



## **Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan**

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### **Abstract**

The International Criminal Court (ICC) was established as a permanent independent institution to prosecute individuals who have committed or are implicated in the most serious crimes of international concern including genocide, crimes against humanity and war crimes. This study assesses the challenge of ensuring peace and reconciliation while holding leaders accountable, with specific reference to the politics of the ICC cases in Sudan (Darfur) and Kenya. In particular, this article argues that the issue of prosecuting alleged perpetrators is problematic with respect to the cases that the ICC is currently engaged in. The study argues that since the ICC has become involved in peace, reconciliation and political processes, it thus has the potential to disrupt such initiatives if its interventions are not appropriately sequenced. The study further argues that both President Omar al-Bashir of Sudan, and subsequently President Uhuru Kenyatta of Kenya, managed to politicize the ICC interventions in their countries. The article concludes that this process of politicization of the Court's interventions in Sudan and Kenya, eventually led the ICC into a political stand-off with the African Union (AU), with the United Nations Security Council being an unresponsive but implicated secondary actor. The study also concludes that since neither the ICC nor the AU have managed to find a way out of the impasse, there is a need to develop some innovative strategies. This article therefore offers some insights into a prospective way forward.

### **Résumé**

La Cour pénale internationale (CPI) a été mise en place en tant qu'institution indépendante permanente pour poursuivre les individus qui ont orchestré et mis en œuvre les crimes les plus sérieux de préoccupation internationale, y compris

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les crimes contre l'humanité et les crimes de guerre. Cette étude évalue le défi d'assurer la paix et la réconciliation tout en tenant les dirigeants responsables, avec une référence spécifique à la politique de la CPI sur les dossiers au Soudan (Darfour) et au Kenya. En particulier, cet article soutient le point de vue que la question de la poursuite des auteurs présumés est problématique en ce qui concerne les dossiers dans lesquels la CPI est actuellement engagé. L'étude soutient que puisque la CPI est devenu engagé dans la paix, la réconciliation et les processus politique, il a le potentiel de perturber de telles initiatives si ses interventions ne sont pas adéquatement séquencées. Elle soutient aussi qu'à la fois le Président Omar al-Bashir du Soudan et ensuite le Président Uhuru Kenyatta du Kenya, ont réussi à politiser les interventions de la CPI dans leur pays. Cet article conclut que ce processus de politisation des interventions de la Cour au Soudan et au Kenya, a finalement conduit la CPI dans un affrontement avec l'Union Africaine (UA), avec le Conseil de Sécurité des Nations-Unies étant un acteur non-réactif, mais impliqué. L'étude conclut aussi que puisque ni la CPI, ni l'UA n'ont réussi à trouver une voie de sortie de l'impasse, il y a besoin de développer certaines stratégies innovantes. Cet article offre en conséquence certaines réflexions sur une marche en avant.

## **Introduction**

The International Criminal Court (ICC) was established as a permanent independent institution to prosecute individuals who have orchestrated and implemented the most serious crimes of international concern including genocide, crimes against humanity and war crimes. The Rome Statute, which entered into force on 1 July 2002, is explicit on the role of the Court in exercising a criminal jurisdiction over perpetrators of these crimes. This study will assess the challenge of ensuring peace and reconciliation while holding leaders accountable, with specific reference to the politics of the ICC cases in Sudan (Darfur) and Kenya. In particular, the study will argue that for the cases that the ICC is currently engaged in, such as Sudan and Kenya, the issue of prosecuting alleged perpetrators is problematic. It is evident in practice that the individuals who have been subject to the jurisdiction of the Court are also key interlocutors in ongoing peace processes with all the complexities that this entails. Therefore, the study will argue that since the ICC has become implicated in peace, reconciliation and political processes, it also has the potential to disrupt such initiatives if its interventions are not appropriately sequenced.

