reliable database is currently available, it is estimated that since 2006 the Congolese military has investigated approximately fifty cases of war crimes and crimes against humanity.³⁵⁹ In late 2015, the first genocide trial opened before a civilian Court of Appeal in Katanga, marking the end of the military's monopoly over international crimes (Radio Okapi 2016).³⁶⁰

The ICC has influenced – directly and indirectly – the work of the Congolese judicial authorities in a number of ways. Since 2006, military tribunals have repeatedly used the ICC Statute's definitions of crimes, as well as the contextual elements of the ICC's Elements of Crimes, to secure convictions (Labuda 2015). In doing so, military judges have set aside domestic criminal law in favor of the ICC's more comprehensive and progressive legal framework. Congolese magistrates have also applied ICL more generally, including the case law of the *ad hoc* tribunals, to fill gaps in the Congolese criminal law and to ensure that crimes do not go unpunished (Avocats Sans Frontières 2009, 27, 37; ICTJ 2015, 8).

Several examples help to illustrate the ICC's impact on judicial practice. For instance, in the *Songo Mboyo* trial, the ICC Statute's wider definition of rape was applied in domestic proceedings to criminalize acts that did not meet the requirements of sexual violence under Congolese domestic law.³⁶¹ In some instances, military tribunals chose to apply the ICC Statute's rules on victim and witness protection, because domestic law did not provide for analogous protections (Labuda 2015; Witte 2011, 20-21). In yet other cases, direct application of the ICC Statute enabled domestic judges to avoid inconsistencies in the Congolese legal framework, especially the MCC's outdated definitions of war crimes and crimes against humanity (Labuda 2015, 420-422).

The very fact that approximately fifty investigations of international crimes have taken place in the DRC is a significant development.³⁶² Other ICC situation countries have seen far fewer domestic prosecutions (Human Rights Watch 2011). Equally important is that many more cases have been prosecuted as ordinary domestic crimes, in particular sexual violence crimes committed by the Congolese armed forces (FARDC) and non-state actors in the eastern DRC.³⁶³ It is also noteworthy that many trials before Congolese military tribunals appear to have targeted members of the state security services, not just rebels and militias.³⁶⁴ This

³⁵⁹ For an overview of the main trials before 2010, see Office of the High Commissioner for Human Rights, 2010, 410-421. The ICTJ compiled a more comprehensive dataset of investigations (not just trials) between 2009-2014 in Ituri, North and South Kivu (ICTJ 2015, 17, 20-23, 41-67, see accompanying footnotes on p. 20-21 for quantitative data). Figures cited in these reports suggest that approximately 50 international crimes investigations, not all of which led to prosecutions, took place between 2006 and 2015. Approximately 25-30 ended in conviction or acquittal, while the others remain under investigation or are blocked due to procedural or other obstacles.

³⁶⁰ In fact, one trial including charges of genocide took place in 2011 before a civilian court (Tribunal de grande instance de Kinshasa/Kalamu), which directly applied the ICC Statute's provisions on genocide to acquire jurisdiction over the crime. See *Affaire Mputu Muteba dite affaire des kimbanguistes* (TGI Kinshasa/Kalamu RP 11.154/11.155/11.156).

³⁶¹ Tribunal Militaire de Garnison de Mbandaka, *Songo Mboyo*, 12 April 2006, p. 27. See also Jean-Pierre Fofe Djofia Malewa (2006).

³⁶² Some of these cases are examined in Avocats Sans Frontières (2013).

³⁶³ See the discussion below on mobile courts. There is no extensive catalogue of such domestic cases, although Human Rights Watch (2005; 2009) did provide some estimates of prosecution rates in the eastern part of the country in two reports focused on sexual violence.

³⁶⁴ The ICTJ (ICTJ 2015, 22-23) suggests over half the cases concern FARDC troops. See also Horowitz (2012, 5).

would suggest that the military justice system is operating in an impartial manner, and that international criminal justice is not merely a matter of victor's justice in the DRC.

These raw data need to be put into context, however. First, incorporating the ICC's legal framework into domestic trials has not been without its problems. Some military courts have prioritized domestic norms while others have used the ICC Statute's provisions, the cumulative effect of which is a patchwork of conflicting national case law on international crimes. Where they have applied the ICC Statute, military judges have often struggled to explain why certain international rules apply to the exclusion of domestic criminal law while others do not (Avocats Sans Frontières 2009, 10-20). In some cases, domestic judicial authorities appear to cherry-pick provisions that are convenient to the case at hand, while ignoring the broader institutional and normative context of the ICC Statute (Labuda 2015, 422-427).³⁶⁵ According to the ICTJ, the most active NGO in this field:

“Despite the efforts of military judges to remedy the shortcomings of domestic law and increase protections for parties, the existing jurisprudence remains fragmented, inconsistent and, in turn, unpredictable for those brought before Congolese courts” (ICTJ 2015, 8).

Aside from these purely legal difficulties, there are serious concerns about the fair trial rights of Congolese defendants. Prolonged pre-trial detention without charge is systemic, including in cases relating to international crimes (Horowitz 2012, 45-47). Many domestic trials have taken just days or weeks to complete, which is hard to square with the factual and legal complexity of international crimes prosecutions. Observers have also drawn attention to problematic interpretations of facts and the low evidentiary standards used by Congolese military tribunals (Avocats Sans Frontières 2009, 6). Wider systemic deficiencies in the Congolese judicial system include politicization of the indictment process, faulty forensic investigations, restricted access to defense counsel, inadequate time for preparing cases, and lack of legal aid for indigent defendants. As explained above, one of the greatest problems is that, despite years of international criticism, military tribunals in the DRC continue to have jurisdiction over civilians in international crimes cases.

A second set of questions relates to the ICC's role in influencing the fight against impunity in the DRC. Some commentators have focused on the raw number of prosecutions to suggest that the ICC has had a beneficial or catalytic effect on national justice efforts (Mattioli and van Woudenberg 2008). While there is little doubt that domestic accountability efforts are attributable to a resurgence of interest in the rule of law and, more broadly, state-building initiatives in the DRC, the link to the ICC, and especially complementarity, is more tenuous. Despite the ICC's lengthy presence in the DRC, interviews with local and international actors

³⁶⁵ However, the new ICC implementation law requires Congolese judges to interpret the Congolese Penal Code's definitions of international crimes in light of the ICC's Elements of Crimes. See Loi no. 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Art. 4 modifiant Art. 224 CP.

suggest that the ICC's organs have played little, if any, role in incentivizing domestic trials.³⁶⁶ To date, the Office of the Prosecutor (OtP) has limited its focus to a few mid- and low-ranking individuals, while leaving the broader work of domestic judicial reform to civil society and international partners.³⁶⁷

Some scholars have gone further and argued that the ICC has actually undermined the Congolese judicial system's efforts to try suspects locally. For instance, Clark (2011) suggests that Ituri province, where the first set of ICC investigations concentrated, had the most developed judicial system in the country and was thus least in need of the ICC's assistance. Others have pointed out that Thomas Lubanga and Germain Katanga were tried and convicted in The Hague at a huge cost, even though the domestic authorities already had cases pending against them (Schabas 2008a). Not only did these international trials arguably undermine domestic judicial efforts, but – equally important – they contradicted the aims of complementarity. It should be recalled that, under Article 17 of the ICC Statute, the Prosecutor does not have legal authority to take cases if a state is already doing so (provided that domestic efforts are genuine), which in turn raises questions about why Lubanga and Katanga were transferred to The Hague in the first place.³⁶⁸

That these are not merely academic complaints about the ICC's approach to complementarity is borne out by recent developments in the DRC. When Katanga invoked complementarity in 2009 to argue that the DRC – not the ICC – should try him, the ICC judges dismissed his challenge. In allowing his trial to proceed in The Hague, the judges relied, *inter alia*, on statements from the Congolese authorities who "...expressly rejected the idea that the DRC could henceforth try Katanga".³⁶⁹ In 2016, after serving his ICC-mandated sentence for war crimes and crimes against humanity, the Congolese authorities brought virtually identical charges against Katanga before the High Military Court in Kinshasa (Labuda 2016a). Invoking the ICC Statute's prohibition of double jeopardy, Katanga asked the ICC judges to prevent his trial in the DRC from going forward. In a twist of irony, the ICC found that Katanga's re-trial in the DRC did not violate the "object and purpose" of the ICC Statute, including its complementarity provisions, and authorized the High Military Court's proceedings.³⁷⁰ Whatever one thinks of the outcome, the Katanga saga – the first convicted

³⁶⁶ Author interviews with ICC officials and Congolese magistrates, The Hague, Netherlands, 23-24 November 2015, Kinshasa, Democratic Republic of Congo, 23, 26 April 2016. See also ICTJ (2015, 23-26) where there is no mention of the ICC's role in supporting domestic prosecutions.

³⁶⁷ It should also be noted that ICC officials sometimes openly state that this is not part of their mandate (McAuliffe 2015, 207-208). Author interview with ICC official, 23 November 2015.

³⁶⁸ It is not possible to explore the procedural history of these two cases in this article. Suffice it to say that the ICC judges analyzed the legal issue of complementarity in the Lubanga and Katanga cases, but allowed both trials to proceed. See ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, February 10, 2006; ICC, *Katanga and Ngudjolo, Situation in the Democratic Republic of Congo*, ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, September 25, 2009. The ICC judges' narrow positivist readings of complementarity in these two cases are not incorrect as a matter of strict legal interpretation, but they raise questions about the goals of complementarity and the ICC (Schabas 2008b, 757-758).

³⁶⁹ ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Trial Chamber II, June 12, 2009 (transcript of oral hearing). The French transcript reads: "...expressément exclu l'idée que la République démocratique du Congo pourrait désormais avoir à juger Germain Katanga".

³⁷⁰ ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision Pursuant to Article 108 (1) of the Rome Statute, April 7, 2016.

person to complete a sentence imposed by the ICC – illustrates the challenges of operationalizing complementarity in the field (Labuda 2016b).

In sum, the ICC's track record in the DRC reveals both the promise and risks of incorporating international criminal law into domestic judicial practice (Human Rights Watch 2011, 11). On the positive side, progressive interpretations of the applicable law in domestic cases have secured accountability for some victims, and the number of prosecutions continues to rise thanks to the efforts of local and international NGOs. At the same time, some domestic trials underscore the challenges of applying international norms at the national level, in particular inadequate legal training in ICL and a lack of infrastructure adapted to lengthy and complex proceedings. The wider resource constraints plaguing the Congolese judicial system and the still undefined contours of complementarity suggest that the relationship between the ICC and domestic actors will continue to throw up both positive and negative examples of international criminal justice in action.

7.3.4 Domestic Capacity

The ICC's wider intervention in the DRC has influenced the Congolese judicial system in other ways as well. Parallel to new legislation and domestic prosecutions, a range of international donors have partnered with domestic actors to strengthen the Congolese authorities' ability to "fight impunity". Key areas of reform include: investigation and prosecution capacity, judicial infrastructure and capacity-building projects, victim and witness protection, penitentiary reform, and legal knowledge transfer.

Over the years, a number of projects have focused on strengthening the investigative and prosecutorial capacity of the Congolese authorities (International Bar Association 2009). In 2009, the UN Joint Human Rights Office (UNJHRO) began deploying Joint Investigative Teams (JIT), which allowed Congolese military magistrates and UN human rights officers to jointly conduct missions to crime sites to interview witnesses and victims (ICTJ 2015). Although JIT missions operate under the command, and will only be deployed at the request, of Congolese magistrates, a large number of joint operations have taken place in the last five years.³⁷¹ Since 2011, MONUSCO has also operated Prosecution Support Cells (PSC), which couple Congolese prosecutors with counterparts seconded from UN member states, primarily from Africa.³⁷² Some concerns persist about the nature and quality of the UN's cooperation with the Congolese military in this area, but PSCs have on the whole helped to strengthen the capacity of local magistrates to investigate and prosecute particularly serious crimes, such as sexual violence and homicide.

Several international actors have been involved in police reform, which has enhanced the National Police Force (PNC)'s ability to investigate serious crimes and arrest suspects. The

³⁷¹ Author interviews with MONUSCO official, 2 September 2015 and Congolese judicial official, 4 September 2015..

³⁷² United Nations Security Council, Resolution S/RES/1925, May 28, 2010, at 12(d). Author interview with MONUSCO official, 25 April 2016.

UN Police have provided training to the PNC since 2002, and the EU operated a police and justice sector reform mission in Kinshasa and Goma between 2005-2014. Meanwhile, the British and German governments have supported more specific interventions in the policing sector, with a focus on sexual and gender-based violence crimes and special investigative units (Human Rights Watch 2004; Witte 2011, 25). Despite these efforts, the entire criminal justice sector – both civilian and military – remains woefully understaffed and there is a shortage of both material resources and expertise in international criminal investigations (Witte 2011, 28).

Several large-scale donor-funded projects have sought to address these gaps. The EU, one of the most active partners to date, began its involvement in the DRC with a project in Ituri focused on restoring the capacity of the local judiciary (2003-2004) (Witte 2001, 51). It then launched three other major judicial reform and capacity-building projects: (1) “Programme d’appui à la Justice” (PAJ, 2003-2006), which supported judicial infrastructure renovation in three provinces; (2) “Programme de Restauration de la Justice à l’Est de la RDC” (REJUSCO, 2007-2010), co-funded with Belgium, the Netherlands, the UK and Sweden, which focused on strengthening judicial capacity and increased public awareness through outreach and monitoring; and (3) the ongoing “Programme d’Appui au Renforcement de la Justice à l’Est de la RDC (PARJ-E or Uhaki Safi, 2009-2016)”, whose aim is to “consolidate the rule of law in the east through fighting impunity”. At the time of writing, the last program was being implemented in Ituri and the Kivus by RCN Justice and Avocats sans Frontières (Uhaki Safi 2016).

The UN has also been heavily involved in judicial capacity-building through both its peacekeeping mission and agencies, in particular the UN Development Program and the UN Joint Human Rights Office (JHRO). Implemented with the support of Belgium, the Netherlands, Sweden and Canada, a large peacebuilding initiative called STAREC (Plan de stabilisation et de restauration des régions affectées par les conflits, 2009), helped, among other things, to build courts and detention centers in several eastern regions. Meanwhile, the UNDP has supported efforts to strengthen the military justice system’s capacity to fight sexual violence crimes (2011-2013) (UNDP 2016) and enhance women’s access to justice (2009-2013). USAID, the American government’s development agency, and Japan have also assisted with office refurbishment, case management and information technology in some provinces of the DRC. Funded by governments and international organizations, many of these projects have been implemented by international NGOs, the most prominent of which are Lawyers Without Borders (ASF), RCN Justice et Democratie, the International Center for Transitional Justice (ICTJ), and the American Bar Association’s Rule of Law Initiative (ABA-ROLI).

Aside from these judicial infrastructure projects, one of the most notable developments in the DRC is the widespread use of mobile courts.³⁷³ With the support of donors (Netherlands, USA, UN, EU), Congolese actors and international NGOs, especially ASF and ABA ROLI, have used mobile courts in several provinces, including the eastern Congo, to prosecute a wide range of offenses (Khan and Wormington 2012). These courts have broad mandates that go beyond international crimes *per se*, but some internationally-funded projects have focused on violations, especially sexual and gender-based crimes, that may also – if other conditions are met – rise to the level of war crimes and crimes against humanity. Although mobile courts present their own set of logistical and financial challenges, hundreds of cases have been dealt with this way over the past several years, even if only a fraction have concerned international crimes *per se*.³⁷⁴

Victim and witness protection has been another site of intervention for international actors, given that the domestic legal framework did not, until recently, provide any national safeguards in this area. MONUSCO has provided witness protection and helped to relocate victims in some of the ICC's Congolese cases, in particular the Lubanga, Katanga/Ngudjolo and Ntaganda trials (Witte 2011). Civil society has been instrumental in this regard, especially with respect to sexual and gender based violence. NGOs such as the Open Society Initiative for Southern Africa (OSISA), ASF and ABA ROLI have all contributed in various ways, from medical and psycho-social support to providing safe houses and transport for witnesses willing to testify in trials. The ICC Statute's recent domestication offers new hope, although it remains to be seen how the new normative framework will translate into operational reality.

Another important area of reform in the Congolese judicial system has been the national penitentiary system (International Bar Association 2009, 23). Neglected for a long time, the international community began paying greater attention to the DRC's prisons after a number of notorious escapes involving individuals convicted of war crimes and crimes against humanity (Witte 2011, 32). The UN's peacekeeping mission provided financial support and training to several prisons as early as 2006, but it was not until 2010 that a dedicated Corrections Advisory Unit within MONUSCO was given the authority to advise and support the Congolese authorities in "all areas pertaining to the management of the penitentiary system" (MONUSCO 2010). Since then, several donor countries, especially the Netherlands, have provided funding to refurbish prison infrastructure, while the UN has continued to assist the Congolese Ministries of Justice and Defense in efforts to establish a comprehensive reform strategy coupled with adequate training for Congolese prison staff (United Nations Department of Peacekeeping Operations 2014, 8). Despite these efforts, penitentiary reform remains the most underfunded aspect of the wider judicial reform project in the DRC.

³⁷³ Mobile courts are authorized under Congolese law. See Art. 45-47, Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire.

³⁷⁴ Eric Witte (2011, 52-53) provides an overview of institutional reform in the DRC.

Lastly, a variety of ICL knowledge-transfer initiatives have taken place in the DRC over the last decade. The UN peacekeeping mission and international NGOs have provided training to both military and civilian magistrates and to criminal defense attorneys. Although the Congolese university system still lacks an ICL curriculum, it has become much easier to acquire information about the ICC's work thanks to publications released by NGOs, in particular ASF, RCN Justice and ABA ROLI. The ICC outreach office has also helped in disseminating information about the Court's work in the DRC. Notwithstanding these efforts, some local actors believe that the international community should move away from training initiatives and devote more financial resources to litigating actual cases.³⁷⁵ Fifteen years after the ICC intervened, a skilled cadre of magistrates and attorneys has emerged but challenges to bringing concrete cases remain mostly logistical and political.

The ICC's role in supporting domestic capacity has been limited thus far. In line with the ICC Prosecutor's reading of complementarity, in particular the notion that the Court should not act as a development agency, the ICC does not intervene in domestic debates on judicial reform. Most activities have been coordinated by local and international NGOs, including Parliamentarians for Global Action, Coalition for the ICC, Human Rights Watch and others. Nonetheless, the OtP has participated in some training activities funded by other partners (Witte 2011, 25-26).

The overall impact of these projects is that the Congolese legal system has undergone significant reform in the last decade, in part due to the international community's generous support and commitment to strengthening the rule of law. Yet the process of transforming the judiciary remains unfinished (AfriMAP. 2013). Although many shortcomings are attributable to the scale of the undertaking, it is clear also that the Congolese political establishment has on various occasions delayed institutional reforms. The most prominent examples are the lengthy process of domesticating the ICC Statute and efforts to shift jurisdiction over international crimes from the military to civilian courts. Establishing specialized mixed chambers to try past crimes failed to gain traction, despite the support – and availability of funds – of various international actors and domestic civil society groups (Witte 2011, 53; Office of the High Commissioner for Human Rights 2010, 480). Adept at choosing which forms of institutional redevelopment to prioritize, there is little doubt that the Congolese government's political calculations have circumscribed the ability of international actors to influence the fight against impunity.

7.3.5 Contextual Factors

It is almost a truism to state that the relationship between the ICC and the Congolese government is complex (Labuda 2016c). On the one hand, the DRC is the ICC's most active

³⁷⁵ Two NGOs are especially active in this area: *Avocats Sans Frontières* and Geneva-based TRIAL (Track Impunity Always).

state party, with thirty-nine indicted suspects but just three convictions, all of them against Congolese nationals.³⁷⁶

Not surprisingly, the ICC has relied heavily on the Congolese authorities' cooperation for evidence in these three cases as well as the ongoing trial of Ntaganda. On the other hand, a glaring impunity gap persists in the DRC for many international crimes that neither the ICC nor the domestic judicial system has investigated (Witte 2011, 37). Though the government is officially committed to the fight against impunity, including a "zero tolerance" policy for grave human rights violations, the reality is that atrocity crimes continue in some parts of the country while justice for past violations remains more an aspiration than a concrete governmental strategy.

Notwithstanding official rhetoric to the contrary, the obstacles to accountability for international crimes in the DRC are mostly political. Three sets of challenges can be identified: (1) vertical cooperation between the ICC and the Congolese government; (2) horizontal "turf wars" between Congolese authorities; and (3) multi-level coordination problems between the Congolese government, international actors and civil society groups.

As regards vertical cooperation, the ICC has, for the most part, expressed satisfaction about its contacts with the Congolese authorities. The Prosecutor's investigations in the DRC have enjoyed the support of President Kabila's government, with unimpeded access to investigation zones and reasonable information-sharing.³⁷⁷ Although there were major challenges with the ICC's cases, especially in the early years, this had more to do with inexperience than bad will. It was unclear initially which Congolese organs were responsible for facilitating the ICC's work in country, and the ICC's own investigations encountered a series of setbacks, primarily with respect to the use of intermediaries and an overreliance on the UN's peacekeeping mission for information (De Vos, 2011 and Melillo 2013, 775). These difficulties have gradually dissipated and the ICC implementation bill should facilitate cooperation further.³⁷⁸

Yet this is only part of the story. Owing to the lack of victim and witness protection mechanisms at the national level, the ICC has repeatedly expressed reservations about sharing information about ongoing investigations with the Congolese authorities.³⁷⁹ By the same token, the Congolese complain that cooperation is a one-way street (Witte 2011, 26). Though understandable from an operational perspective, the ICC's reluctance to share intelligence raises questions about its approach to complementarity. Despite the ICC's official complementarity rhetoric, reports suggest that the Prosecutor has shown little

³⁷⁶ Even if Jean Pierre Bemba's conviction in March 2016 concerned crimes committed in the neighboring Central African Republic, it is an open secret that his trial depended on the Congolese government's cooperation and had significant political repercussions in the DRC (Human Rights Watch 2011, 32). Author interviews with former ICC official, 1 October 2016 and Congolese lawmaker, 19 August 2016.