African countries were actively involved in the creation of the International Criminal Court and played a crucial role at the Rome conference when the Court's Statute was drafted and adopted. To date, Africa represents the largest regional grouping of countries within the ICC's Assembly of States

Parties. While African countries were initially supportive of the ICC the relationship degenerated in 2008 when President Omar al-Bashir of Sudan was indicted by the Court. Following this move the African Union, which is representative of virtually all countries on the continent, adopted a hostile posture towards the ICC. The African Union called for its member states to implement a policy of non-cooperation with the Court, which remains the stated position of the continental body. This study will argue that both President Omar al-Bashir and subsequently President Uhuru Kenyatta of Kenya, managed to politicize the ICC interventions in their countries. Furthermore, al-Bashir and Kenyatta were able to pan-Africanize their criticisms and contestations against the ICC through the African Union (AU) which was pre-disposed to challenging the Court's interventions on the continent.

The study will suggest that even though both organizations share a mandate to address impunity, the stand-off between the ICC and AU suggests that they are in fact engaged in practicing a variation of 'judicial politics' and 'political justice'. The study concludes that this process of politicization of the Court's interventions in Sudan and Kenya ultimately subsumed the ICC into a political stand-off against the African Union (AU), with the UN Security Council as an unresponsive but implicated secondary actor. The study will also conclude that since neither the ICC nor the AU have managed to find a way out their impasse innovative strategies need to be adopted to ensure that both organizations fulfil their mandate to address impunity on the African continent. This study offers insights into a prospective way forward for confronting impunity and holding leaders accountable, while ensuring the promotion of peace and reconciliation in Africa. This study draws from literature in a range of disciplines including international law; international relations and political studies. Consequently, it provides an interdisciplinary contribution to the discourse relating to the ICC and its relationship with Africa.

## **Africa and the Establishment of the ICC**

### ***The Trajectory of International Criminal Justice***

The establishment of the ICC was the culmination of an evolution of international justice that can be traced back to the Nuremberg and Tokyo trials following the Second World War. The Rome diplomatic conference which led to the signing of the Statute establishing the Court, in July 1998, was a long and arduous affair of international negotiation and brinkmanship. The majority of countries represented at the Rome conference, including

African countries were of the view that it would be a positive development in global governance to operationalize an international criminal justice regime which would hold accountable individuals who commit gross atrocities and violations against human rights. Specifically, the Court has jurisdiction over war crimes, crimes against humanity and genocide; and the intention is that its jurisdiction over the crime of aggression will become operative by 2017. The reality of the Rwandan genocide of 1994 also convinced many African governments of the need to support an international criminal justice regime which would confront impunity and the persistence of mass human rights violations on the continent. African countries were therefore part of a wider campaign of support for the ICC.

The Court also had its opponents. At the 1998 Rome conference, 120 participants voted for the final draft of the Rome Statute, but twenty-one abstained and seven voted against. From its inception, 'the Court faced a strong challenge from the United States, which first signed the Statute and then "unsigned" it' (Sriram 2009: 315). The failure of powerful countries, including Russia and China, to proactively support the Court and subject themselves to its criminal jurisdiction, immediately began to raise alarm bells about the reach and ultimately the efficacy of the Court. The concern was that the remit of the Court would be confined to the middle and weaker powers within the international system. The Statute required sixty ratifications to come into force, which were obtained in April 2002, paving the way for the launch of the ICC in July 2002. The African governments subsequently raised objections about the self-exclusion by powerful countries, underpinned by concerns about how the original noble intentions of the Court had become subverted by the political expediency of the interests of the great powers.

## **Interventions of the ICC and Perceptions in Africa**

### ***The Advent of Political Justice***

The Court's current prosecutorial interventions are exclusively in Africa: the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Sudan (Darfur), Uganda, Libya, Côte d'Ivoire, Mali and Kenya. Through a combination of self-initiated interventions by the former Prosecutor, Louis Moreno Ocampo, as well as two UN Security Council referrals, and the submission by individual governments of cases to the Court, this Afro-centric focus has created a distorted perception within the African continent about the intention underlying the establishment of the Court. It is important to note that the cases in the Central African Republic, the Democratic Republic of the Congo and Uganda were self-

referrals by the governments of these countries. However, the fact that these cases were referred by presidents of countries whose political intention was to target their political opponents indicates that the ICC became a willing accomplice to the machinations of domestic politicians. This has discredited the ICC in the eyes of the political opponents and their supporters who were summoned by the Court. This means that the ICC, by association with the ruling regime, effectively became instrumentalized as a 'political weapon' in these countries. Consequently, there is sense in which 'political justice' is informing the cases currently before the ICC notably in Sudan, Kenya, Uganda, DRC, Côte d'Ivoire, CAR and Mali.

### *The Reality of Selective Justice*

In addition, there is the issue of international political perceptions of the ICC interventions in Africa. By examining each African case one might be able to formulate a rational explanation as to why all the current cases of the ICC are from Africa. One can observe that there is a combination of domestic and international political interests behind the submission of, for the time being, only African cases and UN Security Council referrals to the ICC. The UN Security Council is effectively dominated both diplomatically and financially by its Permanent Five (P5) – China, France, Russia, United Kingdom and United States, which constitute the global power elite. The reality is that African countries voluntarily signed up to be subject to the jurisdiction of the Court, so some have questioned why they subsequently have criticized the Court for doing its work. However, one might argue that it is possible for a neutral observer, who critically analyses the facts, to develop the perception that the ICC was established for the sole purpose of prosecuting cases from Africa, given the fact that all of the individuals who have been summoned are African.

Irrespective of the prism through which one chooses to assess the situation, there is a perception among several African governments that the Prosecutor has been selective in submitting cases to the ICC Pre-Trial Chambers. The selective justice in the Court's current prosecutions is seen as an injustice towards the African continent and a form of 'judicial politics'. War crimes are being committed across the world and the ICC has opened a number of preliminary investigations in non-African countries including Afghanistan, Georgia, Colombia, Honduras and Korea. In 2014, the ICC opened preliminary investigations into potential war crimes committed in Iraq by military personnel and political leaders from the United Kingdom, based on a dossier submitted by civil society activists. However, the slow pace, and as some have argued the 'non-movement' in bringing preliminary

to the point of issuing summons and initiating prosecutions of non-African cases, suggests to analysts and politicians in Africa, that a more insidious agenda is in fact in operation as far as ICC interventions and Africa are concerned. Hence, it appears to African governments that the ICC is keen to pursue cases on their continent only, where the states are weak when compared to the diplomatic, economic and financial might of the US, the United Kingdom, Russia and China. This has hit a diplomatic nerve within the African continent. According to some African officials, there is an entrenched injustice in the selective actions of this international criminal court system whose primary function is to pursue justice for victims of gross violations. Proponents of the Court end up engaging in highly convoluted and incoherent arguments as to why there are no cases from outside Africa.

### ***The Moral Integrity of the ICC System***

The moral integrity of the ICC system, including the UNSC referral mechanism, has therefore been called into question by a number of commentators and observers in Africa. The essential accusation is that cases are not being pursued on the basis of universal demands of justice, but according to the political expedient of choosing cases that will not cause the Court and its main financial supporters any concerns.

## **Crisis in Kenya: The Challenge of Holding Leaders Accountable**

### ***A History of Violence in Kenya***

Following the presidential elections held in Kenya on 27 December 2007 the results of the poll were heavily contested by the two main political parties, the Party of National Unity (PNU) and the Orange Democratic Movement (ODM). When the contested results were announced, violent protests, ethnic profiling and killings afflicted the country in the early months of 2008 across Kenya. The violence affected communities in the low-income areas of the capital city of Nairobi, as well as in key urban and rural centres including Mombasa, Kisumu, Eldoret and parts of the Rift Valley, Nyanza, Western and Coastal Provinces. Over a six to seven week period an estimated 1,200 people were killed in the violent clashes and approximately 450,000 people were internally displaced and forced to flee their homes as a direct result of the violence. A National Accord and Reconciliation Agreement was mediated by the Kofi Annan-led Panel of Eminent Personalities, under the auspices of the AU, on 28 February 2008. The Agreement stipulated the need to convene commissions of inquiry to assess the electoral process and also to investigate the post-electoral violence.