³⁷⁷ Author interviews with ICC officials, 23-24 November 2015 and Congolese judicial official, 23 April 2016. See also Witte (2011, 41).

³⁷⁸ See Section 3.1 above.

³⁷⁹ Author interviews with ICC official, The Hague, 24 November 2015; Congolese judicial officials; Kinshasa, April 23, 2016.

interest in encouraging domestic prosecutions in the DRC (Kambale 2015, 177; Schabas 2008a). This may finally be changing with recent investigations in North Kivu, but the ICC's prosecutorial strategy in the DRC has consistently prioritized easy mid-level targets who can be quickly transferred to The Hague, regardless of whether the Congolese authorities have the will or capacity to prosecute those individuals at the national level (Clark 2011).

This highly problematic understanding of complementarity is underscored by the type of Congolese defendants targeted by the ICC: Lubanga, Katanga, Ngudjolo, Mbarushimana, Ntaganda and Mudacumura were all rebel leaders, although some had been integrated into the Congolese armed forces as part of the UN's demobilization programs by the time of their arrest. The Congolese government has proved very willing to cooperate in eliminating its military opponents, but this of course raises profound questions about the impartiality and legitimacy of the ICC as an institution (Kambale 2015, 192).

That being said, the Prosecutor's pragmatic approach to case selection has spared the ICC the cooperation dilemmas that it encountered in other situation countries, most notably Kenya. The prospect of a breakdown in cooperation is not unfounded, as illustrated by the case of Ntaganda. A rebel leader reintegrated into the Congolese army, the government for years openly refused to hand Ntaganda over to the ICC, citing his beneficial role to peace and stability in the eastern Congo (Labuda 2016c, 277). It is for these reasons that, despite the calls of human rights groups, the ICC will probably not issue indictments against high-ranking commanders who have the Kabila government's support. With the ICC struggling to gain a foothold in many African states, the cooperative relationship with the Congolese authorities is seen as too high a price to pay.

The second set of contextual challenges to fighting impunity in the DRC lies at the horizontal level, in intra-Congolese politics (Wetsh'okonda 2009, 71; Witte 2011, 38). Contentious by its very nature, the pursuit of international crimes has generated tension and competition within the Congolese political establishment, in particular between the executive, the legislature, and the military. Legislative proposals to domesticate the ICC Statute were ignored for many years or voted down in Parliament for reasons that remain unclear. Two obstacles to domestication were discussed above, namely the military's reluctance to relinquish jurisdiction over international crimes and resistance to abolishing the death penalty (ICTJ 2015, 12). A third obstacle is that some key politicians feared that a strengthened accountability framework would implicate them in the commission of international crimes. The perception that the ICC is a neo-colonial and biased institution played at least some role in slowing down judicial reform.

Domestic politics also loomed large in the Congolese government's attempts to establish mixed chambers to try international crimes pre-dating the ICC Statute's entry into force. The ICC can only investigate crimes committed after July 2002, which excludes the vast majority of violations committed during the First and Second Congo Wars (1996-2003). Although the idea of a special *ad hoc* tribunal for the DRC goes as far back as 2003, it was not until the UN

published the Mapping Report in 2010 that concrete legislative action to establish an accountability mechanism materialized.³⁸⁰ In the end, despite several years of negotiations between local and international actors, the Congolese legislature twice rejected the executive's proposals to establish specialized chambers for past crimes (Labuda 2015, 409; ICTJ 2015, 13). Here too the reasons for failure are somewhat unclear, but it is likely that the prospect of accountability for the widespread and systematic crimes committed prior to 2002 generated even stiffer resistance within the Congolese political and military establishment than the ICC implementation law's prospective reforms.³⁸¹ Serious coordination problems between legislative drafts of the ICC implementation law and drafts of the specialized chamber's legislation also undermined efforts to pass these laws (Witte 2011, 50).

Coordination of international and domestic efforts is the third broader challenge to fighting impunity in the DRC. Although the ICC's intervention has triggered a range of direct and indirect reforms in the national judicial system, cooperation between the Congolese authorities, international actors and domestic civil society groups continues to face serious difficulties (Witte, 2011, 47). Various international actors often intervene in the same areas of the judicial sector, which rarely leads to an effective division of labor and more often than not produces unhelpful competition between potential partners. To give but one prominent example, sexual violence has received disproportionate attention to the exclusion of other issues, leading to overlapping mandates and wasted resources.³⁸² In addition, the Congolese government has struggled to set out a clear set of priorities which would enable effective partnerships on international crimes. Though numerous action plans and coordination groups have been launched and re-launched over the years, there is still much room for improvement in terms of cooperation on domestic judicial reform and strengthening the rule of law (AfriMAP 2013, 139).

7.4 Conclusion

Although its intervention is ongoing, it is not too early to reach certain tentative conclusions about the ICC's impact in the DRC. In light of a broad understanding of complementarity (see section 2), it is possible to say that the ICC has contributed to normative, procedural and judicial reform and thereby strengthened the rule of law in the DRC. It took nearly fifteen years, but the ICC Statute was incorporated into the domestic legal system in 2016, and with it a slew of procedural and normative reforms to the investigation, prosecution and adjudication of international crimes. Some aspects of the ICC implementation law will surely be challenged by human rights groups in the coming years, especially the death penalty's expanded applicability, but the reform process seems well underway and the ICC can take some credit for that.

³⁸⁰ For a discussion of earlier proposals, see Kambale (2015).

³⁸¹ Author interview with Congolese activists, 22 April 2016.

³⁸² Author notes, Comité mixte de Justice, Congolese Ministry of Justice, 29 September 2010.

Though the implementation law is probably the most symbolic example of the ICC's impact at the national level, it is important to remember that many of the law's wider aims have been integrated into domestic judicial practice – in a gradual and piecemeal manner over the past fifteen years – through the efforts of civil society groups and international donors. This last point brings us to the ICC's, and specifically the Prosecutor's, impact in the DRC. My research suggests that the ICC has had very little direct role in triggering judicial reform and, more importantly, encouraging domestic prosecutions. Despite the ICC's professed attachment to complementarity, including its iteration of so-called "positive complementarity", there is little reason to believe that the Prosecutor has encouraged or assisted the Congolese authorities in prosecuting international crimes.³⁸³ There has been a noticeable rise in the rate of international crimes trials at the national level, but this is attributable exclusively to the efforts of civil society groups, international donors and the UN peacekeeping mission.

The pre-eminent role of civil society organizations in incentivizing judicial reform is laudable, and the DRC epitomizes the breadth of their impact. Yet it has limitations and unintended consequences. NGOs and donor agencies do not wield the same "hard power" that governments and international organizations do. Specifically, they have little capacity to engage with the Congolese government on the most contentious, high-profile cases, as was amply demonstrated by the shortcomings of the 2013-2014 Minova rape trial (Human Rights Watch 2015). The ICC must play a more active role in precisely these kinds of trials, where the threat of indictments against senior commanders can disrupt the entrenched interests of the Congolese political and military establishment.

Paradoxically, the mediation of complementarity through civil society and human rights activists may also contribute to a distortion of the wider goals of transitional justice. In the DRC, civil society groups have thus far prioritized criminal accountability to the exclusion of other forms of justice, especially reparative and truth-seeking mechanisms.³⁸⁴ Reading complementarity as imposing a duty to domesticate the ICC Statute's crimes and a concomitant duty on national authorities to prosecute all international crimes is defensible as a matter of human rights advocacy, but it comes at a price. Resources have been made available for international crimes and sexual violence, but not for the wider aims of reparative justice and truth-seeking, to say nothing of global justice and the socio-economic rights of Congolese victims. For the time being, this broader human rights agenda remains the unfulfilled promise of judicial reform and the rule of law in the DRC.

³⁸³ This is confirmed indirectly in ICTJ *et al.* (2015, 23-26). In this sense, *see also* Horowitz (2012, 5).

³⁸⁴ The same point is made by Pascal Kambale (2015).

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8 Catalyzing Effects Of Complementarity In South Sudan

David K. Deng

8.1 Introduction

The onset of large-scale violence in South Sudan in December 2013 has prompted a discussion about the role that impunity plays in driving conflict in the country. Past peace processes in South Sudan have repeatedly failed to address accountability for human rights violations as a component of sustainable peace. Instead, peace talks have typically been initiated with blanket amnesties and promises of political and military appointments for rebelling forces.³⁸⁵ This approach has been criticized for creating a marketplace for insurrection, in that leaders view violence and rebellion as a legitimate negotiating tool to pursue their political ambitions (Justice and Security Programme 2015). The lack of viable justice options also prompts communities to take matters into their own hands and pursue revenge attacks against their perceived opponents both in retribution for harm that has been done to them and as a way to deter future attacks against their communities. Because impunity is the norm, those who engage in revenge attacks can safely assume that they will not be held criminally liable for their actions.

In August 2015, the two warring parties in South Sudan — the Government of the Republic of South Sudan and the Sudan People’s Liberation Movement-in-Opposition (SPLM-IO) — signed the Agreement to Resolve the Crisis in South Sudan (ARCISS). The ARCISS represents an effort to break with past practice in peace processes, at least in so far as it relates to justice and accountability. Chapter V of the agreement lays out a comprehensive program for combating impunity and addressing the legacies of past human rights abuses. Among the institutions provided for in Chapter V is a Hybrid Court for South Sudan (HCSS), which would be responsible for bringing cases against individuals responsible for violations of international human rights and humanitarian law since December 2013.

The provision of a hybrid court such as the HCSS in the context of a peace agreement is not just new for South Sudan, but exceedingly rare internationally as well. Other hybrid courts have been established through bilateral agreement with the United Nations and through legislation at the national level, but to form such an accountability mechanism through a peace process that is driven by the very same people who would likely face prosecution in

³⁸⁵ While the 2005 Comprehensive Peace Agreement (CPA) did not involve an explicit amnesty, it is widely understood that the two negotiating parties – the Government of Sudan and the Sudan People’s Liberation Movement and Army (SPLM/A) – agreed that neither would promote criminal accountability for wartime grievances. Numerous peace processes in South Sudan since that time have provided explicit amnesties to perpetrators of human rights abuses.

the court is virtually unheard of.³⁸⁶ Typically, in mediation efforts such as these, negotiations revolve around the question of whether or not the agreement would incorporate an amnesty for crimes committed during the conflict and how to divide national wealth and power among the warring factions. For the Government and the SPLM-IO to commit to such an accountability mechanism in the peace agreement begs the question: Why take this step now to pursue justice and accountability? And what are the prospects for genuinely investigating and prosecuting international crimes in the South Sudanese context?

This paper examines these questions with reference to the complementary jurisdiction of the International Criminal Court (ICC). While South Sudan is not a state party to the Rome Statute, the ICC could conceivably have jurisdiction over international crimes committed in South Sudan through a referral by the United Nations Security Council (UNSC) under Article 13. As this paper argues, the complementarity jurisdiction of the ICC, among other factors, likely played a role in prompting the warring parties to commit to the HCSS and other mechanisms for justice and accountability. In this sense, the notion of positive complementarity, or an affirmative duty to prosecute or punish international crimes at the national level, coupled with fears of the costs to sovereignty and reputation that an ICC referral would have, may have catalyzed efforts to investigate and prosecute those responsible for atrocities at the national level.

But to what extent does the HCSS itself represent a threat to the very idea of the ICC as the main international mechanism for holding accountable those who bear most responsibility for international crimes? On the one hand, the HCSS could be seen as a national initiative that recognizes South Sudan's primary right to investigate and prosecute international crimes that arise in its territory. From this perspective, Article 17 of the Rome Statute would render any case brought in the HCSS inadmissible at the ICC. On the other hand, the HCSS could be seen as a competing international justice mechanism that provides opportunities for the state in South Sudan (and the broader African region) to cordon off the conflict from the scrutiny of the ICC. The establishment of the HCSS could thus complicate efforts to assess the admissibility of cases from South Sudan at the ICC.

The paper also examines other accountability mechanisms and rule of law initiatives in South Sudan, such as investigations and prosecutions at the national level, the recent tabling of an international crimes bill in the National Legislative Assembly, and the possibility of using customary (or traditional) justice mechanisms to hold perpetrators of international crimes accountable. To the extent that initiatives such as these would be able to fulfill any state duty to prosecute and punish those responsible for violations, they could provide a critical

³⁸⁶ The ongoing negotiations between the government and Farc in Colombia include an accountability mechanism that would involve both national and international judges, but the author is not aware of any other peace process that has provided for such a mechanism. See Colombia Peace, English Summary of the September 23 Government-FARC Communiqué on the Transitional Justice Accord (23 Sep. 2015), available at <http://colombiapeace.org/2015/09/23/english-summary-of-the-september-23-government-farc-communicue-on-the-transitional-justice-accord/>.

means of extending accountability beyond the relatively small number of cases that could be brought at the HCSS or the ICC.

8.2 Overview of the Conflict and the IGAD Peace Process

Since December 2013, South Sudan has been embroiled in a brutal civil conflict. Fighting has displaced over 2.33 million people, including 1.61 million internally displaced persons (IDPs) and another 728,000 that have sought refuge in other countries. More than 4.8 million people face emergency or crisis levels of food insecurity. (World Food Programme 2016) The two warring parties — the Government of the Republic of South Sudan (GRSS) and the Sudan People’s Liberation Movement-in-Opposition (SPLM-IO) — have both been accused of carrying out acts of brutality against the civilian population, including mass killings, rape, sexual mutilation, sexual slavery, torture, enforced disappearances and recruitment of child soldiers. (AUCISS 2014; Amnesty International 2014; Human Rights Watch 2014; Human Rights Watch 2015; Panel of Experts 2015; UNMISS 2014a, 2014b, 2015.)

Shortly after the outbreak of violence, the Intergovernmental Authority for Development (IGAD) initiated a mediation effort in order to secure a ceasefire and political settlement to the crisis. After more than 20 months of on-again, off-again negotiations, the warring parties finally signed the ARCISS in August 2015. (IGAD 2015) The ARCISS lays out the terms of a Transitional Government of National Unity (TGONU) that would be responsible for implementing an ambitious post-conflict stabilization and reform agenda. Over the course of a 30-month transitional period, the TGONU is expected to secure a permanent ceasefire, establish law and order, ensure humanitarian support for conflict-affected populations, facilitate the return or resettlement of displaced populations, organize national elections, develop a new constitution and enact comprehensive reforms across a range of governance sectors.

Chapter V of the agreement, entitled “Transitional Justice, Accountability, Reconciliation and Healing,” outlines the parties’ plans for addressing the legacy of violence and culture of impunity in South Sudan. Among the proposed institutions is the HCSS, which would be responsible for bringing cases against “individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period.” The court would be comprised of a mixture of judges, prosecutors, defense counsel and other personnel from South Sudan and other African states. The ARCISS tasks the African Union (AU) Commission with responsibility for developing guidelines about the structure and functions of the HCSS, and the court would be established through legislation at the national level. Unlike the ICC, which operates under the principle of complementarity, the HCSS would have primacy over national courts in South Sudan. In other words, the HCSS would be empowered to oblige courts in South Sudan to defer to its jurisdiction, irrespective of whether national courts show a genuine willingness and ability to bring cases against those responsible for international crimes.

In April 2016, after many months of delay, Dr. Riek Machar Teny, the leader of the SPLM-IO, returned to Juba and the TGONU was officially launched. Nonetheless, implementation of the ARCISS continues to falter, particularly with regard to the all important security arrangements under which the rival forces were to be designated cantonment areas pending integration of the rival forces. In July 2016, on the eve of South Sudan's fifth anniversary of independence, large-scale fighting between the GRSS and SPLM-IO erupted in Juba resulting in the death of hundreds of people and displacing tens of thousands.³⁸⁷ At this writing, Machar has fled Juba and the prospects for the ARCISS remain in the balance.

8.3 National Demand for Justice and Accountability

Although the main priority of the peace process thus far has been placed on securing a durable ceasefire, protecting civilians and facilitating humanitarian assistance for conflict-affected populations, these short-term priorities coexist alongside a growing demand for justice and accountability and other longer-term reforms. Recent research has shed new light on the extent to which South Sudanese support efforts to hold accountable those responsible for conflict-related abuses. In 2014-15, the South Sudan Law Society (SSLS) carried out a series of surveys in partnership with various international partners to assess perceptions of truth, justice, reconciliation and healing, and to determine South Sudanese priorities for transitional justice and national reconciliation in light of the conflict. The surveys targeted a combined total of 4,925 individuals in 15 locations across South Sudan. (Deng *et al.* 2015a, 2015b; Willems and Deng 2016) Survey data demonstrates widespread support for the criminal prosecution of individuals responsible for conflict-related abuses. For example, in response to an open question about what should be done with people suspected of committing abuses, 66 percent of respondents (n = 1,525) in one of the surveys said they should face trial or tribunal. When asked directly in a closed question whether people suspected of abuses should be prosecuted in courts of law, 93 percent of respondents (n = 1,525) said, 'yes.'

The survey data also found considerable opposition to the idea of amnesties. Fifty-nine percent of respondents (n = 1,525) in one of the surveys said that people responsible for abuses should not be granted amnesty. Interestingly, this opposition to amnesties remained pronounced despite the potential effect that it could have in terms of prolonging the conflict. Forty-eight percent of respondents who opposed amnesties said they would not support amnesty even if it were necessary for peace. The emphasis respondents placed on justice and accountability suggests that many South Sudanese no longer view the blanket amnesties and political rewards commonly offered to entice potential spoilers into the fold as legitimate tools to resolve the current crisis.

³⁸⁷ In the weeks before the fighting in Juba, large-scale violence erupted in Wau, a town that until then had not experienced fighting on this scale in the conflict.

Despite the support for criminal prosecutions, low levels of awareness about the peace process and the justice and accountability provisions of the ARCISS present formidable obstacles to the development of a South Sudanese-owned process of transitional justice. As the agreement was being negotiated 41 percent of respondents (n = 1,525) said that they were not aware of the IGAD-led peace process, including 64 percent of female respondents. In another survey conducted in October and November 2015, just weeks after the signing of the agreement, 25 percent of respondents in Wau (n = 493) and 15 percent of respondents in Juba (n = 485) said that they were not even aware that a peace agreement had been signed.³⁸⁸ Seventy percent of respondents in Juba and Wau said that they had never heard of the HCSS.

8.4 Complementarity under the Rome Statute

The principle of complementarity recognizes that states have the primary right to exercise jurisdiction over international crimes. The Rome Statute envisages the ICC as a court of last resort in cases where states do not investigate or prosecute the crimes or conduct investigations or prosecutions that do not demonstrate a genuine willingness or ability to hold suspected perpetrators accountable. The substance of the rule is provided for in Art. 17 of the Rome Statute:

- (a) Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
 - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
 - (d) The case is not of sufficient gravity to justify further action by the Court.

- (b) In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

³⁸⁸ Women were twice as likely (19 percent) to say that they were unaware that a peace agreement had been signed than men (eight percent). (Deng and Willems 2016a).

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

(c) In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Art. 17 can be read together with Art. 20(3), which provides additional clarification on the meaning of a genuine inability or unwillingness to investigate or prosecute:

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

1. Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
2. Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Complementarity is case-specific, meaning that it is assessed on a case-by-case basis. As such, analyzing the implications in a context where the ICC has not identified a particular case that it is investigating renders the discussion somewhat academic. Nevertheless, the possibility of an ICC referral may influence decisions made by warring parties and the brokers of a peace agreement.

8.5 Catalyzing Effects of Complementarity

Since the conflict erupted in December 2013, the Government of South Sudan has made several efforts to investigate abuses committed during the conflict. In February 2014, just a few months after the conflict erupted, President Kiir established a human rights investigation committee by presidential decree. The committee was chaired by former chief justice of the Supreme Court, John Wol Makec, and had the mandate to investigate allegations of targeted killings and human rights violations that occurred across the country

as a result of fighting between GRSS and SPLM-IO forces. A member of the committee reported in February 2015 that it had already submitted a confidential report to the Office of the President, but to date, no follow up action to bring cases against those responsible for violations has been reported. (Radio Tamazuj 2015a) More recently, the President formed a committee led by Riek Gai Kok, the Minister of Health, to investigate violence that erupted in Wau in June 2016. (Sudan Tribune 2016) Other investigations have been carried out by the Human Rights Commission, the police and the military, but aside from a 13-page report that the Human Rights Commission issued in March 2014, no information from these investigations has been made public.³⁸⁹

While these investigations potentially provide a source of information for future efforts at accountability, they are unlikely to constitute a genuine attempt to investigate violations that would meet the threshold for inadmissibility under the Rome Statute. Firstly, investigations in the meaning of the Rome Statute must have the potential to be followed by prosecutions, and commissions of inquiry or investigation committees such as those mentioned above would not qualify as they are not empowered to initiate prosecutions themselves and would only be able to recommend that other bodies further investigate with a view to prosecuting. (Nouwen 2013, 60) Furthermore, the investigations did not in fact lead to prosecutions. Given the lack of transparency that characterized the investigations, it is not possible to determine whether a decision was made not to prosecute despite evidence of criminal activity or whether there is some other reason for why no action was taken against those responsible for abuses, but in either case, these efforts would not be sufficient to render the cases inadmissible at the ICC.