### ***Efforts to Domesticate the Prosecution of International Crimes***

The Kenyan Commission of Inquiry into Post-Election Violence (CIPEV – the Waki Commission) was mandated to investigate the facts and circumstances surrounding the post-electoral violence. On 11 December 2008, the Kenyan Parliament passed the International Crimes Bill which effectively domesticated the Statute of the International Criminal Court. The passage of this Bill empowered the Kenyan state to investigate and prosecute international crimes committed locally or abroad by a Kenyan or committed in any place against a Kenyan. The passage of this Bill was a key recommendation of the Waki Commission. The next step was supposed to be the establishment of a Special Tribunal of Kenya to begin the process of adjudicating on cases relating to the organizers and perpetrators of the post-electoral violence in Kenya.

### ***The Aborted Special Tribunal of Kenya***

To confront impunity, the Waki Report called for the establishment of a Special Tribunal of Kenya to try suspected sponsors and organizers of the post-electoral violence. This would serve as an in-country legal framework for the adjudication and administration of justice for the alleged suspects. Astutely, the Waki Commission ensured that the recommendations in its report were accompanied by sunset clauses that would initiate consequences for in-action or intransigence. Specifically, the Waki Report states that if ‘an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted’, then ‘a list containing names of, and relevant information on, those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court’ (CIPEV 2008: 473). This sunset clause effectively laid the foundation for the Prosecutor of the ICC to intervene in Kenya. Subsequently, Kofi Annan submitted the list of suspects to the first Prosecutor of the ICC, Louis Moreno Ocampo, who selected six names, which were subsequently reduced to four names by the ICC trial chambers.

### **Conflict in Sudan: The Challenge of Holding Leaders Accountable**

Post-colonial Sudan was beset from the outset with political tension, which escalated in the early 1970s into a war of secession by the south. By the 1990s, the Sudanese National Islamic Front (NIF) of President Omar al-Bashir, who took power through a military coup in 1989, launched an Islamist-based domestic and foreign policy, thus perpetuating tension including among

the Christian and Animist communities in the south of the country. The longstanding dispute between the Sudanese government and the secessionist southern Sudan People's Liberation Movement/Army (SPLM/A) significantly affected the dynamics of the region. Relations with Ethiopia and Eritrea, who were engaged in a border war, deteriorated. The conflict between the Government of Uganda and the Lord's Resistance Army (LRA) in northern Uganda is also affected by the situation in Sudan, since Ugandan resistance militia are launching their attacks from Sudanese territory. Hundreds of thousands of Sudanese refugees are now camped in neighbouring countries.

### ***The Conflict in Darfur and the Sudan Regime's Atrocities***

In 2004, the conflict in Darfur in western Sudan devastated social infrastructure and subjected a large number of people to starvation (IRIN 2004). The situation turned out to be the most difficult humanitarian challenge that the African continent has experienced. The conflict in this area was initiated in February 2003 when local movements rebelled against discrimination towards the region's three main indigenous ethnic groups – the Fur, Massalit and Zaghawa. They also demanded greater political participation in their own affairs and the adoption of programmes to genuinely promote economic development. These populations organized themselves into armed groups known as the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM). Subsequently, these armed groups have splintered and fragmented into a broad range of militia.

From the outset, the al-Bashir-led government of Sudan engaged, and continues to confront, these groups in armed confrontation. By the mid-2000s pro-government militia (also colloquially known as the Janjawid) and anti-government militia, SLA and JEM, were fighting over control of pastoral and agricultural land. The majority of humanitarian workers on the ground as well as the victims suspected that the Janjawid was receiving covert support from the government. The pro-government militia aggressively conducted violent pogroms against the people of the region. In particular the pro-government militia was accused of stealing cattle and taking over the region's grazing lands and scarce water sources from the Fur, Massalit and Zaghawa ethnic groups of the region.

### ***The United Nations Referral of the Darfur Situation***

In addition to the fighting there has been a pattern of organized attacks on civilians and villages, including killings, rape and abductions. A particular conflict strategy seemed to be predicated on the forced displacement,



through the destruction of homes and livelihoods, of farming populations in the region. Estimates indicate that sixty per cent of the villages in this region of Darfur, which is home to about 1.5 million people, have been destroyed, burned or abandoned because of fear of attacks from the warring parties, aerial bombardments from government troops and compulsory recruitment by the SLA and JEM. In 2005, the unfolding situation motivated the United Nations Security Council (UNSC) to refer the situation in Darfur to the ICC.

### **The Politics of the ICC Cases in Sudan and Kenya and the African Union's Involvement**

The quest to hold leaders accountable in Sudan and Kenya gradually became transformed into a contestation between the African Union and the ICC. It is often the case that individuals and leaders who have been accused of planning, financing, instigating and executing atrocities against citizens of another group, all in the name of civil war, can be investigated by the ICC if the country in question is a States Party or if the issue is referred to the Court by the UNSC. However, it is often the case also that those individuals and leaders are the very same people who are called upon to engage in a peace process that will lead to the signing of a peace agreement and ensure its implementation (Meernik 2005: 272).

#### ***ICC Interventions in Sudan Relating to the Darfur Region***

In the situation in Darfur, the case of *Prosecutor v. Omar al-Bashir* proved to be controversial. The ICC Pre-Trial Chamber I has issued an arrest warrant for al-Bashir for genocide, crimes against humanity and war crimes. Meeting shortly after the Court's decision, the African Union Peace and Security Council issued a communiqué on 5 March 2009 which lamented that this decision came at a critical juncture in the ongoing process to promote lasting peace in Sudan (African Union 2009). Additionally, through its communiqué of 5 March 2010, the AU Peace and Security Council (PSC) requested the UN Security Council to exercise its powers under Article 16 of the Rome Statute to defer the indictment and arrest of al-Bashir. The AU PSC subsequently expressed its regret over the UN Security Council's failure to exercise its powers of deferral and effectively postpone any action of the ICC. Consequently, on 3 July 2009, at the 13th Annual Summit of the Assembly of Heads of State and Government held in Sirte, Libya, the African Union decided not to cooperate with the ICC in facilitating the arrest of al-Bashir. This decision led to a souring of relations between the AU and the Court.

The AU was making the case for sequencing the prosecution by the Court due to the fragile peace in Darfur. There were undoubtedly political reasons for such a request by the AU, since the arrest and arraignment of a sitting head of state in Africa could set a precedent for a significant number of other leaders on the continent, who could potentially be subject to the criminal jurisdiction of the ICC for their own actions. Therefore, rallying behind al-Bashir, who was re-elected as President of Sudan in April 2010, could be construed not only as a face-saving exercise.

To date, the Office of the Prosecutor of the ICC has so far been faced with non compliance by the Government of Sudan with regard to the arrest warrant for al-Bashir, and even other African countries have declined to arrest Bashir when he has travelled there, including Djibouti, Kenya, Ethiopia, South Sudan and Chad. In this case, the prosecution is being delayed not because of the decision and discretion of the Court but because of the non compliance of African countries and the international community in seeing through its request (De Waal 2008: 31).

In the majority of cases that the ICC is currently engaged in, the issue of prosecuting alleged perpetrators is problematic. As noted earlier, given the contentious reality that, more often than not, individuals who have been subject to the jurisdiction of the Court are also key interlocutors in ongoing peace processes, the Court is currently implicated in influencing the dynamics of peace-building in countries in which prosecutions are pending or ongoing. Therefore, the ICC has the potential to disrupt in-country peace-building initiatives if its interventions are not sequenced appropriately (De Waal 2008: 31).