Early in the conflict, the Government of South Sudan also made an effort to prosecute a number of military personnel, supposedly for crimes committed in Juba at the start of the conflict. Media reports put the number of individuals arrested at anywhere from a dozen to more than 100. (Catholic Radio Network 2014) The process by which the cases were brought was not made public, and it is not clear whether the individuals were prosecuted for serious crimes such as murder or rape. Since South Sudan has not domesticated international crimes into its national legal framework, the individuals could not have been charged with war crimes, crimes against humanity or genocide. Nonetheless, the Rome Statute does not require that cases be brought as international crimes to meet the inadmissibility threshold of the Rome Statute. However, the point soon became moot as all the individuals who were arrested escaped in March 2014 during an outbreak of fighting among soldiers at the military prison where they were being detained. As such, these prosecutions would not suffice to render the cases inadmissible at the ICC. More recently, according to media reports, two soldiers were publicly executed by firing squad for abuses committed during the fighting in Wau in June 2016. (Radio Tamzuj 2016) Again, little information about the crimes

³⁸⁹ The 13-page report is largely based on secondary sources in Juba as monitors were unable to conduct field visits to Jonglei, Unity or Upper Nile. (Amnesty International 2014, 47).

that they allegedly committed or the process that was used to adjudicate their guilt is publicly available.

In addition to formal criminal justice processes, another option for the Government is to bring cases against people responsible for international crimes in customary courts. South Sudan has a plural justice system comprised of parallel systems of statutory courts administered by legal professionals and customary courts administered by chiefs and other traditional authorities. Whereas statutory courts are found mainly in urban areas, customary courts are present throughout the country. Customary courts are generally more accessible geographically, culturally and in terms of cost than statutory courts, and it is sometimes estimated that 90 percent of all civil and criminal cases are brought in customary courts. (Jok and Leitch 2004)

While it may be tempting to provide a role for customary courts in promoting justice and accountability with regard to violations of international human rights and humanitarian law, any such effort would have to overcome a number of obstacles. Decades of large-scale conflict have undermined the power and influence of traditional authorities, and chiefs typically find it very difficult to enforce their decisions against individuals with political or military authority. The nature of the conflict is also such that typical remedies under customary law would be very difficult to administer. For example, a typical remedy for murder under customary law is for the perpetrator and his or her family to provide the family of the deceased with a predetermined number of cattle to compensate them for their loss. In situations of large-scale conflict, however, it is often difficult to determine who killed whom. In some cases, communities have provided collective compensation to one another for killings that occurred in the context of large-scale inter-communal conflict, but such compensation awards would likely be difficult to negotiate for professional forces comprised of individuals from many different communities that are not located in the same region. There may also be concerns that compensation awards do not sufficiently punish perpetrators for the most egregious offenses, such as the offenses against women, children and the elderly that have characterized the conflict in South Sudan.

The weakness of existing justice mechanisms, whether statutory or customary, is reflected in recent survey data from the SSLs. In a survey targeting individuals in the UNMISS protection of civilian (POC) site in Malakal, 58 percent of respondents (n = 1,198) say that it would not be possible for statutory courts to hold perpetrators of conflict-related abuses accountable and 69 percent say that it would not be possible for customary courts to hold perpetrators accountable. (Deng *et al.* 2105b)

While the purely national efforts to promote justice and accountability that are currently available in South Sudan are unlikely to meet the threshold of inadmissibility under Article 17 of the Rome Statute, that does not mean that they could not serve as part of a broader effort in coordination with a more internationalized accountability mechanism. Survey data shows very high levels of victimization in South Sudan, with more than half (52%) of

respondents (n = 1,912) in one survey saying that they had been victimized in the past by an armed group or military actor in the context of conflict; the vast majority of abuses occurred since December 2013. (Deng and Willems 2016b) Given the scale of the atrocities committed during the conflict, existing mechanisms would provide an important means of extending accountability beyond what would be possible in the HCSS or the ICC.

South Sudan has begun making some progress towards a more systematic approach to international crime prosecutions at the national level. In September 2015, the Ministry of Justice tabled legislation in the National Legislative Assembly that would incorporate war crimes, crimes against humanity and genocide into the penal code. (Catholic Radio Network 2015; Radio Tamazuj 2015b) Despite concerns that civil society organizations have voiced about the text of the proposed amendment, and the fact that the legislation would not apply retroactively, the promulgation of the legislation may nonetheless signify a growing interest in prosecuting and punishing perpetrators of international crimes at the national level in South Sudan.³⁹⁰ Furthermore, as noted above, South Sudan would not need to prosecute cases as international crimes in order to meet the threshold of inadmissibility under the Rome Statute. If it were to prosecute individuals for serious crimes, such as murder and rape under the penal code, it could theoretically demonstrate a genuine willingness and ability to investigate and prosecute the crimes committed during the conflict that would render a case inadmissible at the ICC.

8.6 Implications for Design of the Hybrid Court

To a certain extent, the fact that the warring parties and the IGAD mediation agreed to establish the HCSS could be linked to their fears of an ICC referral. The situation in South Sudan is not like that in Uganda, DRC or other countries that have referred cases arising in their territories to the ICC of their own volition. To the contrary, the situation in South Sudan is more appropriately compared to Libya or Sudan, where any referral of cases would likely have to be made by the UNSC. The reluctance of the Government of South Sudan to involve the ICC reflects the perceived costs that an ICC referral would have for the country, both in terms of its implications for South Sudan's sovereignty as well as its reputational costs. Similarly, at the regional level, support for the HCSS among member states of IGAD and the AU likely reflects a desire to close this space off from the ICC due to a perception that the ICC is unfairly targeting African leaders and to show that the AU's slogan of 'African solutions for African problems' can work in practice. Similar reasoning may account for the speed with which the AU established a commission of inquiry to investigate violations of international human rights and humanitarian law in South Sudan.

The provision for the HCSS in the ARCISS can thus be viewed as a reaction to the complementarity principle of the Rome Statute. Even if a UNSC referral is unlikely in the

³⁹⁰ See South Sudan Joint Open Letter to the National Legislative Assembly on the Penal Code (Amendment) Bill 2016 (1 Feb. 2016), available at <https://www.amnesty.org/en/documents/afr65/3365/2016/en/>.

current political dispensation (due to the AU's staunch opposition to the ICC and the likelihood of a Chinese or Russian veto so long as the referral does not enjoy the support of the AU), among populations in South Sudan the ICC is seen as a real possibility, and perhaps even a desirable one. Indeed, 82 percent of respondents (n = 1,198) in one of the surveys referred to above support the involvement of the ICC to hold accountable perpetrators of conflict-related abuses in South Sudan. (Deng *et al.* 2015b)

However, the extent to which the HCSS can be viewed as a national effort to investigate and prosecute international crimes would depend on a series of design questions that revolve around the balance between the national and international components of the hybrid court. On the one end of the spectrum lies the Special Court for Sierra Leone (SCSL). Although the SCSL is often hailed as a successful effort to tackle impunity in the wake of what at the time was one of the world's most devastating conflicts, it is also criticized for failing to deliver on the promise of leaving a lasting legacy on the national justice system in Sierra Leone. The SCSL was effectively "grafted" onto the domestic justice system in Sierra Leone, offences were not prosecuted by the SCSL in the name of the Republic of Sierra Leone, and the court staff were predominantly international.³⁹¹

On the other end of the spectrum are accountability mechanisms such as the International Commission against Impunity in Guatemala (CICIG). The CICIG was formed in 2007 specifically to support the Public Prosecutor's Office in bringing cases against illegal security groups and clandestine security organizations that are responsible for human rights violations and abuses in Guatemala. The CICIG's mandate permits it to carry out independent investigations, to act as a complementary prosecutor and to recommend public policies to help fight the criminal groups that are the subject of its investigations. Unlike the SCSL, the CICIG operates under Guatemalan law and works alongside the Guatemalan justice system. (Washington Office on Latin America 2015) According to the report on the CICIG by the Washington Office for Latin America:

"The CICIG has passed and implemented important legislative reforms; provided fundamental tools for the investigation and prosecution of organized crime that the country had previously lacked; and removed public officials that had been colluding with criminal and corrupt organizations. Through emblematic cases, the Commission has demonstrated that with the necessary political and technical support, the Guatemalan justice system can investigate complex cases and bring to justice actors once considered untouchable."

³⁹¹ William Burke-White, *A Community of Courts: Towards a System of International Criminal Law Enforcement*, Michigan Journal of International Law 1-101, at 3 (2002), cited in Sarah Nouwen, *Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts*, Legal Studies Research Paper Series, University of Cambridge (Oct. 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991109. The SCSL was first formed through a bilateral agreement between the UN and the Government of Sierra Leone and later ratified into national law. The act ratifying the agreement states, "[t]he Special Court shall not form part of the Judiciary of Sierra Leone." Special Court Agreement, 2002, (Ratification) Act, 2002, § 13, available at <http://www.rscsl.org/Documents/SCSL-ratificationact.pdf>.

The Bosnian War Crimes panel provides another variation on the hybrid court model designed to maximize local ownership and legacy. The Bosnian War Crimes Chamber was established in the criminal division of the State Court of Bosnia and is comprised of a mixture of national and international staff. Over time, the international participation will phase out leaving a permanent court entirely comprised of national staff. Since starting its work in 2005, the War Crimes Chamber has completed over 200 cases involving serious violations of international law.

The Government of South Sudan, SPLM-IO and the AU have not yet discussed the specific design questions surrounding the establishment of the HCSS, but it is apparent from the ARCISS that the AU would be responsible for making decisions about “the location of the HCSS, its infrastructure, funding mechanisms, enforcement mechanism, the applicable jurisprudence, number and composition of judges, privileges and immunities of Court personnel or any other related matters.” (IGAD 2015, Ch. V, § 3.1.2) Indeed, some are already speculating that the AU would like to establish the HCSS on the premises of the African Court of Justice in Arusha, Tanzania.

The extent to which the HCSS is seen as an initiative of the TGONU in partnership with the AU and other international actors, as opposed to a more internationalized regional initiative, will be relevant to both the legacy that it would leave in South Sudan’s justice system as well as its position in the complementarity framework of the Rome Statute. An AU court that is based in Tanzania and comprised of mostly non-South Sudanese African personnel would do less to build capacity and strengthen the South Sudanese justice system than a court based in Juba with robust involvement of national actors. The more internationalized model might also give rise to more complicated scenarios when it comes to assessing the complementary jurisdiction of the ICC.

There may be a risk that the Sudanese Government and SPLM-IO, and perhaps even their allies in IGAD and the AU, will view the HCSS as a means of obscuring admissibility at the ICC without having to genuinely investigate and prosecute international crimes. To the extent that the real obstacles to national efforts to investigate and prosecute do not result from the absence of courts, laws or capacity, but rather result from the subordination of the state to patronage institutions, the mere provision of support from an internationalized mechanism may not be sufficient to overcome the political obstacles to justice and accountability in the South Sudanese context. Indeed, Alex De Waal argues that the essence of governance in South Sudan is a “political marketplace” founded on military-political patronage networks, kleptocracy, and the use of violence as a bargaining tool. (De Waal 2014) To the extent that the realities of this system dictate government policy and practice, the costs of challenging the system by holding to account the senior political and military figures that are thought to be responsible for international crimes may outweigh the benefit of engaging genuinely with the HCSS.

8.7 Conclusion

Local demand for justice and accountability arise from a variety of factors. A new political dispensation that finds value in holding accountable those responsible for violations, a scale of atrocities that shock the conscience and developments on the international level can all reinvigorate calls for accountability and galvanize action. In the South Sudanese context, holding people responsible for international crimes criminally accountable has surfaced in discussions about what is needed for sustainable peace for the first time. The question is not whether people want justice and accountability and whether they see it as a priority in the short- to medium-term; they clearly do. Rather, questions now revolve around the feasibility of such an effort in the South Sudanese context and the implications for the broader conflict.

While the idea of the ICC asserting jurisdiction over atrocities committed in South Sudan may seem far-fetched, assessing the admissibility of cases at the ICC is not a purely academic exercise. The apparent unwillingness of the parties to implement the ARCISS in good faith and the rhetoric that South Sudanese politicians have deployed against neighboring countries, bilateral partners, IGAD, the AU and the UN has generated a certain amount of resentment among South Sudan's international partners. If the conflict continues to jeopardize their interests and the lives of their nationals in South Sudan, it is not inconceivable that they could increasingly come to view an ICC referral as a desirable outcome in a context where the international community is running out of sticks to incentivize a change in attitude among the leadership of the warring parties.

Even if an ICC referral never materializes, the principle of complementarity is able to catalyze a response from national actors. If complementarity is viewed as nothing more than a rule of admissibility, the state in South Sudan would be incentivized to act only insofar as it views an ICC referral to be a practical possibility. The cost-benefit analysis for the state would therefore have to weigh the costs of action, particularly in terms of how it affects power relationships and loyalties at the national level, against the costs of a referral in relation to sovereignty and reputation, if it were to take place. If, on the other hand, complementarity were viewed as conferring a positive obligation on the state to investigate genuinely and prosecute those responsible for international crimes, it could catalyze a range of measures, including the incorporation of international crimes into the national legal framework, investigations and prosecutions at the national level, and efforts to involve customary justice mechanisms in the nation's response to atrocities. Indeed, there is some indication that the Government of South Sudan intends to proceed with some of these initiatives moving forward.

Perhaps the most notable reaction to the catalyst of complementarity is the inclusion of the HCSS in the recently signed peace agreement. The acceptance of a hybrid court is no doubt a product of various calculations among the warring parties, in addition to their lack of experience with international justice and a possible underestimation of the significance of

committing to the establishment of such a court. While both warring parties have made public statements to the effect that they will turn over anyone who is suspected of responsibility for international crimes to the HCSS, it remains to be seen how much political will there actually is to submit senior political and military figures to criminal accountability.

As this paper argues, the principle of complementarity in the Rome Statute was likely among the factors that influenced the warring parties to agree to establish the HCSS. Whether the parties simply view the HCSS as a means of heading off an ICC referral or whether they recognize an affirmative duty to investigate and prosecute international crimes is immaterial. Politics, whether at the national, regional or international level, will ultimately dictate whether they engage seriously with the HCSS moving forward.

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9 The Prospects For Regional And Sub Regional Complementarity In Africa

Mia Swart

9.1 Introduction

The International Criminal Court (ICC) moved into its new permanent building in The Hague in December 2015. In marking the occasion, some have commented that the permanent premises indicate that the Court is here to stay. The Coalition for the International Criminal Court (CICC) stated:

“The opening of the permanent premises of the International Criminal Court...sends a clear message to the world that international criminal justice is here to stay despite past and continuing challenges to its authority” (CICC 2016).

For some, the permanence of the physical structure reinforced the idea that the ICC would be permanent.

This idea of permanence failed to resonate with many who have become disillusioned with the ICC. The Court has been riddled with problems from the start, but its reception and performance over recent years has created grave concern, not only about the future success of the Court, but also about its very survival. After the withdrawal of the Kenyatta case in 2014³⁹² and the Ruto case in 2016,³⁹³ it seems that the ICC faces a crisis of legitimacy (BBC 2016). Over the last decade the support of African states for the ICC has withered, not helped by the fact that, at the time of writing, all the accused before the ICC were from Africa. It should have been expected that this practice of the ICC would elicit accusations of neo-colonialism (Swart 2015, Halakhe 2014).

The disappointing track record of the ICC and the current reality of lack of cooperation of African states as witnessed in the Kenyan cases and the South African Al Bashir debacle (de Wet 2015) raises the question of the need for alternative fora to prosecute international crimes. It will be argued here that the ICC, even if strong and successful, cannot shoulder the burden of being the sole, or even the main, institution to prosecute international crimes.

³⁹² See International Criminal Court, *Kenyatta*, ICC-01/09-02/11-1005, Trial Chamber, and Decision on the withdrawal of charges against Mr. Kenyatta, March 13, 2015 (available at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-1005>).

³⁹³ In a decision issued on Tuesday, April 5, 2016, Presiding Judge Chile Eboe-Osuji and Judge Robert Fremr terminated the case against William Ruto and his co-accused Joshua Arap Sang, and vacated the three charges of crime against humanity for which they were on trial because the prosecution's case had broken down and the evidence was too weak. See International Justice Monitor available at <http://www.ijmonitor.org/2016/04/why-icc-judges-did-not-acquit-ruto-and-sang/>.

Although the ICC was never intended to be the sole forum for such prosecutions, the current problems it faces and the slow pace of justice meted out by the ICC (Whiting 2009, 325) provide a compelling argument to investigate the possibilities of regional and sub-regional courts prosecuting international crimes.

The relationship between the African Union (AU) and the ICC soured following a bitter dispute around head of state immunity, a dispute that will not be recounted here.³⁹⁴ Clearly, the relationship between Africa and the ICC is of crucial importance to the legitimacy of the Court, but there may be a need to identify what avenues exist for states to fight impunity outside the framework of the ICC. One potentially powerful alternative would be prosecuting those accused of international crimes in domestic courts. This is not an avenue that has often been pursued in Africa, although recent developments offer a flicker of hope in this regard as can be seen in the recently decided Hissene Habré case, delivered in the Extraordinary African Chambers of Senegal.³⁹⁵ The focus of this article is on *regional* prosecutions.

It is increasingly evident that regional, sub-regional and national courts have an equally important role to play in prosecuting international crimes. This chapter will argue that regional courts can be just as important as national courts in prosecuting international crimes, and that the definition of complementarity in the Rome Statute should be extended to include prosecution by regional and sub-regional courts. The idea that sub-regional courts can play a role in prosecuting international crimes has not received adequate academic attention. It will be argued that once one accepts that regional courts such as the proposed African Court of Justice and Human Rights can prosecute international crimes, it is but a small step to recognize the importance of prosecutions on the sub-regional level. It will similarly be argued that if the major African sub-regional courts have human rights jurisdiction, it is a natural step to accept that these courts could potentially assume jurisdiction over war crimes cases. Progressive international lawyers have long accepted the close relationship and inter-dependence between human rights law, international humanitarian law and international criminal law.

Sirleaf (2016) writes of an “emerging regime complex” to describe the various layers of courts that could potentially adjudicate war crimes trials. This chapter focuses on the impact of the following prominent regional African courts: the African Court of Human and People’s Rights; the ECOWAS Community Court of Justice; the East African Court of Justice (EACJ); and the now-defunct SADC Tribunal.³⁹⁶ Although this list is not exhaustive, it includes those sub-

³⁹⁴ Members of the African Union have demanded head of state immunity protection from prosecutions for international crimes since Sudanese President Omar al-Bashir was first indicted by the ICC in 2009.

³⁹⁵ The chambers were inaugurated by Senegal and the African Union in February 2013 to prosecute the person or persons most responsible for international crimes committed in Chad between 1982 and 1990, the period when Habré was president. See Committee against Torture, *Guengueng v Senegal* (36th Session, 2006) CAT/C/36/D/181/2001 May 17, (2006) AHRLR 56 (CAT 2006) as well as Extraordinary African Chambers, *Hisenne Habre* May 30, 2016. http://www.chambresafricaines.org/pdf/Jugement_complet.pdf. See also Swart 2016.

³⁹⁶ There are currently fourteen main African regional integration initiatives. These are: Arab Maghreb Union (AMU); the Common Market of Eastern and Southern Africa (COMESA); the Economic Community of West African States (ECOWAS); the

regional African courts that are widely regarded as some of the most prominent and influential. The regional African courts that will be examined are the African Court for Human and People's Rights (ACHPR) and the proposed African Court of Justice and Human Rights.

A key issue is whether these sub-regional courts have the mandate and jurisdiction to hear international crimes. All the sub-regional courts that form the focus of this chapter, the ECOWAS Court of Justice, the East African Court and the SADC Tribunal, were initially created to bolster sub-regional economic integration. De Wet notes that, in the case of ECOWAS and SADC, the emphasis shifted from economic integration to a mandate focusing on peace-keeping and security (De Wet 2014; Sampson 2011). The question of whether these courts have jurisdiction over human rights violations has been hotly disputed, but has now largely been resolved in favor of them having such jurisdiction. The next challenge is to ask whether these courts can also be vested with the authority to try international crimes. This chapter will examine whether it is practical and desirable to further extend the jurisdiction of these courts.

The current initiative to expand the jurisdiction of the African Court of Justice and Human Rights to include jurisdiction over war crimes, crimes against humanity and other international crimes could further strengthen African regional efforts to prosecute international crimes. The initiative has, however, been widely criticized, and the arguments for and against the expansion of the court's jurisdiction will briefly be discussed.

In the context of security governance, it has been argued that regional and sub-regional organizations are playing an increasingly powerful role (Abass 2004). The lack of confidence in the Security Council and its incapacity to make decisions objectively and expeditiously have resulted in regional organizations taking on a more prominent role in the maintenance of international peace and security. It will be argued here that the same reasoning can be applied to the context of international criminal justice mechanisms, and that regional organizations no longer have to play a subservient role to international organizations and UN mechanisms.