On 29 and 30 January 2012, the 18th Ordinary Session of the Assembly of AU Heads of State and Government, which was held in Addis Ababa, Ethiopia, reiterated its position not to cooperate with the International Criminal Court. It stipulated that all AU states had to abide by this decision and that failure to do so would invite sanctions from the Union. In particular, the decision urged 'all member states to comply with AU Assembly Decisions on the warrants of arrest issued by the Court against President Bashir of the Sudan' (African Union 2012: paragraph 8). The African Union further requested its member states to ensure that its request to defer the situations in Sudan, as well as Kenya, was considered by the UN Security Council.

### ***ICC Interventions in Kenya***

On 31 March 2010, Pre-Trial Chamber II granted former ICC Prosecutor Ocampo his request to open an investigation using his *proprio motu* powers into the situation in Kenya. On 15 December 2010, Ocampo identified

six individuals whom he suspected of orchestrating the most serious crimes during the Kenyan post-electoral violence of 2007 and 2008. The so-called Ocampo Six included Uhuru Kenyatta (former Deputy President), William Ruto (former Minister), Henry Kosgey (former Minister and Member of Parliament), Joshua Arap Sang (radio presenter), Mohammed Ali (former Head of the Police) and Francis Muthaura (former Head of the Civil Service). Subsequently, the ICC Pre-Trial Chamber II found that there was a reasonable basis for all six to appear before the Court for alleged crimes against humanity. On 8 March 2011, the ICC issued a summons to appear before the Court. On 7 and 8 April 2011, all six individuals voluntarily appeared before Pre-Trial Chamber II. Between 1 September and 5 October 2011, the confirmation of charges hearings took place. On 23 January 2012, the Pre-Trial Chamber II found that the ICC Prosecutor's evidence failed to satisfy the evidentiary threshold required in the case of Henry Kosgey and Mohammed Ali. In terms of Francis Muthaura, even though his charges were initially confirmed, they were subsequently dropped. On 29 March 2012, the ICC Presidency constituted Trial Chamber V to conduct the Ruto, Sang and Kenyatta cases. In a subsequent ruling the ICC postponed Kenyatta's trial to April 2013 after the presidential election. Legal analysts would argue that this was well within the ICC's right, however, political analysts have argued that this was a pragmatic political decision by the ICC in order to avoid entangling itself in the Kenyan presidential poll which took place in 2013. This intention was however subverted by events on the ground as the ICC became increasingly politicized within the Kenyan domestic political scene.

*'Choices have Consequences': The Politicization of the ICC in Kenya's 2013 Elections*

In parallel to these ICC proceedings, the politicization of the Kenyan ICC cases was unravelling in Kenya, in the lead-up to the presidential elections which were due to take place in March 2013. In particular, Kenyatta and Ruto combined their political forces to establish the Jubilee political party, and accused the former Prime Minister, Riala Odinga, who was leading the CORD political party, of having engineered the submission of their names to the ICC. The specifics of how Odinga was supposed to have orchestrated this political sleight of hand were never explained by the Kenyatta-Ruto axis, and as time progressed the issue of 'how' became less relevant as high octane politics consumed the Kenyan populace. The phrase that was regularly utilized to politically taunt Kenyatta and Ruto was: 'don't be vague and go to The Hague'.