9.2 The ICC

Regional and sub-regional courts should not be granted jurisdiction to prosecute international crimes merely because the ICC might not be living up to the expectations of its supporters or fulfilling its own mandate. There are many reasons why regional courts should play a role in prosecuting international crimes. The sheer scale of such crimes and the limitations of the ICC will make it impossible for the ICC to try all perpetrators worldwide,

Intergovernmental Authority for Development (IGAD) and the Southern African Development Community (SADC); the East African Community (EAC) the Central African Economic and Monetary Union (CEMAC); the Community of Sahel-Saharan States (CEN-SAD); the Great Lakes Basin (CEPGL); the Indian Ocean Commission (IOC); the Mano River Union (MRU) and the Southern African Customs Union (SACU).

but the fact that the ICC has disappointed so many in the way it has approached its task remains a compelling reason for regional courts to step in (Tiba 2016).

Just over a decade after it started its work, the ICC is suffering a crisis of legitimacy (Dancy 2014). The dropping of charges against Kenyatta and then his deputy Ruto for lack of evidence is an excellent illustration of the court's inability to prosecute without the cooperation of African states. When the Rome Statute came into effect after it obtained the necessary 60 ratifications more rapidly than expected (Danner 2003), the necessity of continuously building and maintaining relationships with the ratifying countries was not fully appreciated. It seems as if the first Prosecutor, Luis Moreno-Ocampo, took the support of African countries for granted, and even went as far as actively offending African states with his rhetoric. For many years the key test for academics concerning the legitimacy of the ICC was whether the court, and specifically the Prosecutor, was independent from political interference (Danner 2003), but it takes more than independence for a court to be legitimate. It also takes meticulous procedural regularity, a quality the court has not displayed in its dealings with intermediaries. The ICC did not establish its legitimacy once-and-for-all in 2002, and its work is dependent on continuous buy-in from states, which in turn depends on the ICC continuously working to demonstrate its legitimacy. The Court's lack of universality has also tainted perceptions of it and increased the perception of selectivity.

The fact that the first two Prosecutors focused exclusively on Africa exacerbated the perception of selectivity, and countries such as South Africa and Namibia have threatened to withdraw from the Rome Statute. Fears also exist that African states may withdraw collectively. The idea of collective African withdrawal gained traction when the Kenyan Parliament voted on September 5, 2013 to withdraw from the Rome Statute and "to suspend any links, cooperation and assistance" with the ICC. While the vote did not result in Kenya leaving the ICC, it did illustrate the growing disillusionment of African states with the ICC, and so even if they remain part of the ICC project, African states need to find alternative ways of prosecuting international crimes. One reason for this is that the doctrine of complementarity applies to states regardless of whether a state ratified the Rome Statute. This is in line with the notion of complementarity as a "big idea" (Nouwen 2013). Complementarity as a "big idea" means that complementarity can be severed from the admissibility context of the ICC and can be interpreted as requiring states to take the initiative to investigate or prosecute international crimes. This means that even if African or other states withdraw from the ICC they cannot withdraw from responsibilities under complementarity if they want to be perceived as responsible and "full" members of the international community.

9.3 The Importance of Regionalism and Sub-Regionalism

Regionalism has loosely been defined as representing “the body of ideas, values and concrete objectives that transform a geographical area into a clearly identified regional social space” (Grant and Söderbaum 2003, 7). It enables states to deal with common transitional issues. Regional systems in international law can be an effective means to establish the international machinery necessary for carrying out tasks of mutual interest, thereby establishing distinct centers of action that further common goals and have shared benefits (Schulman 2013).

It is in the space between the state and the international that one finds the ideal half-way point for the protection of individual and collective rights. From a human rights point of view, the appeal of regionalism lies in the fact that it provides victims with an alternative to the forums provided by their national systems. At the same time it provides such individuals with forums that are distinctly African, escaping the danger that the courts to which they have to resort are disconnected, or are driven by neo-colonial or Western agendas.³⁹⁷ In spite of the multi-dimensional nature of African regionalism, Africa has so far been neglected in the general debate on the topic.³⁹⁸ Generally speaking, scholarly attention focuses on the European system, and the African system, by contrast, has often been described as weak and ineffectual.

The UN encourages states to first resort to regional bodies to achieve settlement of regional disputes before approaching the UN Security Council.³⁹⁹ This highlights the importance of establishing viable, functional and workable continental units to meaningfully support a greater international infrastructure. The increased role of regionalism brings the possibility of duplicated, overlapping and potentially contradictory policies to the forefront of the international political landscape. The growth of regionalism has resulted in a relationship of collaboration, dissociation or complementarity between different international and regional judicial forums.

The creation of sub-regional courts such as the ECOWAS Community Court of Justice (ECCJ), the East African Court (EAC) and the Southern African Development Community (SADC) Tribunal in the second half of the last century, indicates the importance African states are attaching to sub regionalism. Regional integration has been described as “a voluntary pooling of resources for a common purpose by two or more sets of partners belonging to different states” with the aim of “reinforcing structural interdependencies of a technical and economic sort” (Bourenane 1997). But it is clear from the proliferation of sub regional African courts since the early 1990s that integration involves more than economic and

³⁹⁷ This has often been said about the ICC, especially given that all indictees before the ICC so far have been African. See, for example, David Hoyle (2012).

³⁹⁸ Grant and Söderbaum (2003) write that mainstream perspectives tend to claim that if there is any regionalism at all in Africa, it is primitive and characterized mainly by failed or weak regional institutions, and that this obscures the fact that there are multi-dimensional processes of regionalism in Africa.

³⁹⁹ United Nations Charter, Art. 24(1) .

political integration. The regional and sub regional courts are increasingly deciding on human rights matters. These courts can be seen as pooling the resources of their member states with regard to personnel, infrastructure and non-tangible resources such as knowledge and expertise. This means that the African regional and sub regional communities and courts have both an economic impact and a human rights impact. It seems clear that the strict distinction between collective economic and trade interests and human rights concerns is gradually collapsing. Since many have argued that the distinction between human rights law and humanitarian law has similarly collapsed, there seems to be a compelling argument for courts to also pool the resources of the member states of regional and sub regional communities to try international crimes.

Regional and sub regional courts have the potential to be a nexus of activity, not only for economic integration, but also for human rights litigation and realization at the state and supra state levels. The relevance of human rights to regional economic communities can, however, not just be described in terms of a shift or a movement. Calls are increasingly being made for the bridging of the gulf between the trade and human rights regimes. The developmental agenda of the regional courts also means that human rights cannot strictly be separated from economic interests. The right to development can be regarded as a conglomeration of numerous rights and the developmental imperative is closely linked to socio-economic rights. In the words of Musungu (2003, 94) “where human rights are protected, open markets will flourish as stability and the rule of law are ensured”. It can similarly be argued that the enforcement of humanitarian law and international criminal law will strengthen the rule of law in the sub regions and therefore also promote economic integration.

Sub-regionalism represents the meeting point between two seemingly contradictory phenomena: it represents a move away from the global to the culturally specific. At the same time it represents a move away from a state-centered perspective previously dominant in newly independent African states.

9.4 Where Does Regionalism and Sub-Regionalism Fit Into The Complementarity Scheme?

The principle of complementarity has been described as a foundational principle or “defining feature” of the Rome Statute system (Nouwen 2013, 8). Complementarity dictates that the ICC may only exercise jurisdiction over a case if the case is not being investigated or prosecuted by a state, or if an investigation has been initiated but is not genuine..⁴⁰⁰ Complementarity was intended to have what Nouwen (2013, 10) described as a “catalyzing effect” of encouraging states to initiate domestic prosecutions. Since Article 17 only refers to

⁴⁰⁰ Article 17 of the Rome Statute of the International Criminal Court states that “the court shall determine that a case is inadmissible where a case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.

states, regional courts have been excluded from the complementarity scheme. Max du Plessis (2012) has written of “regional complementarity”, indicating that the term “complementarity” does not ordinarily encompass the idea of complementarity in the context of a region. Following du Plessis and others (Jackson 2016), I will therefore adopt the terms regional complementarity and sub-regional complementarity.

The fact that regional and sub-regional courts were excluded from the ambit of Article 17 raises the question of whether the ICC will ever refrain from prosecuting because a regional or sub-regional court has decided to prosecute, and whether a case being prosecuted by a regional court can qualify as being prosecuted by the state for the purposes of Article 17(1)(a). Jackson (2016) argues that a genuine prosecution by a lawfully constituted regional tribunal should be seen as the exercise of jurisdiction by the state such that the case is inadmissible before the ICC. He bases this conclusion on a construction of Article 17, using the 1969 Vienna Convention on the Law of Treaties. He specifically relies on the contextualized application of the principles of treaty interpretation enshrined in Article 31 of the Convention.

The adoption of the Malabo Protocol by the African Union in May 2014 indicates the firm intention of some African states to form a regional court, the African Court of Justice and Human Rights, which will have jurisdiction over international crimes (Sirleaf 2010). Disappointingly, the Protocol includes a clause providing immunity to heads of state,⁴⁰¹ which has led many progressive international lawyers to deride the efforts to establish the regional criminal court in Africa as “a thinly disguised attempt to further entrench impunity”.⁴⁰² However damaging the idea of exempting heads of state might be, the initiative to create a regional court of this kind is a very positive step. It is to be hoped that the immunity clause will not be a foundational issue for the court, and can be amended in time. As Sirleaf (2016, 741) notes, the Protocol presents an opportunity for African states to alter the status quo in international criminal justice.

Sub-regional courts were not envisaged by the drafters of the Rome Statute as contributing to the complementarity scheme of the ICC. The arguments in favor of regional complementarity apply *mutatis mutandis* to sub-regional communities in Africa. The question of creating the political will to support these regional and sub-regional courts remains one of the most critical concerns. Extending the jurisdiction of these courts to cover international crimes would further have dramatic budgetary consequences for states and regional and sub-regional organizations.

⁴⁰¹ Article 46 (A) of the Malabo Protocol states that the court does not have jurisdiction over any “serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office”.

⁴⁰² *Ibid.*

9.5 Sub-Regional Courts

9.5.1 The ECOWAS Community Court of Justice

The ECOWAS Community Court of Justice (ECCJ)⁴⁰³ is one of the most productive sub-regional courts in Africa. It is the judicial organ of ECOWAS and was created by a protocol signed in 1991.⁴⁰⁴ The Court consists of seven judges appointed by the AU Assembly and began its work in 1996. The seat of the Court is in Abuja, Nigeria.

An individual complaint procedure was created in 2005.⁴⁰⁵ Citizens of ECOWAS member states can file complaints of human rights violations at the ECOWAS Court. An unusual feature of the Court is that victims can appeal to the Court directly, and do not need to exhaust local remedies first. It can be described as a human rights success story (Adjolohoun 2013), partly because the ECCJ is politically sanctioned to hear human rights cases. This distinguishes the Court from all other sub-regional courts. Unlike the SADC Tribunal and the EACJ which can only hear human rights cases that arise from the “application and interpretation” of their founding treaties, the ECCJ has an explicit mandate to adjudicate human rights cases (Ojelade 2011). The shift to human rights was also strongly influenced by the recent amendment to the ECOWAS Treaty which resulted in the ECCJ acquiring the competence to hear human rights cases.⁴⁰⁶

Karen Alter described the court’s jurisdiction as “strikingly capacious” (Alter *et al.* 2013; 2014), but there is currently no active debate about extending the jurisdiction of the court to hear international criminal cases. The large measure of political will and solidarity among ECOWAS states could potentially make for a successful West African court with jurisdiction over international crimes.

Article 58 (2) of the ECOWAS Treaty commits member states to cooperate with the community in establishing appropriate mechanisms for the timely prevention and resolution of intra-state conflict.⁴⁰⁷ It is suggested that such mechanisms could include the creation of a court with jurisdiction over international crimes. After all, the International Criminal Tribunals for the former Yugoslavia and Rwanda were created under Chapter VII of the UN Charter as mechanisms to promote international peace and security.

⁴⁰³ The Community Court of Justice of the Economic Community of West African States

⁴⁰⁴ This Protocol was later included in Article 6 of the Revised Treaty of the Community in 1993.

⁴⁰⁵ Jurisdiction of ECOWAS Tribunal: The Court examines cases of failure by Member States to honor their obligations under the Community law; The Court has competence to adjudicate on any dispute relating to the interpretation and application of acts of the Community; The Court adjudicates in disputes between Institutions of the Community and their officials; The Court has power to handle cases dealing with liability for or against the Community; The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State; The Court adjudges and makes declarations on the legality of Regulations, Directives, Decisions, and other subsidiary legal instruments adopted by ECOWAS. <http://www.courtecowas.org/>. Accessed August 29, 2016.

⁴⁰⁶ Subsequent to this amendment the ECOWAS member states adopted a Supplementary Protocol to give the ECOWAS Community Court of Justice (ECCJ) competence to determine cases of violations of human rights in the member states (Murungi 2009, 2).

⁴⁰⁷ ECOWAS, *Revised Treaty of the Economic Community of West African States (ECOWAS)*, 1993. Accessed August 30, 2016. <http://www.refworld.org/docid/492182d92.html>.

9.5.2 The East African Community Court of Justice

After a slow start, the East African Community Court of Justice (EACJ) has become one of the most productive sub-regional courts in Africa. Although it is not yet a permanent court, its caseload has increased to the point where it could justify such a move. The EACJ was established under Article 9 of the East African Community Treaty of 1999, signed by Kenya, Tanzania, Uganda, Rwanda, and Burundi, and is tasked to ensure adherence to law in the interpretation and application of and compliance with the EAC Treaty. The Court came into being in July 2000 and the judges were sworn in on November 30, 2001. Whereas initially only six judges served on the court, there are now ten.

The Treaty establishing the EACJ states that the human rights jurisdiction of the Court will be determined at a subsequent date,⁴⁰⁸ and although that mandate of the Court has not yet been formally activated, some argue that the Court already has an implied human rights mandate, pointing to the extensive references to human rights in the EAC Treaty, and that the EACJ has already adjudicated some human rights questions. (Murungi 2003, 17). A few cases have been filed with the Court concerning violations of the rule of law which also touch on human rights issues. The East African Law Society has been quite active in bringing cases, and during the first ten years of its work the Court ruled on 60 cases, of which 28 were substantive matters and 32 were applications.

Regional politics has however occasionally trumped the decisions of the Court, putting its independence at risk.⁴⁰⁹ Kenya has suggested that the EACJ extend its jurisdiction to hear international criminal cases. Critics have argued that this would stretch the court's mandate beyond its limits, and is simply unrealistic in light of the general inefficiency of this court.⁴¹⁰ The EACJ's productivity has, however, increased and the capacity of the Court is certainly not a compelling argument against the extension of jurisdiction. In 2012 the East African Legislative Assembly called for the retrospective criminal jurisdiction for the Court,⁴¹¹ but the East Africa Law Society called into question the practicability of the Resolution.⁴¹² A major concern raised with regard to the extension of the Court's jurisdiction is the fact that all party states agreed to exclude human rights jurisdiction from the Court. In the view of the

⁴⁰⁸ See East African Community, *The Treaty for the Establishment of the East African Community*, 1999. Accessed August 30, 2016. http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf.

⁴⁰⁹ See the debacle surrounding East African Court of Justice, No. 1 of 2006, *Anyang' Nyong'o vs. the Attorney General of Kenya*, <http://eacj.org/?cases=prof-peter-nyong'o-and-others-vs-attorney-general-of-kenya-and-others>, accessed August 30, 2016. The subject of this case was interpretation of Article 50 of the Treaty for the Establishment of the East African Community on the process of nomination and election of Kenya's representatives to the East African Legislative Assembly.

⁴¹⁰ On the potential criminal jurisdiction of the East African Court of Justice, see K. Ambos (2016). See also the potential appellate criminal jurisdiction of the Caribbean Court of Justice. Caribbean Community, *Agreement Establishing the Caribbean Court of Justice*, 2001, 2255 UNTS 319, Arts. XXV(4) and XXV(7)(2)(d). The fact that another emerging human rights court, the Caribbean Court of Justice, has contemplated expanding its jurisdiction bodes well for supporters of an African regional court with jurisdiction over international crimes.

⁴¹¹ East Africa Legislative Assembly, Resolution seeking the East Africa Community Council of Ministers to Implore the International Criminal Court to Transfer the Cases of the Accused Four Kenyans Facing Trial in Respect of the Aftermath of the 2007 Kenya General Elections to the East Africa Court of Justice and to Reinforce the Treaty Positions, April 26, 2012.

⁴¹² In the statement dated April 30, 2012, the East Africa Law Society reminded the East African Community that the East African Court of Justice has neither the capacity, expertise nor jurisdiction to entertain international criminal matters; and neither does the Rome Statute provide an avenue for States or Intergovernmental Organizations to request for relocation of cases (after the confirmation of charges).

East African Law Society, extending the jurisdiction to cover international crimes makes no sense if member states do not strongly support the jurisdiction of the Court over human rights matters.⁴¹³ Given that international criminal jurisdiction is inextricably intertwined with human rights, it is infeasible to provide a court with jurisdiction over international criminal law but not over human rights law.

9.5.3 The SADC Tribunal

The Southern African Development Tribunal barely reached maturity when it died a swift death as the result of political interference by Zimbabwe. In spite of the fact that the Tribunal did not exist for long enough to make a substantial contribution to sub-regional jurisprudence and human rights promotion, some aspects of the *Mike Campbell* case, the first case heard by the Tribunal, are worth highlighting here as an example of a sub-regional tribunal embracing its role as human rights court.

The Tribunal was established in 1992 by Article 9 of the SADC Treaty.⁴¹⁴ The mission of SADC has been described as follows:

“To promote sustainable and equitable economic growth and socio economic development through efficient productive systems, deeper co-operation and integration, good governance, and durable peace and security, so that the region emerges as a competitive player in international relations and the world economy” (Oosthuizen 2006, 121).

The SADC Treaty sets out socio-economic objectives as well as broad political and security objectives. SADC currently has 15 members.⁴¹⁵

In essence, the *Campbell* case concerned 79 white Zimbabwean commercial farmers who took the Zimbabwean government to the Tribunal to stop the compulsory acquisition of their farms by the Mugabe government. Campbell and the other farmers argued that the seizures were illegal and racist, and that they violated the SADC Treaty.⁴¹⁶

The Tribunal assumed jurisdiction over the case and stated that the basis for assuming jurisdiction was that the dispute concerned human rights, democracy and the rule of law which are binding principles for members of SADC. This corresponded with substantive provisions invoked by the applicant which were found in Article 4 in the SADC Treaty. In its final decision, the Tribunal also referred to Article 6 of the Treaty which states that member

⁴¹³ By now the East African Court has an impressive record of judgments on human rights matters. See James Gathi (2013, 250-1).

⁴¹⁴ The SADC Treaty transformed the pre-existing Southern African Development Coordination Conference (SADCC) into a new institution.

⁴¹⁵ Angola, Botswana, the Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe.

⁴¹⁶ SADC Tribunal, *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*, Case No. 2 of 2007, [2008] SADCT 2, November 28, 2008, at IV

states shall not discriminate on the grounds of race, political views or other grounds. The Tribunal interpreted Article 4 as importing the right to property into the SADC Treaty since they considered it as a natural element of human rights, democracy and the rule of law as referred to in Article 4 of the Treaty.⁴¹⁷ Subsequent to the *Mike Campbell* case, in August 2010 the heads of states and government of SADC suspended the Tribunal until August 2012 (AllAfrica 2011).

Against all hopes, the 2012 SADC Summit decided to take the retrogressive step of depriving individuals of the right to approach the SADC Tribunal. Many have described the decision by the SADC summit as the death of the Tribunal (Hulse 2012). Nathan (2013) writes that the disbandment reflects SADC's hierarchy of values, in terms of which the organization's formal commitment to human rights and a regional legal order is subordinate to the political imperatives of regime solidarity and respect for sovereignty.

In light of the suspension of the SADC Tribunal, the question of whether the Tribunal should have jurisdiction over international crimes has now become moot. It would however be prudent for SADC states to consider the creation of a new tribunal that will have such jurisdiction.

9.6 The Regional Level: African Court Of Justice and Human Rights

In July 2004, the Assembly of the African Union decided to merge the African Court of Human and Peoples' Rights and the Court of Justice of the African Union, following a proposal by the Chair of the Assembly of the African Union, President Olusegun Obasanjo (Sceats 2009). The ACJHR Protocol was adopted at an AU Summit in Sharm El-Sheikh, Egypt, on July 1, 2008. The Protocol and the Statute annexed to it will come into force after fifteen member states deposit instruments of ratification (Schulman 2013).

Setting up a court with the ability to prosecute effectively will be an enormously ambitious and costly undertaking. For such a new court to function effectively it will need strong prosecution and defense offices, it will need the equivalent of a police force for purposes of enforcement, and it will need facilities such as detention centers. The enforcement of the decisions of the Court will require political will and it is unlikely that non-African governments will all be supportive of the criminal jurisdiction of the court. Since enforcement of court orders is already a problem in Africa, there is good reason to believe that it will be a major problem in the context of the new court. Some of the same political considerations that obstruct the working of the ICC might creep into the working of such a new court.

Interestingly, the new Court could potentially fare better in terms of enforcement than the current African Court of Human and People's Rights. The agreement establishing the new

⁴¹⁷ Ibid.

merged Court contains stronger provisions on enforcement (Sceats 2009) than currently exist for the African Court of Human and People's Rights. Among other things, it clarifies that the AU Assembly may impose political and economic sanctions on states that have failed to comply with any judgment of the Court.

Access to the Court is of great importance. Of great concern is the fact that the ACJHR Protocol preserves the 1998 ACHPR Protocol requirement that member states expressly declare that they accept the competence of the Court to receive cases brought by individuals and accredited NGOs (Sceats 2009). Unfortunately, at a very late stage in negotiations African states voted to deny automatic standing to individual victims of human rights abuses and NGOs. This failure to recognize access for individuals and NGOs seriously limits the effectiveness of the ACHPR. In the context of the ACHPR, the low number of declarations issued by AU states to provide such direct access raises serious questions about the integrity of the member states. It is submitted that this aspect of the ACJHR requires urgent attention in the form of a cross-continental campaign to heighten awareness of the ACJHR. Aggrieved individuals and NGOs should be granted direct access to the ACJHR, failing which a public relations and awareness campaign must be launched by the AU to secure declarations by member states to allow for direct access.

As Max du Plessis (2012) writes:

“Of course, we should all applaud if the AU were in due course to unveil a comprehensively funded, strongly resourced, legally sound, and politically backed African court that fearlessly pursues justice for those afflicted by the continent's warlords and dictators, at the same time as fulfilling effectively its parallel human rights roles.”

Du Plessis' passage encapsulates the major concerns of the critics of granting the African Court of Justice and Human Rights such jurisdiction.

Du Plessis (2012) is particularly critical of the process by which the Protocol setting up the Court was drafted. He warns that the proposed court could give rise to “regional exceptionalism”. He is of the view that the Protocol failed to set a path for African states that must navigate the relationship between these two institutions, which he describes as presenting a “minefield of difficulties”.

It is indeed one of the crucial criticisms of the sub-regional African courts as well the African Court of Human and People's Rights that, judging from case law, these courts are neither efficient nor productive. It is also clear that although some of the courts had a very slow and fairly unproductive start, the case load is now picking up and public confidence in the courts is growing. There has, for example, been a rapid rise in the case law of the East African Court.

It is precisely because of recent skepticism of the effectiveness of African sub-regional courts that reforms are necessary to make the courts instruments of human rights protection and potentially also courts that could prosecute international crimes. This could breathe new life into these courts.

9.7 The Rise of Regionalism in the Context of Security Governance

There is nothing new about proactive regionalism in Africa. Because of the proximity between the fields of security governance and international criminal law, it is instructive to consider the way in which African regionalism has gained prominence in this field. For some time a trend towards pro-active regionalism has been discernible in the context of security governance. The rise of regionalism during the Cold War created a trend of regional involvement in areas of conflict resolution and peacekeeping intervention (Du Plessis 2012).

The United Nations itself has recognized the increasing reliance placed on regional organizations. The UN Secretary General Boutros Boutros-Ghali's report, *An Agenda for Peace*, stated that:

“The United Nations has never claimed that it alone can carry out peace-keeping operations...but the demand has now become such that I believe that the United Nations must share the work with others...regional organizations are the obvious candidates for larger roles”.

The report called on regional organizations to become more actively involved in preventative diplomacy, peacekeeping and peacemaking.

A greater measure of regional involvement in both conflict resolution and intervention can be discerned in the activities of the following regional organizations: ECOWAS in Liberia, Sierra Leone, Côte d'Ivoire and New Guinea; the North Atlantic Treaty Organization (NATO) and the European Union in the former Yugoslavia; the Organization of American States (OAS) in Haiti; and numerous activities of the African Union and the South African Development Community (SADC) (Esterhuizen 2013).

During the crisis experienced in the Congo between 1963 and 1964, the predecessor to the AU, the Organization of African Unity (OAU), was determined to take the primary role in the resolution of the conflict and was so empowered by a Security Council Resolution placing the matter “in the lap of the OAU” (Abass 2004, 33), although the UN did become directly involved at a later time. Other examples of regional primacy in peacekeeping operations include the presence of Arab League forces in Kuwait until 1963, and an Arab Security Force peace-keeping mission in Lebanon between 1976 and 1982 without UN involvement.

It has been observed that the main objectives of the African Union to promote “peace, security and stability on the continent”⁴¹⁸ are entirely consistent with the objectives of the ICC and international criminal justice generally. Although the Constitutive Act of the African Union recognises non-interference⁴¹⁹ and sovereign equality⁴²⁰ as two of its founding principles, it simultaneously recognises the right of a member state to request an intervention by the Union⁴²¹ and the right of the Union to intervene in member states upon a decision by the Assembly.⁴²² The Assembly may intervene if it finds the existence of “grave circumstances; namely war crimes, genocide and crimes against humanity”.⁴²³ In 2003 the Protocol on Amendments to the Constitutive Act of the African Union extended the justification for intervention even further to include “a serious threat to legitimate order”.⁴²⁴

With regard to ECOWAS, the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security came into operation in 1999. This Protocol conferred upon ECOWAS a mandate for peacekeeping, humanitarian intervention and the enforcement of sanctions and embargoes.⁴²⁵ The 1999 Protocol authorizes the Mediation and Security Committee of ECOWAS to “authorize all forms of intervention”.⁴²⁶ ECOWAS is authorized to undertake military interventions under a defined set of circumstances, namely situations that:

“Threaten to trigger a humanitarian situation [...] pose a serious threat to peace and security in the sub-region [and following the] overthrow or attempted overthrow of a democratically elected government”.⁴²⁷

Allain (2004) argues that the AU and ECOWAS have created new frameworks outside of the primacy of the Security Council. Various factors have contributed to the decision of these two African organizations to move away from the Security Council and the traditional Charter framework.

Regional organizations often possess intimate knowledge of the background to the dispute, including the social, ethnic, cultural, economic and political issues that have an impact on the dispute and the settlement thereof. A failure to understand the complexity of the local issues has been detrimental to the peace efforts in the region. The success of ECOWAS in

⁴¹⁸ Organization of African Unity, *The Constitutive Act of the African Union*, 2000. Accessed August 30, 2016. <http://www.refworld.org/docid/4937e0142.html> (“AU Constitutive Act”), Art. 3(f).

⁴¹⁹ AU Constitutive Act, Art. 4 (g).

⁴²⁰ AU Constitutive Act, Art. 4(a).

⁴²¹ AU Constitutive Act, Art. 4 (i).

⁴²² AU Constitutive Act, Art. 4.

⁴²³ AU Constitutive Act, Art. 4 (h).

⁴²⁴ African Union, *Protocol on Amendments to the Constitutive Act of the African Union*, 2003. Accessed August 30, 2016. <http://www.refworld.org/docid/493fe67d2.html> (“AU Protocol”), Art. 4.

⁴²⁵ ECOWAS, Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, 1999, accessed August 30, 2016, http://www.zif-berlin.org/fileadmin/uploads/analyse/dokumente/ECOWAS_Protocol_ConflictPrevention.pdf. Arts. 22 and 52.

⁴²⁶ Id., Art. 10

⁴²⁷ Paragraph 46 of the Framework for the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security 1998.

mediating the dispute in Côte d'Ivoire in 2002 was largely attributed to its familiarity of the terrain and politics of the region (Abass 2004, 181). As Esterhuizen (2013, 71) notes, regional organizations also have a greater *interest* in solving the dispute.

9.8 Conclusion

“An integrated pan-African court offers opportunities for developing a unified, integrated, cohesive, and hopefully, indigenous jurisprudence for Africa. Years on, this jurisprudence will be used as a yardstick for determining whether or not one can talk of a regionally peculiar corpus of African international law” (Kindiki 2007, 140).

In light of the massive scale and widespread nature of violations of humanitarian law on the African continent and beyond, there is no reason why the ICC should be the only or even the dominant court prosecuting international crimes. States must work towards establishing, strengthening and diversifying a network of state and civil society institutions that will provide a viable forum for the investigation and adjudication of international crimes in countries where the judicial system is weak, politicized, slow or otherwise incapacitated. Regional courts are particularly appropriate to fulfil common humanitarian goals.

Creating viable regional and sub regional institutions in Africa with the jurisdiction to prosecute international crimes will be enormously challenging from a practical point of view. Even if the finances can be found to erect such courts, the political will to make these courts meaningful will have to be found. As Sceats (2009, 14) observes:

“While African states are clearly willing to create pan-African institutions designed to safeguard human rights, they may lack the political will to submit themselves to true scrutiny by these bodies, as battles over access suggest, or to reform their practices when these are found to have violated human rights. Of course this problem is not unique to Africa, as demonstrated by the challenge of securing compliance by states such as Russia and Turkey with judgments of the European Court of Human Rights”.

Nevertheless, one has to remain optimistic about the eventual creation of fully functional continental regional and sub-regional courts with jurisdiction over international crimes. The extension of the ECOWAS court's jurisdiction to cover human rights cases illustrates how an existing international institution can be redeployed for new purposes. One of the strongest continental human rights institutions, the African Commission on Human and People's Rights has been criticized for failing to deal adequately with some of the most egregious human rights violations committed in Africa, including the Rwandan genocide, the massive violations of human rights in the Democratic Republic of Congo, as well as the humanitarian disaster in Darfur (Ingange-Wa-Ingange 2010). The African Commission and other African institutions were criticized particularly severely for failing to intervene to stop the Rwandan

genocide, and rightly so. African states have inescapable legal and moral obligations under international humanitarian law and international criminal law. African institutions cannot be in a position where they are damned if they do prosecute and damned if they do not.

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10 Reflections on Africa and International Criminal Law

Ronald C. Slye

10.1 Introduction

The relationship between African states and the emerging international criminal law regime appears to be at a crossroads. The African Union has repeatedly criticized the International Criminal Court (ICC) since the indictment of the Sudanese head of state, Omar al Bashir. The indictments of Uhuru Kenyatta and William Ruto, who post-indictment became respectively Kenya's President and Deputy President, heightened this tension. Threats of mass withdrawals of African states from the Rome Treaty initially looked like standard political bluster and grandstanding from isolated individuals, but now appear to have gained some support within the region. There are credible indications that South Africa, the country often viewed as the continent's leader in the areas of international human rights and justice, is seriously debating whether to withdraw from the Rome Treaty.

These are worrying developments for Africa, the ICC, and international justice. Some of the worst atrocities of the last two centuries have been committed in Africa, sometimes by Africans themselves, but always with African victims. Some of those responsible for such atrocities have been held to account, from the architects of the Rwandan genocide, to some of those responsible for atrocities under South African apartheid, to Hissèn Habré of Chad, but many have not; slavery, colonialism, and numerous ongoing conflicts, not the least of which is the decades-long conflict in the DRC. Africa is not, of course, the only place where such atrocities have occurred. Europe, Asia, and the Americas have suffered comparable atrocities, and like Africa some have been addressed, but many have not.

Some suggest that the source of this tension and growing distance between African states and international criminal law can be found in different conceptions of justice found in Africa. This difference is sometimes described as between Africa and "Western" or "Northern" conceptions of justice, or between Africa and the conception of justice adopted by the international community as manifested in institutions like the ICC. While one can find different conceptions of justice in some African societies compared to conceptions of justice found in Europe, North America, or at the international level, I submit that such differences do little to explain the tension that has arisen between African states and the ICC.

10.2 Seeking an African Conception of Justice

If the tension between African states and the ICC, or international justice generally, is caused by different conceptions of justice, then we should be able to identify a distinctly African conception of justice that is different from that found in other societies in the world.

Conceptions of justice are contested in Africa as they are in all parts of the world, including at the international level, but the *concept* of justice is accepted in Africa as it is elsewhere. Individuals should be held responsible for their wrongful acts, and those who suffer harm caused by the wrongful acts of others are entitled to some form of redress. These shared values are broad but deliberately ill-defined; the devil, as they say, is in the detail as to what constitutes a wrongful act, or what the proper form of redress might be.

We can also find contested conceptions of justice within the western or northern systems of justice, and such differences are as often found within regions or cultures as they are between them. Take victim participation in criminal trials as an example. The proper role of victims in a criminal trial is contested in common law systems such as the United States and the United Kingdom (Doak 2005). Victims are generally limited to the role of witness for the purpose of establishing facts related to the guilt or innocence of the suspect. In some jurisdictions, victims testify about their own suffering as part of the sentencing of a convicted suspect. In others they play a more active role as local municipalities and states experiment with different forms of mediation and restorative justice. Some of the more innovative uses of victims in the United States are inspired by other judicial systems, including some in Africa.

In civil law systems, victims play an active role in initiating most criminal proceedings compared to common law systems where victims have far less power over whether and how a crime is prosecuted. Historically, common law criminal trials reserved a large role to victims similar to what we see in civil law systems today (Christie 1977; Langbein 1973), and the neat distinction we see today between civil and common law systems with respect to the role of victims is historically contingent, rather than based on a fundamental disagreement about the conception of justice across cultures or societies.

At the international level, the ICC has deliberately incorporated a more active role for victims than is usually found in present-day common law systems. The increased role of victims in the ICC system was in part a reaction to the experience of the *ad hoc* international criminal tribunals. The decision to include in the ICC a role for victims that goes beyond that of a witness was also partly due to the influence of those trained in civil law systems, and the influence of conceptions of justice found in some African and Asian societies.

Sentencing and forms of punishment also vary throughout the world. The sentences meted out for some of the worst crimes at the international level appear relatively lenient when compared to sentences for comparable and lesser offences in the US. Rwanda opposed the

creation of the ICTR in part because of the decision to exclude capital punishment as an available sentence. Capital punishment has been abolished in Europe, and highly contentious within the US. In Africa some states have abolished the death penalty completely (e.g. Burundi, Rwanda, Senegal, South Africa) while others continue to include it as an available punishment (e.g. Democratic Republic of the Congo, Chad, Ethiopia, the Sudan). This diversity should not be surprising. With the increase in global communications and engagement (what some refer to as globalization), one finds a rich cross-pollination of ideas and institutions around the globe. Different conceptions of justice are as often found within societies as across societies.

There are 54 countries in Africa. They include democratically-elected governments and entrenched dictatorships; some with more capitalist-oriented economies, and others with more socialist-oriented economies; those with majority Christian and those with majority Muslim populations; and those with code-based and those with common law legal systems. Africa is probably the most diverse continent on earth as measured by these and other metrics. To speak of an African approach to anything one would need to speak at a level of generality to encompass this rich diversity, a level of generality that in most cases would be rarely insightful or useful.

Notwithstanding this present-day diversity, one may distinguish between justice practices that were imposed or adopted from European powers during colonization, and pre-colonial justice practices, although our knowledge of the latter is limited. These pre-colonial justice systems vary in significant respects; some included sanctions such as public punishments and exile from a community that are less accepted today. Others included more community involvement in determining responsibility and consequences for wrongdoing, attributes that are being adopted or considered in many modern legal systems outside Africa. Community decision-making sometimes worked well. There was more engagement in the justice system by citizens, and thus a more cohesive and deliberative structure of government. At the same time such structures often entrenched existing power differences, including limiting or even eliminating the participation of women in such processes. There are internal debates within African societies concerning the proper role of these more traditional justice practices, given that every African state has adopted a version of one of the major legal systems in the world, whether common law, civil law, or Islamic law. In South Africa and Kenya, traditional practices and what is referred to as customary law are incorporated into a broader justice system that is ultimately accountable to their respective Constitutions. While constitutional rights trump customary law, the latter are given some autonomy within the overall justice system. When it comes to criminal law, however, both Kenya and South Africa (and many other if not all African states) adopt a more retributive version of criminal justice, in fact often far more retributive than some of the criminal justice systems found in Europe and North America.

10.3 The Current Dispute between the AU and ICC

Regardless of how one evaluates such pre-colonial practices, their current manifestations and relationship to the overall legal systems in which they are currently found do little to explain the current tension between the African Union and the ICC. Politics and power, as reflected in the current global economic, political, and legal order, better explain these differences.

The major point of contention between the AU and the ICC centers around the indictment of President Omar al-Bashir of the Sudan, and the indictments of President Uhuru Kenyatta and Deputy President William Ruto of Kenya. The African Union has made a number of arguments challenging these indictments, which generally take three different forms. The first claim is that the indictments endanger ongoing efforts to bring peace (in the case of the Sudan) or threaten to destabilize an otherwise stable country by undermining its current government (in the case of Kenya).⁴²⁸ This argument deserves to be taken seriously, as it raises questions about the proper balance between punitive forms of accountability and broader peace and justice concerns, including ending a conflict, providing assistance to civilians, and fostering national unity and reconciliation. In fact the ICC Prosecutor appears to have taken concerns like this into account in deciding not to indict the then President and Prime Minister of Kenya, but instead indicting individuals close to and subordinate to those individuals. Skepticism about such arguments is premised on the assumption that they are marshaled to deflect *any* form of accountability, and there is good reason to treat such skepticism seriously, both as a general matter as well as in the context of both the Sudanese and Kenyan situations. Regardless of the accuracy of such skeptical arguments in these two cases, the broader question of the proper balance of various peace and justice initiatives is a legitimate, and important, area of inquiry.

The second argument is a variation on the first, but articulated at a more general level of abstraction: indicting current heads of state and other senior government officials destabilizes governments in states that are poised on the brink of instability, thus destroying the ability of such governments to perform basic functions for their people. This argument has been made against the Kenyan indictments, particularly those of the current President and Deputy President, although those indictments were handed down before these two individuals were elected to office. The argument is that Kenya is at a delicate stage of its development, and could descend into chaos or even genocide without strong government leadership. The violence after the disputed 2007 election that teetered on the brink of genocide is pointed to as proof of the legitimacy of this concern. A subset of this argument is that indictments by the ICC undercut democracy and the democratic will of the people. Critics argue that the Kenyan people elected Kenyatta and Ruto, and that the ICC (and the

⁴²⁸ The AU has also suggested that the Kenyan cases may contribute to a destabilization of the broader east African region. African Union, *Decision on the International Jurisdiction, Justice and the International Criminal Court (ICC)*, Doc. Assembly/AU/13(XXI), May 26-27, 2013, para. 5.

international community) should defer to that democratic choice rather than challenging or trying to remove such officials. At their foundation, these arguments are profoundly resistant to an approach to the rule of law or justice that is not subordinate to broader political concerns including, in the case of Kenya, the will of the majority as expressed through the ballot box. Taken to its logical conclusion, such an argument would preclude holding any elected official accountable for his wrongful acts unless and until they were first removed from office.

The third argument focuses on the perception that the ICC, and more broadly the West or Global North, are “targeting” Africa, and that the international justice system is hypocritical and consists of two justice systems, one for rich and powerful states and another for the rest of the world. As with the first two arguments, this third touches on some legitimate concerns which are part of a broader critique of global political, economic, and legal power that is obscured if the focus is limited to an institution like the ICC. It is difficult to argue, for example, that the ICC as an institution is targeting Africa as many of the African situations before the Court were referred to the ICC by African states themselves. There are two sets of exceptions to these African self-referrals: two matters referred by the UN Security Council (the Sudan and Libya); and two by the Prosecutor’s office (Kenya and Ivory Coast). While the referrals by the Security Council may be criticized, they are not the actions of the Court itself. They thus raise issues concerning the overall global justice system. The two African matters referred by the Prosecutor, however, can be attributed to the Court, or at least to its prosecutorial arm.⁴²⁹ The fact that the first time the Prosecutor invoked such powers was in the case of Kenya provides some support to the targeting Africa claim. Recently the Prosecutor has invoked her own power to refer a matter again, and in this case she has reached outside of Africa to Georgia, providing the seeds for a counter narrative concerning the targeting Africa claim.

African states are the primary focus of ICC attention in part because African states were quick to buy into the ICC system by ratifying the Rome Treaty, and make up the largest block of ICC member states. This broad support for a global criminal justice system contrasts with the weak support (and in some cases overt hostility) from the world’s most powerful states, most notably the United States. While the focus of the ICC on situations in Africa is a tribute to African states’ willingness to support a global criminal justice system, the indifference or hostility of some of the world’s most powerful states that refuse to be part of that system and to weaken that system when it comes to examining situations important to such states, precludes large areas of the world from ICC involvement, and is another manifestation of the differential treatment of states based upon where they fall in the global power hierarchy.

⁴²⁹ Rob Currie (2011) has argued that the Cote d’Ivoire situation should be viewed as a self-referral rather than as a genuine exercise of the Prosecutor’s *proprio motu* powers.

10.4 The Crux of the Conflict: Immunity in Office

While these arguments capture some of the tensions underlying the conflict between the AU and the ICC, the specific substantive issue that is at the heart of the conflict concerns the immunity, or not, of sitting heads of state and, to some extent, other senior government officials *while they are in office*. The African Union and many African states assert that a sitting head of state, and to some extent other senior government officials, should be immune from international legal process while in office. While international law strongly points in the opposite direction – there is growing precedent that no government official is immune from international legal process, at least for the worst international crimes – what many point to as a clear rule prohibiting such immunity was, until recently, a contested matter even outside Africa.

Ever since the post-World War II trials at Nuremberg and Tokyo, international law has asserted that the official capacity of an individual does not indemnify them from liability for certain international crimes. Nuremberg and Tokyo established a fundamental shift in international accountability from the state as an organization to the individuals that make up the power structure of the state. Nuremberg Principle III captures this development:

“The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law”.

One finds similar manifestations of this idea in some of the early international criminal law treaties that came into being after World War II. Most notably, the Genocide Convention provides, “[p]ersons committing genocide...shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.⁴³⁰

While one may interpret this basic principle of official accountability as completely removing those historic immunities that applied to heads of state and other government officials, until recently it was not clear whether this prohibition against official immunity applied to a *sitting* head of state or government official. While one can point to prosecutions and other forms of legal accountability that crystallize the principle that a *former* head of state or senior government official may be held accountable for international crimes, the establishment that such immunity does not apply to a head of state or other official while still in office has only recently been clarified under international criminal law.

Most of the high profile prosecutions of heads of state for various international crimes occurred after the individual left office: the prosecution of Karl Dönitz at Nuremberg (who served as the German head of state for 23 days); the attempted Spanish prosecution of

⁴³⁰United Nations General Assembly, Convention on the Prevention of and Punishment of the Crime of Genocide, 1977, 78 UNTS 277, at Art. IV.

Augusto Pinochet (and the highly publicized decision by the House of Lords of the United Kingdom asserting that Pinochet's former position as head of state did not protect him from criminal accountability for torture); and the prosecution in Senegal of Hissène Habré of Chad.

Meanwhile there are numerous domestic legal proceedings that have upheld the absolute immunity of a sitting head of state from the legal process *of another state*. Both US and UK courts have rejected attempts to hold President Robert Mugabe of Zimbabwe accountable for torture on the ground that he was immune as a sitting head of state. Similar opinions have been reached by French (finding Muammar Ghaddafi of Libya immune as a sitting head of state) and Spanish courts (Fidel Castro of Cuba and Paul Kagame of Rwanda).

The International Court of Justice in 2002 affirmed the immunity of some government officials while in office, holding that such immunity applied not just to heads of state but also, in the case presented before it, to a sitting foreign minister. The case was brought by the Democratic Republic of the Congo against Belgium challenging a Belgian arrest warrant for the foreign minister of the DRC, Abdulaye Yerodia Ndombasi. While the ICJ upheld the immunity of a foreign minister before the courts of a foreign state, in *dicta* the Court opined that such immunity would not apply if the indictment and prosecution were before an *international tribunal*.⁴³¹

The ICJ's distinction in the *Arrest Warrant* case between foreign domestic courts and international tribunals has been reflected in a series of indictments and prosecutions by international tribunals. The prosecutions of former Yugoslav President Slobodan Milošević and former President of Liberia, Charles Taylor were initiated while these two officials were still in office. The fact that both Milošević and Taylor were indicted while they were serving as heads of state supports the ICJ argument that immunity for a sitting official does not apply for international crimes when prosecuted by an international tribunal.

The conflict between the ICC and the AU, however, does not turn on this distinction between foreign domestic courts and international tribunals highlighted by the ICJ. Instead, the AU asserts that sitting heads of state and other senior government officials are entitled to absolute immunity from *any* legal process while they remain in office. This assertion of immunity is absolute, and thus applies to legal proceedings arising out of international crimes, and applies to both foreign domestic courts and international tribunals such as the ICC, although the AU presumably would not prohibit a state from prosecuting its own sitting government officials if the relevant domestic Constitution or laws allowed such a prosecution. This assertion explains the AU criticism of the ICC indictments against al Bashir, Kenyatta, and Ruto.

⁴³¹ *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, Judgment, 2002 I.C.J. Report 3, February 14, 2002, at para. 61.

The AU's position thus concerns protecting the *office* of head of state and other government positions, and not the individuals themselves who hold that office, although of course protecting the office does protect those individuals so long as they stay in office. Yet the AU does not appear to be consistent with respect to the immunity of all sitting government officials, and there is even some suggestion that some within the AU may oppose immunity for all sitting officials, including heads of state. On the first point, in 2007 the ICC indicted a Sudanese government official, Ahmad Muhammad Harun. Notwithstanding this indictment of a sitting government official, the African Union only began to mobilize against the ICC's involvement in the Darfur situation with the 2009 and 2010 indictments of the Sudanese President, Omar al Bashir. In fact African Union statements and resolutions opposing the ICC involvement in Darfur have focused on the indictment of al Bashir and mostly ignored the other indictments.⁴³² On the second, the AU commissioned a report on the situation in the Sudan by a panel headed by former South African President Thabo Mbeki. That panel's report recommended that a hybrid criminal court be created to prosecute individuals "who appear to bear particular responsibility for the gravest crimes committed during the conflict in Darfur".⁴³³ In addition the report recommended the "removal of legal and *de facto* immunities and other legal impediments to prosecutions",⁴³⁴ suggesting that the immunity of al Bashir should be removed for such purposes. The Mbeki report was endorsed by the AU Peace and Security Council at its 207th Meeting on October 29, 2009 in Abuja.⁴³⁵

Notwithstanding the AU's support for immunity of sitting officials, once an individual leaves office the AU has supported holding those individuals to account for international crimes and has acted accordingly, including at the international level. The AU has indicated its support for international accountability for former officials in a series of statements and resolutions issued contemporaneously with the resolutions criticizing the ICC involvement in the Sudan and Kenya. For example, it passed a series of resolutions encouraging Senegal to prosecute the former head of state of Chad, Hissène Habré.⁴³⁶

The AU concern with current government officials over former government officials suggests that the AU is less opposed to the exercise of international mechanisms of accountability *per se*, and more concerned with challenges to the existing power structures of African states. One can see this in the strong AU reaction to efforts to hold sitting government officials accountable (al Bashir, Kenyatta, Ruto) and in the increasing frustration by the AU at the failure of the Security Council to even consider, much less agree to, an AU proposal to have the prosecutions in the Sudan and Kenya postponed for at least a year as allowed under the

⁴³² African Union, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Doc. Assembly/AU/13(XIII), July 3, 2009 (only mentioning the al Bashir indictment, and calling on African states to ignore the arrest warrant against al Bashir while being silent on the other indictments). At the same African Union meeting the Assembly passed a resolution supporting the prosecution of Hissèn Habré. African Union, *Decision on the Hissèn Habré Case*, Doc. Assembly/AU/12 (XIII) Rev. 1, July 3, 2009.

⁴³³ African Union, *The Quest for Peace, Justice and Reconciliation: Report of the African Union High-Level Panel on Darfur*, PSC/AHG/2(CC VII), October 29, 2009, at para. 320(b).

⁴³⁴ *Ibid.*, at para. 336(b) and 25(d).

⁴³⁵ African Union Peace and Security Council, *Communiqué*, PSC/AHG/COMM.1(CC VII), October 29, 2009.

⁴³⁶ For example, see African Union, *Decision on the Hissèn Habré Case*, Doc. Assembly/AU/12 (XIII) Rev. 1, July 3, 2009.

ICC statute. While there are undoubtedly elements of self-interest in the AU positions regarding immunity and international accountability – not unlike the self-interest one finds in the US refusal to ratify the Rome statute, and the coercion used by the US to enter into bilateral treaties protecting US citizens from being brought before the ICC – the AU positions against the ICC should be viewed as part of the general African critique of the hypocritical position taken by the Global North with respect to holding current and even former government officials accountable. While in theory the ICC could indict a government official from the US, Russia, China, India, or Israel (if an official from one of these non-party states committed an international crime on the territory of a state party to the Rome treaty), the political reality is that such a development is highly improbable, verging on the impossible. The same can be said for high-level government officials of powerful states that are a party to the Rome treaty, such as the UK or France. There may be good political and even principled arguments against prosecuting high-level government officials of powerful states like the US, Russia or the UK. The political cost of such a prosecution to the ICC and to international justice more broadly would likely be high, and thus perhaps not worth risking. African states, however, do not have the power to distort the international justice system in such a way. The political risk to the ICC of indicting a sitting African government official is much less than the risk of indicting officials from more powerful states, making it more likely that such indictments will be focused on African officials,⁴³⁷ and thus giving rise to credible accusations of hypocrisy and double standards.

The AU criticisms of the ICC are thus better understood in the context of these larger power differentials. They are a part of broader challenges by African states to the current international power structure, such as the growing calls to expand the permanent members of the Security Council to include an African state.

10.5 From Institutional Reform to Institution Building

As attempts to reform and influence the ICC either directly or through the Security Council have largely failed, the AU has moved to create an alternative institution to address international crimes at the regional level as a further challenge to the current international power structure. The regional criminal court proposed by the AU has received attention primarily because of the following immunity provision:

“No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office”.⁴³⁸

⁴³⁷ The perceived risk even in Africa, however, appears not to be negligible, as suggested by the ICC Prosecutor’s decision not to prosecute President Kibaki or Prime Minister Odinga of Kenya.

⁴³⁸ African Union, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights STC/Legal/Min/7(I) Rev. 1, May 15, 2014, Art. 46Abis.

While it is not clear which officials would fall under this broader grant of immunity, one can assume that positions such as a vice president and a foreign minister would probably be included.⁴³⁹ It is clear, however, that the proposed immunity would only apply to officials while they are in office, as the statute also provides that, subject to the immunity provision quoted above, “the official position of any accused person shall not relieve such person of criminal responsibility or mitigate punishment”.⁴⁴⁰

While some see this proposed regional African court as an attempt to sidestep the ICC, at least with respect to pending cases against sitting government officials, it is unlikely that the proposed court would have any impact on the legal authority of the ICC to continue with both existing and future cases against serving African government officials. There is no legal argument that the ICC should defer to a prosecution before the African court. First, the doctrine of complementarity appears to only apply to simultaneous proceedings before state courts. Kenya appears to acknowledge this as it has proposed changing the Rome statute to make clear that ICC complementarity applies to regional processes as well as state processes. A prosecution before a regional criminal court is not clearly covered by the ICC’s complementarity provisions. Second, even if one were to interpret the ICC complementarity provisions to apply to proceedings before a regional, rather than state, court, by virtue of the immunities provided for in the regional court there could be no such prosecution of a serving head of state or other senior government official and thus no process to which the ICC could defer. In other words, if the African regional criminal court had come into existence prior to the ICC cases against the Sudan and Kenya, no proceedings could have been brought by the regional court against al Bashir, Kenyatta and Ruto, and thus the predicate for a complementarity argument – a simultaneous legal proceeding against the same suspect – could not exist.

While the regional criminal court would not provide a *legal* argument against ICC involvement, there is no question that the existence of such a court could be used to support a political challenge to the involvement of the ICC. One could imagine a situation in which the regional court indicted mid-level officials or former high-level officials for acts arising out of an ICC situation country. Such a scenario would create a political argument that the ICC should defer to an alternative African process for addressing an injustice arising out of Africa. If those most responsible for the crimes being investigated were serving high-level officials (as is the case with the Sudan and Kenya) there might thus be a strong political argument that the ICC should not target such officials given the regional prosecutions arising out of the same situation.

⁴³⁹ The ICJ in the *Arrest Warrant* case based its recognition of immunity on the fact that Yerodia was Foreign Minister. Immunity was deemed proper in that case because foreign ministers are required to travel internationally, and without such legal protection they would be hindered from performing their official functions. International Court of Justice, *Arrest Warrant of April 11 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 2002 ICJ Rep. 3, February 14, 2002.

⁴⁴⁰ African Union, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights STC/Legal/Min/7(l) Rev. 1, May 15, 2014, Article 46B(2).

While much attention has been paid to the immunity provisions of the proposed African court, and some attention has also been paid to the relationship between such a court and the ICC, there are significant innovations in the proposed court that have received less attention than they deserve.⁴⁴¹ The crimes within the jurisdiction of the court include not only those found in the ICC treaty (war crimes, crimes against humanity, genocide, and aggression), but also other international crimes that are of particular concern to African states and that have not garnered a comparable level of support from most states in the Global North. These include terrorism; mercenarism; corruption; money laundering; trafficking in persons, drugs, and hazardous wastes; and the illicit exploitation of natural resources. While African citizens and government officials have been implicated in such crimes in the past, many of these crimes also implicate individuals, governments, and entities from the Global North. Most significantly, the African regional criminal court will have jurisdiction over juridical persons – in other words, unlike the ICC the regional criminal court will be able to prosecute both natural persons and corporations.

The African regional criminal court will thus criminalize at the international level many crimes that disproportionately affect the people of Africa. By including juridical persons within the proposed court's jurisdiction, the African Union is taking up an issue (corporate accountability for gross violations of human rights) that many international human rights organizations and others have been championing for decades at the international level.

Separately from the substantive provisions of the proposed regional criminal court, concerns may also be raised that such a court will fracture and undermine a nascent international criminal justice system. Similar fears were raised in the last half of the twentieth century with the development of regional human rights systems in the Americas, Europe, and Africa. Many argued that such regional human rights systems would undermine the universalism of the idea of human rights. To some extent these concerns were well-founded, as one can find differences among the rights protected by each of the regional systems. Most notably, the African Charter on Human and People's Rights includes rights that are focused more on groups or peoples than one finds in other regional systems. At the same time there is remarkable consistency among the regional human rights systems concerning some of the core principles of human rights including bodily integrity rights such as the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, non-discrimination and the rights of women, even if there are differences concerning the interpretation of those rights, and disparities in the levels of achievement of those rights.

With the benefit of hindsight, it is now clear that the regional human rights systems strengthened, rather than weakened, the international human rights system. Regional systems have received a larger buy-in from their local populations, and regional systems have been able to develop mechanisms of enforcement appropriate to the human rights

⁴⁴¹ The one notable exception is an extensive report by Amnesty International (2016).

challenges faced in their region – compare the proactive powers of the Inter-American Commission on Human Rights (and the African Commission on Human and Peoples Rights) to the (now defunct) European Commission on Human Rights. The regional human rights systems have also made more transparent the differences in values and approaches to human rights found in different parts of the world. Rather than contributing to the fracturing of the idea of human rights, the articulation of such regional differences facilitates a cross-cultural and cross-regional conversation about different conceptions of human rights. This increasingly vigorous dialogue has strengthened, rather than weakened, the overall system of human rights protection.

It is of course too early to tell if the proposed regional African criminal court will similarly strengthen the newly-emerging international criminal justice system. The protocol creating the regional criminal jurisdiction in the African system requires fifteen ratifications, and presently has only four signatories and no ratifications. It also faces serious institutional challenges, as it is being proposed separately from other proposals to consolidate the African judicial system, mostly notably a 2008 proposal to merge the African Court of Human and People's Rights (which is the court of the African regional human rights system) with the African Court of Justice (which is the inter-state dispute mechanism created as part of the African Union) into a consolidated African Court of Justice and Human Rights.⁴⁴² The proposal is to add criminal jurisdiction to this yet-to-be created consolidated African Court. There are numerous details to be worked out concerning how a court with such expanded jurisdiction would operate. Given that only five states have ratified the protocol creating the consolidated court and no state has ratified the protocol giving such a court jurisdiction over international crimes, it may be a long time before we can evaluate the impact of this assertion of international criminal jurisdiction by a regional court.

In the meantime, the AU proposal to establish a regional court with jurisdiction over international crimes is part of the continuing international conversation about furthering international criminal justice. The AU proposal challenges the international trend of removing all immunities held by government officials even while still in office, and proposes expanding the definition of crimes that can be prosecuted at the international level. These challenges occur in the context of a larger political challenge by Africa against the existing power structure of the international system, most notably exclusion from permanent membership on the Security Council. The challenge is thus not based on different conceptions of justice; rather it is based on a demand for more power and influence at the international level by African states, including the demand that crimes important to Africa and which are committed in part by corporations from the Global North, be included in the pantheon of crimes that can be prosecuted at the international level. This development may lead to a richer, and more balanced, conversation about the future of international criminal justice.

⁴⁴² The Protocol on the Statute of the African Court of Justice and Human Rights currently has only five of the thirty state ratifications required to enter into force.

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11 The Evolution of International Criminal Justice – The Incorporation of Domestic Legal Pluralism In The Current Practices of The International Criminal Court

Justin Yang

11.1 Introduction

This paper explores the relationship between the modern global criminal justice infrastructure and the diverse and plural legal systems of the states that comprise the international community. It looks at whether and how the current system can harness the legal plurality of criminal laws in adjudicating international crimes. It views the future mode of adjudication that can actively balance the central tenets of criminal justice with the individual circumstances of the crime, as well as the cultural and local contexts which may be materially relevant. Evaluating such factors within the formal judicial process recognizes the inherent diversity of international crimes. Although crimes may share the same classification and label in law, such as acts constituting a war crime in Sweden and in Saudi Arabia, the circumstances leading up to and contributing to the commission, as well as its interpretation and forms for sanctions, may vary greatly from society to society.

However, the monistic construction of the current global criminal justice system is unreceptive to the local contexts of crimes. Rather than adapting to the individual circumstances surrounding the crime, the crime is detached from its locality, and is evaluated through the non-contextualized legislative framework of the international judiciary. Such an approach is limited in identifying contextually appropriate sanctions, which in turn may undermine the healing process of the victim communities. From a geopolitical perspective, such unilateral exercises may be less welcomed by developing states wishing to increase their assertion of sovereign authority. Future adjudications should therefore take into account local perceptions and desires of justice and finality in the society in which the crime took place. What brings closure to local communities of victims may not always mirror the concepts of justice sought by the institutions in The Hague. Taking into account local perceptions of justice may lead some to argue that such a position may propagate cultural relativist views to justify gross violations of international human rights. This is not the aim of this paper. Rather, it emphasizes the need for pluralistic input in the process of international criminal adjudication, and identifies an avenue in the current global infrastructure where it can take root. It then explores how such a project can be achieved, and the positive changes it can bring to the progressive discourse of international criminal law.

This paper briefly traces the historical development of international criminal justice (ICJ) to illustrate the overwhelming and exclusive influence of Western states that have shaped the orientation and functions of international judiciaries. It identifies factors that have exacerbated the need for pluralism and increased deference to sovereign processes in international proceedings. These factors have challenged the Western-centric mode of vertical criminal adjudication, which has led to the establishment of a horizontal mode of international criminal adjudication.

This paper then analyses the complementarity mechanism of the International Criminal Court (ICC) as a viable avenue within which legal pluralities within individual state parties can be evaluated. Notwithstanding the substantial literature on complementarity, there has been very little exploration of substantive legal pluralism. Plural domestic practices can be relevant both in national proceedings and in ICC proceedings. Similar to the concept of qualified deference, the evaluation and potential use of contextually appropriate domestic practices over standardized international ones may improve the quality of the adjudication as well as the effectiveness of the justice attained. It may also benefit the political relationship between the ICC and state parties in generating and sustaining state consent. The paper then studies the likely permissible boundaries on the scope of legal pluralism within complementarity. It concludes with the argument that the incorporation of domestic legal pluralism within the international criminal justice discourse is a logical and necessary measure to operate on the horizontal plane of sovereign equality.

11.2 The Development of Modern International Criminal Justice

International law is continually shaped by the community of states. Sovereign states are organic entities, and their approach to international co-existence has fluctuated with time. As such, the direction, or rather trajectory, of international law has been in oscillation between the original Westphalian reality of minimally regulating relations between independent sovereign states, and a collaborative concept of global society mutually upheld by an international community. The design and function of international institutions are therefore significantly influenced by the specific trajectory of international law at the time of their establishment.

The creation of the United Nations (UN) represented the culmination of international collaboration, and the solidification of the current international legal order. Although its roots can be traced to the preceding League of Nations, the UN is entirely unique in concretely establishing its international executive authority on the horizontal plane of international relations. In other words, the formation of the UN Security Council (UNSC) created an unprecedented hierarchy within the Westphalian plane of equal autonomous sovereigns.

There are two insights about the current international infrastructure that strengthen the case for the increased accommodation of legal pluralism. Firstly, there has been a conflation

of the concept of democratic legitimacy and the operational necessity of hierarchy. This relationship is best exemplified in the establishment of the UN General Assembly (UNGA) and of the UNSC. The UNGA embodies the principles of internationality and democratic legitimacy, and is reflective of the collective will of the international community. The UNSC, with particular reference to the privileges of the permanent five members (P5), is established with no such democratic legitimacy. It was specifically created to improve the shortcomings of the League of Nations, and to endow the UN with effective decision-making abilities. As the UNSC is entrusted with all the major decisions of the UN and international governance, including the sanctioned use of force, it can be argued that the UN itself is not democratic in practice. This undemocratic international executive authority is often incorrectly made synonymous with the rhetoric of international consent that surrounds the creation of the UN.

Secondly, the above clarification is necessary because the resulting institutions of ICJ were created under the auspice of this new legal order. Therefore, beyond the rhetoric of collectivity and internationality, these institutions were inevitably designed and controlled in some form by the UNSC. In other words, an analysis of the orientation and selectivity of international criminal adjudicative institutions reveals that, for the most part, the global criminal justice system has been an exclusive enterprise of a multinational group of powerful Western states.

In the post-war periods following the two World Wars, the strength and stability stemming from the military victories of the Allies, in particular the US and the UK, enabled the actualization of collective post-war desires to establish some form of global governance and overarching accountability on the Westphalian plane of sovereign equality. The resulting system of international governance, though designed to avert future war, was inevitably designed in favor of the founding Western authorities. This is most clearly evident in the permanent membership of the UNSC.⁴⁴³ To bring legal accountability onto the international sphere, the hierarchical modality found in domestic criminal justice was referenced. Domestic criminal law stems from *jus puniendi*, which is the sovereign prerogative to adjudicate crimes committed within its territory. This essential characteristic of statehood is fundamentally a vertical process between the state adjudicator and the accused. It requires a sovereign presiding at the apex of the hierarchy, from which there can be no appeal. It is immediately difficult to see how this could be transposed into the Westphalian international reality, where there was a plurality of equal sovereigns co-existing without established hierarchies. There was no way for a state to legitimately transgress on Westphalian parameters of sovereign equality and non-interference, save for war. The novel creation of the international executive authority of the UNSC, however, made this possible. The concept of criminal justice was modified to incorporate the UNSC as the ultimate authority, and sovereign states as entities subject to such authority.

⁴⁴³ Notwithstanding China and the USSR.

This paradigm permeated throughout the practice of ICJ in the 20th century. The atrocities and human catastrophes of WW II provided the impetus for the UNSC to exercise its new supreme authority, albeit under the guise of internationality. The International Military Tribunal for Nuremberg (IMT) was unilaterally created by the victorious governments of the US, UK, France (provisional), and the USSR. The judicial participants were limited to those assigned by the four signatory states and, as such, the application of the law was also limited to the legal traditions of those states. This is immediately juxtaposed with the preambular declaration of the IMT, declaring that it was “acting in the interests of all the United Nations”.⁴⁴⁴ Similarly, the International Military Tribunal for the Far East (IMTFE) was created unilaterally, but with even less democratic legitimacy; it was established following the Special Proclamation of General Douglas MacArthur, the Supreme Commander of the Allied Powers.

With the new supranational authority and legal morality compensating for the lack of democratic legitimacy, these institutions were able to transgress on the Westphalian tenets of sovereign equality and non-interference. The IMT Charter amalgamated and codified crimes that previously existed independently with varying degrees of certainty and legitimacy. It made exclusive claims to the practice of this new international criminal law, and applied it unilaterally and arbitrarily to contexts across Europe and Japan. It has been argued that in these circumstances of “total war”, where every aspect of the state had been restructured to support war, such bullish intervention by an international judiciary was necessary. A greater concern is that the practices of these incipient institutions inadvertently set a dangerous precedent that has reverberated into modern justice mechanisms. In applying justice on behalf of the international community, the tribunals explicitly suspended the application and relevance of domestic legal systems. It was a necessary measure in the prosecution of Nazi officials, as Nazi laws were technically valid and legitimate in the state of Germany.

Crimes against humanity, for example, had traditionally existed to protect citizens of one state against the criminal actions of another (Bantekas and Nash 2003, 300). The Westphalian reality did not foresee a situation where a state could be made accountable for its actions towards its own citizens. The relationship between a sovereign state and its nationals was an entirely internal matter for that state, and could not be scrutinized by other equal states. However, the IMT extended the constituent elements of crimes against humanity to include acts committed “against *any* civilian population”.⁴⁴⁵

What is distilled for this current analysis is that an unelected body of victorious states had used the rhetoric of international collectivity to construct its supranational authority on the

⁴⁴⁴ IMT Charter, Preamble.

⁴⁴⁵ IMT Charter, Article 6(c) (emphasis added).

horizontal plane of sovereign equality. This authority permitted transgressions against the founding pillars of international co-existence, and eroded the concept of absolute sovereignty. The discrepancy between UN rhetoric and the actual practice of power had become evident in the selectivity of the IMT; actions that may have triggered liability for the Allies, including the indiscriminate bombing of Nuremberg itself, were explicitly ignored by the Tribunal. In the famous circumstances of the IMTFE, Emperor Hirohito was intentionally not arraigned because “the Truman administration and General MacArthur both believed the occupation reforms would be implemented smoothly if they used Hirohito to legitimize their changes” (Bix 2001). These practices questioned the legitimacy and impartiality of international justice mechanisms being modelled after the vertical hierarchy between a domestic sovereign state and the accused.

The humanitarian catastrophes in the former Yugoslavia and Rwanda in the early 1990s provided fresh impetus for the UNSC to exercise its international governance. The collapse of the USSR had defused the political deadlock that had frustrated unity within the P5. Unlike WW II, the P5 were not directly involved as combatants in either of these conflicts. They were thus not susceptible to allegations of exercising victors’ justice, or retribution, as had been the case for the IMT and the IMTFE. The UNSC exercised its Chapter VII powers under the UN Charter to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

These ad-hoc tribunals were reminiscent of the IMT in exercising justice notwithstanding sovereign barriers. The tribunals were endowed with primacy, which granted legal and jurisdictional supremacy over the courts of sovereign states. In the ICTY context, NATO’s bombing campaigns in Kosovo had formally categorized NATO as a combatant in the conflict, and therefore within the jurisdiction of the ICTY. However, attempts to initiate investigations by the then Chief Prosecutor Louise Arbour were effectively blocked by NATO’s refusal to cooperate. This prosecutorial selectivity established a *de facto* immunity of the P5 from international prosecution. In the context of the ICTR, the UNSC had been in consultation with the post-genocide government of Rwanda. However, Rwanda ultimately voted against the establishment of ICTR for several reasons, including concerns about the size of the judicial staff and the unavailability of the death penalty.

The ICTR was created, notwithstanding the explicit objections of Rwanda, where the crimes took place. Unlike the case of Yugoslavia, these crimes had mostly taken place within Rwandan borders, and were therefore an internal matter. However, Rwandan requests to tailor the proceedings to accommodate the local conditions were not honored. The body entrusted to maintain international peace and security made unilateral decisions. This explicit disregard for sovereignty, especially in regards to a strictly internal matter, clearly resembles the practices of the IMT. However, as this paper seeks to establish, there is no irrefutable reason as to why the international adjudication could not be molded around reasonable national preferences. Unilateral international intervention was necessary to

adjudicate the Nazi German state. The Rwandan instance is distinct from Nazi Germany, as the re-established Rwandan government sought to prosecute the perpetrators and seek restoration through its local courts.

One of the objections that Rwanda raised was the lack of the death penalty in the ICTR. Capital punishment is recognized and practiced within the Rwandan penal system. The UNSC may have views on such a practice, but it is difficult to see how regulating the precise form of justice, saves for perhaps unconscionable or repugnant laws,⁴⁴⁶ is necessary to maintain international peace and security. This is of particular concern when two states of the P5, China and the US, also regularly implement the death penalty within their own national penal systems. It suggests that the UNSC prioritized the coherent development of global criminal law rather than bringing justice to Rwanda. If the priority had been on local justice, the recipient society would have been consulted to identify the relevant factors and contextual nuances that may have materially affected the adjudication process. This evaluation would also have identified appropriate forms of justice that would have facilitated the restorative healing process for victims. The judicial consideration would have then focused on whether, and if so how, it could incorporate these local elements into international practice to maximize the impact of justice. This process would have balanced the process of international criminal adjudication with implicit deference for sovereign individuality.

This has not been the case. Appeasing the legal sensibilities of international legal communities in The Hague and elsewhere in the West has not aided the restoration process in Rwanda. Rather, it has alienated the concept of justice from the people most deserving of it.

11.3 The International Criminal Court

The establishment of the ICC marked an unprecedented point in time where several factors converged to make possible a treaty-based criminal court. The full extent of these factors cannot be comprehensively detailed here, but notably, the geopolitical climate was generally optimistic in the post-Cold War period between the fall of the Berlin wall and 9/11 attacks. Leading up to this period, the process of decolonization had drastically altered the international landscape. Developing states significantly outnumbered the developed Western states, as was apparent in the UNGA. However, these newly created states realized that their long-awaited acquisition of formal sovereignty did not translate into real power on the international stage. Through mechanisms like weighted voting procedures within global financial institutions as well as the limited representation of states in the UNSC, tensions became more apparent between the developing bloc and the Western powers. An example of this friction can also be seen in the promulgation of international human rights law, where

⁴⁴⁶ This concept dates back to the repugnancy clauses during colonialism, where the colonizing state may overrule or deny local laws if they were found to be "repugnant to natural justice, equity, and good conscience" (Anghie and Sturgess 1998, 52).

the urgency to proliferate human protection across borders circumvented the important process of gaining consensus on which specific rights and protections would be selected as truly universal (Yang 2015).

Following the experience of the ad-hoc tribunals operating as the judicial arm of the UNSC, the international community convened to create a permanent court of core international criminal law. The state parties consented to the transfer of *jus puniendi* to an autonomous court, which would not be associated with or controlled by any particular state or bloc of states. In many ways, this concept transcends the Westphalian reality, as it assigns sovereign powers to a completely non-sovereign entity. This level of autonomy was unsustainable within the environmental circumstances of its predecessors, but was made possible in this narrow window of opportunity. One of the main battle lines at the negotiations of the ICC Statute was the involvement of the UNSC. The P5 within the UNSC had intended on integrating the Court under the auspice of the UN, but states fiercely resisted this assimilation. They believed that “the risk of an ICC prosecutor running wild [was] ultimately [...] a lesser evil than a court which would be seen from the beginning as distributing unequal justice” (Steinke 2012, 104, 106). A compromise was agreed to that permits the UNSC to make referrals to the Court, although the Court is not bound to open an investigation upon such referrals, which prevents the UNSC from directing the Court with selective referrals. Once the Court does initiate an investigation of a situation, it is free to prosecute any parties within that situation. The Court therefore effectively curtails the influence of the *status quo* in its investigations and prosecutions.

The treaty-based foundations of the Court impose obligations under treaty law on signatory states.⁴⁴⁷ This translates to an imperative for the Court to constantly generate and sustain state consent in its operations. It is free from the influence of the UNSC, which means it does not enjoy the coercive support of the UN infrastructure. There are neither intrinsic enforcement mechanisms nor penalties for non-cooperation within the Rome Statute.⁴⁴⁸ Therefore, if the Court emulates the “vertical” trajectory of its predecessors, it faces the risk of being marginalized, circumvented, and ultimately ignored.

11.3.1 Complementarity Regime

One of the distinguishing features of this treaty-based institution is the complementarity regime. This mechanism is designed to balance the objectives of international criminal accountability with deference to state sovereignty. It is founded on the recognition that states possess inviolable sovereign rights to exercise criminal jurisdiction within their territory (Benzing 2003, 595). The ICC Statute modifies this notion by first referring to it as the “duty” of each state to prosecute international crimes.⁴⁴⁹ Complementarity can then

⁴⁴⁷ Vienna Convention on the Law of Treaties, Art. 26 (*pacta sunt servanda*).

⁴⁴⁸ ICC Statute, Part IX (International cooperation and judicial assistance).

⁴⁴⁹ ICC Statute, Preamble.

become operative when a state fails to uphold this duty. This relationship enables a horizontal ICJ system to impartially exist over a community of consenting state parties. It is therefore often referred to as the underlying principle (Charney 2001, 120), the cornerstone (La Haye 1999, 1-8), or the key concept of the Court (Bergsmo 2000, 87-96). However, its backstop nature has an added effect of prompting domestic prosecutions by looming over states as an implicit threat. This is key in the discussions on legal pluralism; state parties may wish to avoid the unwarranted intervention of the Court, but may be unsure as to what extent they can use their own laws in their national proceedings that may differ from those of the Court.

The Preamble and Article 1 of the Rome Statute state that the Court “shall be complementary to national criminal jurisdictions”; unlike the ad-hoc tribunals which have primacy over national judiciaries. It is subsidiary and supplementary to the domestic investigations and prosecutions of the most serious crimes of international concern (Benzing 2003, 592). The principle is given substantive effect through the overarching admissibility provisions of Article 17, outlining circumstances in which a particular case may be deemed inadmissible to the Court.⁴⁵⁰ Rather than articulating situations where a case may become admissible, this test is negatively constructed; it offers an exhaustive list of circumstances that may prevent the Court from admitting cases. These circumstances are then conditioned on discretionary determinations made by the Court. The precise internal specifications for these determinations affecting the operation of complementarity are curiously absent from the Statute. The combination of the limited negative parameters and the lack of explicit positive specifications enable the Court to remain flexible in evaluating varying situations of fraudulent domestic proceedings that may suggest impunity. In the articulation of complementarity, concepts like admissibility and jurisdiction are necessarily distinguished; the Court may possess positive jurisdiction over a situation, but may not be able to exercise it if the situation is deemed to be inadmissible.

Therefore, a clear and definite understanding of the operation of Article 17 is imperative to evaluate the symbiotic relationship between the Court and the state parties. In enumerating possible scenarios of inadmissibility, it subjects all such findings to discretionary determinations by the Court. A case can be deemed inadmissible when:

Article 17 (1)

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

⁴⁵⁰ ICC Statute, Article 17.

- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.⁴⁵¹

While Article 17(1)(a) and (b) display deference for formal sovereign processes, they are conditioned on the Court's internal and autonomous determinations of unwillingness and inability of the state. Similarly, Article 17(c) upholds the legal doctrine of *ne bis in idem*, but again subjects it to the Court's views on whether the individual was shielded from criminal responsibility, or the proceedings conducted were inconsistent with the intent to bring the individual to justice.⁴⁵² The Article 17(d) determination of what constitutes "sufficient gravity" is also unsurprisingly based on discretion. This design arguably creates further pressure for states to prioritize seeking convictions and appropriate sentences to appease the Court, rather than fairly adjudicating the crime in line with their own traditions. Instances of mitigating circumstances and acquittals, for example, would be heavily scrutinized by the skeptical Court. While this may be appropriate in certain contexts, this tendency supports the worrying notion that international criminal justice often presumes the guilt of the accused.

In understanding the mechanics of the unwillingness and inability determinations, the Court can consider the indicators set out Article 17(2) and (3).

Article 17 (2)

In order to determine unwillingness in a particular case, *the Court shall consider*, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Article 17 (3)

In order to determine inability in a particular case, *the Court shall consider* whether, due to a total or substantial collapse or unavailability of its national judicial system,

⁴⁵¹ ICC Statute, Article 17.

⁴⁵² ICC Statute, Article 20(3)(a) & (b).

the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.⁴⁵³

The wording of the above provisions makes it clear that the Court's consideration is not limited to the enumerated list, as the Court may unilaterally perceive unlisted acts as being "inconsistent with an intent to bring the person concerned to justice". As the tests of unwillingness and inability are disjunctive, the existence of either may overturn the limited circumstances that establish inadmissibility under Article 17(1). In ascertaining situations of unwillingness, the Court may scrutinize domestic proceedings for possible acts of shielding persons from criminal responsibility,⁴⁵⁴ unjustifiable delays,⁴⁵⁵ and quality of proceedings that are deemed to be inconsistent with the intent of bringing individual to justice.⁴⁵⁶ This intent to bring individuals to justice is insightful to the current discussion because the concept and form of justice is not defined. Justice is a normative concept, and can vary greatly depending on the situation, locality, culture, and context. It can either appease the sensibilities and expectations of the international community as led by the Western powers, or be coherent with the local circumstances and expectations of the victim community. Sometimes both parties may desire similar concepts of justice, but this may not always be the case. In the absence of clarification, one can perhaps presume that the Court is satisfied by a state's intent to seek prosecutorial adjudication which results in a non-capital sentence. In this way, the Court effectively creates subtle parameters for states to seek criminal accountability, although the result may actually hurt justice efforts in the national context.

Inability determinations assess the physical integrity of domestic infrastructures, where a total or substantial collapse or unavailability of a legal system may prevent the state from initiating domestic proceedings.⁴⁵⁷ This determination also provides an interesting analysis for the current discussion. It has been previously argued that a national judiciary may be deemed "unable" under Article 17 if its state legislation only addressed international crimes under the label of "ordinary" domestic crimes. The rationale was that ordinary classifications failed to capture the intrinsic magnitude and gravity of international crimes (Benzing 2003, 614-5). Recent jurisprudence of the Court has clarified this issue, and established that as long as the same person/same conduct test is satisfied, which are the constituent elements for determining whether the state and the Court are viewing the same case, the individual need not be specifically charged with an international crime.⁴⁵⁸

While domestic crimes need not therefore exactly replicate international labels, the Court would then evaluate whether the domestic charge is being used in a manner to shield

⁴⁵³ ICC Statute, Article 17 (2) & (3) (emphasis added).

⁴⁵⁴ ICC Statute, Article 17(2)(a).

⁴⁵⁵ ICC Statute, Article 17(2)(b).

⁴⁵⁶ ICC Statute, Article 17(2)(c).

⁴⁵⁷ ICC Statute, Article 17(3).

⁴⁵⁸ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, October 11, 2013.

criminal responsibility. This could be relevant in instances where a state charges an accused with an unreasonably lenient domestic charge. As analyzed below, these instances could constitute instances of permissible pluralism, as there is an overlapping claim between the Court and the state, and the Court has deferred to the state. However, this pluralism addressing the label of charges is technical in nature, and is insufficient to provide the Court with the context and perspectives of local communities.

Inability determinations can become relevant in how the Court engages “deeper” forms of domestic legal pluralism. The legal diversity that exists within a state system may be viewed as constituting an inability of that system to conduct acceptable proceedings. The Rome Statute enshrines core legal rules, such as the definition of crimes. These have been incorporated into the national context, in not being made contradictory by existing domestic legislation. Therefore, they can be applicable to national crimes, should the state prosecute for the same crime. However, states may have diverging practices and views on other aspects of the proceedings, in both substance and in procedure. There is a clear conflict of laws in this instance between the state and the Court. If the application of state laws does not mirror the practice or views of the Court, there are two general outcomes. The state law must *prima facie* be accepted as a permissible pluralistic approach, existing in parallel to the Rome Statute rather than in contravention. The Court may thus acknowledge the differing legal perspectives of the national judiciary, and assess the legitimacy and suitability of the rule in question. This would be a scenario in which the Court embraces legal pluralism and encourages domestic judiciaries to forge local justice, albeit within the wider parameters set by the ICC system. This practice would inevitably enrich the body of international criminal law, although not every case of pluralism would or should be approved. Conversely, the Court may determine that the domestic system is unable to administer justice the way it would be done at The Hague using de-contextualized international criminal law. This unavailability could then be used to declare the national proceedings as being unable to conduct the investigation and prosecution. This is notwithstanding the reality that national processes may be genuine, legitimate, and more contextually appropriate to forge justice for the victim community.

The governing provisions in Article 17 outline the current operating system of complementarity, and the discretionary determinations provide “red line” parameters within which explorations of plural pursuits of justice in domestic spheres can take place. The discretionary nature of the determinations makes it difficult to undertake analysis in concrete and conclusive terms. However, this flexibility simultaneously provides the potential and practical methods for the Court to adopt context-specific forms of justice that prioritize the local victim community over the desire to develop a monistic body of coherent international criminal law. The Court may “permit” the actualization of justice that is consistent with the cultural and contextual circumstances of the domestic locality. This would be fulfilled by the Court assessing situations for technical and factual impropriety, without necessarily making a determination on the nature of the justice forged. In practice,

this would mean that even in situations where the Court may not necessarily agree with the domestic legal system, as long as the processes are technically “legitimate”, the Court would not seek to admit the case. This approach would promote plural forms of sovereign justice, strengthen the overall system of preventing impunity, and enrich the discourse on international criminal law.

The actual practice of complementarity has naturally been the subject of many interesting academic viewpoints, with particular focus on its triggering mechanism and its orientation. The varying scholarship focuses on three decisive factors that the Court is said to consider in its evaluation of sovereign processes – charges, sentences, and procedures of the domestic proceedings. The view centralizing the importance of charges compares the technical labels that the domestic courts have used in their prosecution of international crimes. While labels on whether the charges are domestic or international, or of serious or minor gravity, may provide indicators on the integrity of the local proceedings, it cannot be deemed as the exclusive or even the primary test in the overall assessment of domestic systems. Therefore, a state’s choice of labels cannot in itself automatically provide grounds for the Court to admit the case. This is supported by the fact that currently there are no positive obligations for states to adopt international labels into their domestic system. The Court has also recently ruled that, “the assessment ... of the domestic proceedings must focus on the alleged conduct and not on its legal characterization”.⁴⁵⁹

In his review of charged-based complementarity, Kevin Heller reiterates that the ICC Statute does not support complementarity solely based on the labelling of charges, and that such a focus on labels is essentially an attempt to unify the body of international criminal law around the ICC system for coordination purposes (Heller 2012, 213). However, there are no inherent advantages in using international definitions as long as domestic legislations can adequately address the conduct in question. Heller goes on to outline his proposal of a sentence-based approach, where the unwillingness test should be “solely” determined by reference to the sentence produced (Heller 2012, 225, 248). The Court would examine the produced domestic sentence and, with a modest margin of appreciation, compare it to the average of imposed sentences for the corresponding crime to gauge its legitimacy (Heller 2012, 225). As the Court currently does not have a comprehensive database of sentences to provide a useful average, Heller proposes incorporating the practice of the ad-hoc tribunals as well as the maximum sentence provided for in the Statute (Heller 2012, 226-7).

In his commentary on Heller’s contribution, Darryl Robinson notes that relying solely on the sentence-based approach, as with the charge-based approach, is insufficient and inadequate (Robinson 2012, 1). Like the gravity considerations within the charge-based approach, the produced sentences can be a guiding indicator within the Court’s determinations, but they cannot be relied upon as the exclusive factor. Assessing domestic proceedings purely on the

⁴⁵⁹ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-11/11-344-Red, Pre-Trial Chamber I, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, May 31, 2013, para 34.

resultant sentence also creates additional problems in practice. The Court must wait until the proceedings have been concluded, including the appeals process, which may mean a delay of many years. The sentence approach also cannot conceptually accommodate possibilities of acquittals or other situations where the sovereign state may stay proceedings to uphold fundamental public values (Robinson 2012, 5). This approach also creates an innate presumption that every trial will produce a conviction, and therefore contrary outcomes are to be subconsciously viewed as disingenuous. The use of averages of the corresponding crimes on the international plane largely overlooks the overwhelming intricacies and factual considerations involved in sentencing.

Robinson therefore advocates using a process-based approach to complementarity as the foundational basis for guiding interactions between the domestic and international judiciary. He argues that while charges and sentences may be used as possible indicators of genuineness, a more holistic analysis of domestic processes is necessary to make a meaningful determination. Put into practice, the Court would oversee and evaluate the nature and quality of the domestic processes being undertaken, and if there is evidence that suggests that the process is not genuine at any point, the Court may make a determination of admissibility (Robinson 2012, 4). If the domestic processes were deemed to be genuinely conducted at an acceptable quality, however, the Court would *prima facie* be satisfied, and would not move to admit the case.

Robinson's process-based complementarity allows a pluralistic approach that supports locally appropriate forms of justice. As long as the proceedings are genuine and legitimate in their contexts, differing perspectives and applications of the law by sovereign judiciaries would not automatically constitute grounds for admissibility. The caveat is that the state must implement the Court's lowest common denominator set of laws, although domestic factors may provide many interpretations and applications of these as well. Sovereign states would also be able to develop their own cultural heritage and legal traditions without being wary of the implicit threat of ICC involvement. In practical terms, this could include unique procedural rules in the proceedings, interpretation of substantive laws consistent with national and sub-national views, and sentencing practices that are coherent with past practices. There would be no inclination to mitigate this implicit threat by unnaturally modifying their domestic systems to artificially mirror that of the ICC. As analyzed above, states are obliged to domesticate the core elements of the Rome Statute into their own legal systems. However, there are more aspects to the investigative, adjudicative, and sentencing practices than the definition of crimes. Given the looming presence of the ICC admissibility procedure, which operates on normative guidelines as interpreted by the Court on a case-by-case basis, states are pressured to act in ways that minimize the possibility of unilateral Court involvement. One of the ways this may occur is by a state sacrificing its own domestic practices in favor of the practices of the Court. These instances create a situation similar to the Rwandan experience, where the concept of justice was alienated from the local victim

communities who could not understand why senior officials were sentenced less harshly by the ICTR than the lower ranking perpetrators who were sentenced by the Rwandan courts.

In addition to its normative undesirability, a homogeneous approach to criminal justice may also facilitate internal inconsistencies and fragmentation throughout the international community. Ultimately, an ideal scenario would entail the Court using a standard of legitimate prosecutions by states exercising their duties to prosecute. By the Court's purposeful inaction, it can facilitate domestic systems to further develop their unique legal identity in line with their indigenous culture and heritage, and deliver localized justice to the affected community.

The following section analyses the most recent instance of complementarity as exercised between the Court and the Libyan government in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*.⁴⁶⁰ This case illustrates the emerging inadequacies of this current approach to complementarity. It reveals that complementarity, as an operational principle, is still in development with unexplored frontiers. The analysis then illustrates how the current complementarity regime can feasibly facilitate the subsequent discussions on plural approaches to justice on the domestic plane.

11.3.2 The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi

Following the Libyan revolution of 2011, the Court made an unprecedented ruling in holding that the case against Abdullah Al-Senussi was inadmissible on the grounds that he was currently subject to on-going domestic proceedings conducted by the competent authorities of Libya.⁴⁶¹

Potential crimes committed during the Libyan revolution were referred to the Court by the UNSC on February 26, 2011,⁴⁶² and formal investigations were initiated on March 3, 2011.⁴⁶³ Arrest warrants were then issued for the former Libyan intelligence chief Abdullah Al-Senussi on June 27, 2011 for alleged crimes against humanity of murder and persecution during the period between February 15 and February 20, 2011.⁴⁶⁴ On April 2, 2013, the post-revolution Government of Libya challenged the admissibility of the case against Al-Senussi under Article 17(1)(a) and 19(2)(b) of the ICC Statute. Article 19 of the ICC Statute details the provisional grounds on which a state may challenge the admissibility of a case:

Article 19 - Challenges to the jurisdiction of the Court or the admissibility of a case

...

⁴⁶⁰ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, October 11, 2013.

⁴⁶¹ *Ibid*, para 311.

⁴⁶² United Nations Security Council, Resolution S/RES/1970, February 26, 2011.

⁴⁶³ International Criminal Court, *Situation in the Libyan Arab Jamahiriya*, ICC- 01/11- 1, The Presidency, Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre- Trial Chamber I, March 04, 2011.

⁴⁶⁴ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-4, Pre-Trial Chamber I, Warrant of Arrest for Abdullah Al-Senussi, June 27, 2011.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

...

(b) A State, which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted;⁴⁶⁵

The Libyan government contended that the case was inadmissible because its national judicial system was actively investigating Al-Senussi's criminal responsibility through concrete and specific investigative steps and, further, its domestic proceedings were not in any way vitiated by its own unwillingness or inability.⁴⁶⁶ This approach set out to satisfy the rubric of Article 17(1)(a). It asserted the existence of current domestic proceedings against the individual as the underlying grounds for the challenge, and explicitly denied the presence of any unwillingness and inability affecting the case. The challenge referenced the initial involvement of the Libyan Military Prosecutor, and the later transfer of the proceedings to the civilian offices of the Prosecutor-General. This transfer of proceedings was said to be pursuant to a decision of the Libyan Supreme Court dated July 17, 2012, in applying the Libyan Criminal Procedure Code, and the Libyan Military Procedures Act;⁴⁶⁷ it was submitted to emphasize the democratic legitimacy and transparency of the post-revolution government.⁴⁶⁸ Libya also contended that while the temporal scope of the ICC arrest warrant and its subsequent prosecution was restricted to between February 15 to "at least" February 20, 2011, the true scope of Al-Senussi's alleged crimes in the state ranged from the 1980s until the fall of the Gaddafi regime on October 20, 2011.⁴⁶⁹

This contention exposed an underlying tension between the domestic plane and the ICC system. It suggested that local domestic judiciaries were inherently better equipped to deliver comprehensive and holistic justice than the distant international system. In order to establish a concrete case with supportable evidence, international prosecutions in general are exceedingly restricted in their scope, whereas local courts usually have wider cultural and contextual understandings of the case with more evidence at their perusal. As such, the Libyan government supported their proceedings as being "much broader than the ICC's investigation".⁴⁷⁰ In the substantive crimes charged, Libya confirmed that the charges "will likely include unlawful killing, looting, the distribution of narcotics, incitement to commit

⁴⁶⁵ ICC Statute, Articles 17(1)(a), 19(2)(b).

⁴⁶⁶ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-307-Red2, The Defence, Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the ICC Statute, April 2, 2013, para 36.

⁴⁶⁷ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, The Defence, Libyan Government's Consolidated Reply to the Responses by the Prosecution, Defence and OPCV to the Libyan Government's Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, August 14, 2013, para 72.

⁴⁶⁸ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, October 11, 2013, para 15.

⁴⁶⁹ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-4, Pre-Trial Chamber I, Warrant of Arrest for Abdullah Al-Senussi, June 27, 2011, 5-6; see also International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-307-Red 2, The Defence, Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the ICC Statute, April 2, 2013, para. 157.

⁴⁷⁰ *Ibid*, para 158.

rape, kidnapping, and other crimes associated with fomenting sedition and civil war”.⁴⁷¹ The charges were not fixed at the time of the challenge. While not explicitly applying international labels, the list of envisioned charges substantially corresponded with illegal and prohibited acts listed in Articles 7 and 8 of the ICC Statute. This indefinite and ambiguous position could have been a strategic move to remain flexible in the possible event that the Court insisted on identical charges, or inclusions of other imperative charges.

Given the heavily discretionary nature of the rubric, Libya could only reassure the Court that it had the infrastructure to properly administer justice “in accordance with minimum international standards”, and had specifically taken “various steps to ensure the safety of witnesses”.⁴⁷² With these ambiguous and at times politically subjective standards, Libya generally reiterated that:

“The evidence adduced by the government proves, with a high degree of specificity and probative value, that the case is being investigated by Libya. Pursuant to Article 17(l)(a) and 17(2) and (3), the evidence is concrete, tangible, and pertinent, demonstrating that the state is willing and able to carry out the investigation genuinely. There is no evidence to support a reasonable inference to the contrary”.⁴⁷³

In emphasizing the explicit absence of evidence to support an inference to the contrary, Libya attempted to reverse the onus of the challenge onto the Court. Under its formulation, it viewed the Court as having to substantiate positively why the challenge should be denied, stipulating that in the absence or failure of such a showing the challenge should succeed by default.

Though subtle, the placement of the onus in these important areas of contention between the Court and sovereign states provides for an interesting analysis. In cases of UNSC referrals, a state would either not have had a chance to prosecute the individual, or to have undertaken proceedings at an unacceptable standard, and therefore may have facilitated forms of impunity. The UNSC referrals may also include situations where crimes have been committed and adjudicated in the territory of a non-state party. In the latter cases indicating possibilities of impunity, the Court may have grounds to question the legitimacy of the proceedings. Therefore, the onus would be rightfully placed on the state to substantiate why the case should not be made admissible. However, in the former scenario of states not having had a reasonable chance to adjudicate the crime, the onus may logically be placed on

⁴⁷¹ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-455, The Defence, Government's Submissions and Response to Defence “Filing on behalf of Mr. Abdullah Al-Senussi pursuant to ‘Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi’ of 19 September 2013” and ‘Addendum’ filed on 5 September 2013’, September 26, 2013, para 8.

⁴⁷² *Ibid*, 8.

⁴⁷³ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-307-Red 2, The Defense, Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the ICC Statute, April 2, 2013, para 124.

the Court to disprove why such an admissibility challenge should fail, as it effectively denies states their prerogatives to exercise criminal adjudication.⁴⁷⁴ Sovereign states genuinely claiming the right to exercise their duty to prosecute should *prima facie* override UNSC referrals as well as *proprio motu* initiations. States should not have to substantiate and convince the Court in exercising this prerogative. In cases of state referrals, however, the fact that the state has referred the case indicates its desire to seek prosecution through the ICC organs. Therefore, the onus would by default be on the state to reverse its initial request, and prove why the proceedings should now take place domestically. In practice, this may occur when the state has referred a situation to the Court, but later wishes to seek alternative methods at resolving the conflict and seeking expedient peaceful restoration.

The wording of the relevant provisions in the ICC Statute, however, irrevocably places the onus in every situation on states to substantiate why the case, by default, is not admissible.⁴⁷⁵ The ICC jurisprudence in a different case arising from the same UNSC-referred situation of Libya has reflected this stance, holding that for Libya “to discharge its burden of proof that currently there is not a situation of ‘inaction’ at the national level, it needs to substantiate an investigation is in progress at this moment”.⁴⁷⁶

In coming to a decision on admissibility, the Pre-Trial Chamber in *Al-Senussi* employed a two-step analysis of the Article 17 rubric; the existence of a domestic on-going investigation or prosecution (first limb), and the willingness and ability to carry out genuinely the proceedings (second limb).⁴⁷⁷ In the first limb, this case-by-case determination hinged on whether the domestic proceedings covered the same case as that before the Court, by applying the same person/ (substantially) same conduct test.⁴⁷⁸ The supplementary determination of what constitutes substantially the same conduct was determined to be discretionary on a case-by-case basis.⁴⁷⁹ Having confirmed the identification of a case, whether or not it was being investigated was determined on the basis of “concrete and progressive investigative steps”, which included “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.⁴⁸⁰ The PTC found that

⁴⁷⁴ Though the existence of UNSC referrals in the first place would very strongly suggest the failure of the domestic system in some fundamental aspect.

⁴⁷⁵ ICC Statute, Articles 17 & 19.

⁴⁷⁶ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-239, Pre-Trial Chamber I, Decision Requesting Further Submissions On Issues Related To The Admissibility Of The Case Against Saif Al-Islam Gaddafi, December 7, 2012, para 14.

⁴⁷⁷ International Criminal Court, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, September 25, 2009, paras. 1, 75-7.

⁴⁷⁸ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, October 11, 2013, paras. 61,74, 76-7.

⁴⁷⁹ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-11/11-344-Red, Pre-Trial Chamber I, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, May 31, 2013, para 77; *see also* International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, October 11, 2013, para 66.

⁴⁸⁰ International Criminal Court, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-274, Appeals Chamber, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, August 30, 2011, paras. 1, 40; *see also* International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, October 11, 2013, para 66.

the first limb was satisfied by the competent Libyan authorities in covering the same case as that before the Court.⁴⁸¹

It is somewhat ironic that the internal mechanisms of international justice depend so extensively on discretionary determinations of the localized facts of a case, yet the overall characterization of individual crimes is treated uniformly without reference to their local context. In other words, the Court necessarily considers local and contextual factors to make key determinations as individually appropriate for the instance. However, this capability to consider local factors is exclusive to the Court, and does not extend to other logical aspects of the criminal proceedings. Crimes being adjudicated at the international level are scrutinized in relation to the ICC Statute, and cannot be influenced or contextualized by local factors on a case-by-case basis. For example, a war crime that is committed in one locality is viewed as the same in a very different locality in legal characterization. It isolates the analysis from the fundamentally relevant domestic factors that have contributed to the commission of the crime and that remain indispensable for achieving justice and accountability. This realization further strengthens the argument for a pluralist approach to criminal justice, as such an approach is better equipped to address the full scope and nuances underlying the crimes.

In the second limb of the test concerning unwillingness and inability, the PTC reviewed the collective submissions of Libya, the Defense, and the Prosecutor. The first two parties argued their views on the fulfilment or failure of key words like “genuine”, “unwillingness”, and “inability”.⁴⁸² The Prosecutor, however, argued that such a determination affecting state sovereignty must take into consideration the drafting history of Article 17, which recalled the original sentiment of states for the Court to not pass judgment on “the fairness of the national system *per se*”.⁴⁸³ In this instance, it was ironically the “rogue” Prosecutor who checked the limits of the Court. The Prosecution further claimed that the ICC system “should not function as a court of appeal on national decisions based on alleged domestic deviations from applicable human rights norms”, and should not “find a state unwilling on the sole ground that the national proceedings violated due process, but must also find a violation of one of the three subparagraphs in Article 17(2)”.⁴⁸⁴ Similarly for determinations of inability:

“While Article 17 sets out benchmarks to enable the Court to identify cases that cannot be genuinely heard before national courts, the Statute's complementarity provisions should not become a tool for overly harsh structural assessments of the judicial machinery in developing countries or in countries in the midst of a post-

⁴⁸¹ Ibid, paras. 167-8.

⁴⁸² Ibid, paras. 173-184.

⁴⁸³ Ibid, para 186; *see also* International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01-11-01/11-321-Red, The Prosecutor, Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute', May 02, 2013, para 71.

⁴⁸⁴ Ibid, para 71.

conflict democratic transition which, as Libya notes, will not possess a sophisticated or developed judicial system”.⁴⁸⁵

These claims seemed to reflect the true and original purpose of the system of complementarity between the Court and domestic states. It explicitly identified the potential for the Court to use complementarity to prejudice developing and post-conflict states. It attempted to refocus the test as existing to protect situations where domestic judicial infrastructure has collapsed or become unavailable. The Prosecutor further argued that the Court should only consider admissibility decisions when domestic proceedings:

“...lack fundamental procedural rights and guarantees to such a degree that national efforts can no longer be held to be consistent with the object and purpose of the Statute... Such considerations should be applied cautiously and only to those cases where due to the complete absence of even the minimum and most basic requirements of fairness and impartiality, the national efforts can only be viewed as a travesty of justice, and accordingly justify the continued exercise of jurisdiction by the Court”.⁴⁸⁶

This qualification becomes increasingly relevant for future discussions on the permissible range of pluralist deviations in domestic practices. It principally suggests that domestic systems need not mirror the ICC system. Rather, it will satisfy the Court if it possesses the basic and minimum requirements of fairness and impartiality within its legal system, and the overall proceedings are not a “travesty of justice”. In practice, this increases the possible scope of the pluralist approach to legal systems that are vastly different from the Western tradition. For example, insofar as a legitimate system of direct Sharia criminal law upholds its respective requirements of fairness and impartiality as it is understood in that local sphere, the Court would *prima facie* be satisfied that that Sharia system had genuinely adjudicated the individual in accordance to its own conception of justice, and delivered a sense of justice that is acceptable and consistent with the local community.

The PTC concluded that, based on the evidence, Libya was not unwilling or unable to undertake genuine proceedings against Al-Senussi, and thereby declared the case inadmissible before the Court.⁴⁸⁷ On July 24, 2014, the Appeals Chamber (AC) confirmed this decision.⁴⁸⁸ In its judgment, the AC discussed the operative principles of Article 17 to

⁴⁸⁵ Ibid, para 72.

⁴⁸⁶ Ibid, para 73.

⁴⁸⁷ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, October 11, 2013, paras. 293, 310-311

⁴⁸⁸ International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Appeals Chamber, Appeals Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’), July 24, 2014.

emphasize the central tenets of independence and impartiality of all proceedings, and the overarching necessity to always act with the intent of bringing the individual to justice.⁴⁸⁹

This is distinct from the case made against Saif Al-Islam Gaddafi. Pre-Trial Chamber I rejected Libya's challenge to admissibility on May 31, 2013, and this was confirmed by the Appeals Chamber on May 21, 2014. Saif Al-Islam Gaddafi remains in custody in Zintan, Libya, and has yet to be surrendered to the Court.⁴⁹⁰ The Court has been criticized on its inconsistent approaches to Gaddafi and Al-Senussi. For example, the lack of legal representation for Gaddafi was found to support a finding that Article 17's test of admissibility had been met, whereas the same facts in Al-Senussi did not. Scholars differ in their assessment of these decisions, some focusing on the weight given to the element of custody, with others focusing on the "at the time" requirement underpinning admissibility considerations (Tedeschini 2015, 76). What is clear is that it is difficult to predict how such an admissibility challenge will be handled in the future.

Following the successful admissibility challenge of Al-Senussi, the resulting Libyan prosecution in 2015 raised further doubts on the correctness of that original decision. The post-revolution climate within Libya has been turbulent, with the state splitting into two rival governments. This is further exacerbated by the current crisis of the so-called Islamic State's occupation of Derna, Libya, from which it is spreading into eastern Libya. Notwithstanding the Libyan verbal commitment to conduct fair trials, the actual proceedings had neither witnesses nor evidence discussed in court. The personal safety of legal representatives was constantly at risk, and a defense lawyer was shot. Given this experience, the Court would likely take a more restricted approach in the future when assessing admissibility challenges. However, sub-standards of due process and fair trials should not be conflated with domestic legal pluralism. The Libyan experience in relation to Al-Senussi highlights the outer parameters of the state in conducting its own criminal adjudication.

So where do these outer parameters lie; where does deference to domestic pluralism cross the line of legitimacy? There are two parallel considerations within this formulation. First is the actual substance of the applicable law, and the second is its overall legitimacy in practice. The Libyan case study remains inconclusive in illuminating substantive pluralism. The criminal charges were left deliberately ambiguous to accommodate the government's overarching political objective of resisting ICC intervention. Furthermore, the post-revolution government of Libya adopted a more "Western" approach to criminal law compared to its Islamic past. In other words, there were no clear instances of non-Western legal traditions being applied as to invite discussions about any discrepancies in substantive law. The second consideration of the overall legitimacy has partially been answered in the Al-Senussi context. The Libyan government employed various strategies to assure the Court that it was capable

⁴⁸⁹ Ibid, para 1.

⁴⁹⁰ On December 10, 2014, the Court issued a finding of non-compliance by Libya with respect to, *inter alia*, the request for the surrender of Gaddafi to the Court.

of undertaking legitimate and genuine proceedings. This consideration reflects the underlying pillars of criminal processes irrespective of localities and cultures. Although the Court unprecedentedly acknowledged its inadmissibility, the ultimate dubiousness of Al-Senussi's trial in Libya may cast a shadow over future inadmissibility challenges. Nonetheless, it would appear that insofar as the proceedings are legitimate and genuine, the adjudication can take place within the state.

This paper looks at the central importance of further exploring pluralism in the substantive sense, rather than in technical labels or minimum standards of due process. Future studies will invariably encounter scenarios where the Court and a state may have fundamentally different views on material substantive laws, procedures, and or sentencing practices. It is at this intersection where questions must be asked as to whether the Court will permit certain substantive deviations insofar as minimum standards are met, or overrule such pluralism by superimposing its views.

11.4 Conclusion

The analysis of the regime of complementarity as a whole reveals that it is still a developing concept, and will be subject to future ideological and practical developments by the Court. So far, the analysis of the jurisprudence has demonstrated that the ICC has predominantly permitted domestic pluralism only as it relates to the labelling of charges. The same person/same conduct test has facilitated this pluralist technicality in the current system, in that domestic systems are not obliged to use international classifications of crimes, and sovereign choices to not do so cannot *prima facie* constitute grounds for admissibility. However, this level of pluralism is ultimately superficial and limited when viewing the wider scope of contextual justice. It cannot hope to encompass the more pertinent issues relating to sovereign states legitimately pursuing justice as appropriate for their locality.

Given the Court's relatively young age and its limited jurisprudence in deferring to the judiciaries of state parties, empirical evaluations on domestic legal pluralism in substantive and procedural law have yet to occur. This paper attempts to elucidate why such a turn to domestic legal pluralism is necessary, and how it can generally be achieved within the existing infrastructure. It has also illustrated the outer boundaries of complementarity, which limit the scope of national pluralism that can be considered. Having created a space where such considerations can take place, future experiences can perhaps categorize the types of plural domestic practices, and assess their compatibility with the ICC system. It is hoped that this level of deference to national legal systems will bring several benefits. The actual process of adjudication can take into account greater contextual factors, which may provide material insights into the nature of the crimes committed. The resulting form of justice can be made more consistent with local practices, and incorporate the expectations and desires of the victim communities. This step can "bring home" the concept of justice, which is far more likely to assist in the restoration process than current practices. Lastly,

states would be more willing to cooperate and support the Court if their own views and practices are incorporated into its proceedings. This can perhaps assist in alleviating the growing discontent of several states in the African Union, leading to a creation of their own international criminal court through the Malabo Protocol. As in the Al-Senussi example, however, such a turn to legal pluralism would necessarily have to be balanced with objective tenets of due process and international standards of adjudication.

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