As a counter-argument, the Kenyatta-Ruto axis, nicknamed 'Uhuruto', argued that Odinga should have been among those named to the ICC given his role as Prime Minister and one of the principals fomenting civil unrest during the 2007 and 2008 post-election violence. Analysts have suggested that if one were to broaden the net, then Mwai Kibaki, as the President of the country at the time, and the ultimate chief executive, or as some would argue 'chief executor', should also have been among the names that were submitted to the ICC Prosecutor. The legal arguments as to whether the two principals, Kibaki and Odinga, as the individuals who are ultimately responsible for decisions and actions taken by their subordinates, have since been drowned out by the political narrative which consumed Kenya between the summons to appear before the ICC and the presidential poll of March 2013. International actors joined the political bandwagon and chose their sides in this cacophony of the domestic politicization of international criminal justice processes, with a US Assistant Secretary of State Johnnie Carson, having stated in effect that 'choices would have consequences' if Kenyatta and Ruto were elected as president and deputy president respectively (Voice of America 2013). Oblivious to the incendiary nature of such a comment coming from the world's only super-power, Carson unwittingly played into Kenyatta and Ruto's game of politicizing their ICC cases. Carson's utterances further fuelled the notion that foreign interests, and now specifically the United States government, was tacitly supporting Odinga as their preferred candidate for Kenya's presidency, despite a subsequent claim by President Barack Obama that his administration was neutral on the issue. Kenyatta and Ruto were able to play the 'foreign interests' card all the way to the day of the elections.

In an outcome that surprised a number of observers, Kenyatta won the presidential poll in March 2013 and Ruto became his deputy. Kenyatta and Ruto did not waste any time in manoeuvring to avoid taking part in the ICC trial process. A broad range of political and diplomatic strategies and tactics were deployed, and continue to be deployed, to avoid Kenyatta in particular appearing before the ICC. At the heart of Kenyatta's strategy was to pan-Africanize the issue of his summons before the ICC as a sitting head of state, by appealing to the African Union for support and endorsement of his position. The African Union had been embroiled in a stand-off with the ICC, fuelled by the UN Security Council referral of Bashir, and therefore Kenyatta found a willing interlocutor among his peers at the AU.

On 12 October 2013, an Extraordinary Session of the Assembly of Heads of State and Government of the African Union was convened in Addis Ababa, Ethiopia, to discuss Africa's relationship with the ICC. The African Union issued a series of decisions, including the need to 'safeguard the constitutional order, stability and integrity of member states' by ensuring that 'no charges

shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such a capacity during their terms of office' (African Union 2013: paragraph 10 (i)). Furthermore, the AU Heads of State called for suspension of the trials of Kenyatta and Ruto until they have completed their terms of office. In a controversial move, the AU Assembly also stipulated 'that any AU member state that wishes to refer a case to the ICC may inform and seek the advice of the African Union' (African Union 2013: paragraph 10 (viii)). In a direct challenge to a case before the International Criminal Court, the AU Assembly decided 'that President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its member states have been adequately addressed by the UN Security Council and the ICC' (African Union 2013: paragraph 10 (xi)).

This in effect confirmed that Kenyatta had found a willing partner in the AU in terms of taking on and amplifying the criticisms of the ICC's interventions on the African continent, just like Bashir had achieved before him. Some analysts have argued that this series of decisions signified the AU as consolidating and entrenching its position with regard to the ICC. The notion that an AU member state has to inform and seek the advice of the Union if it wishes to refer a case to the ICC has been criticized for its overt politicization of what should be impartial legal processes.

### *The UNSC Meeting on a Deferral of the Kenyan Cases*

On 15 November 2013, at the 7,060th Meeting of the UN Security Council, a Resolution seeking to request the ICC under Chapter VII of the UN Charter to defer the investigation and prosecution of President Kenyatta and Deputy President Ruto for twelve months, in accordance with Article 16 of the Rome Statute, failed to win a majority. In terms of the vote, seven members voted in favour and eight members abstained, which prevented a mandatory nine votes being secured. Thus there was no veto to pass the Resolution. This enabled African member states in favour of the UNSC at the time to criticize the Council for its selective application of the powers of the ICC, notably in situations that were not under the 'patronage' of the P5 members.

### *The ICC Assembly of State Parties meeting on Leadership Immunity*

Since the indictment of Bashir, the African Union has argued that the Rome Statute cannot override the immunity of state officials whose countries are not members of the Assembly of States Parties. The African Union sought an advisory opinion from the International Court of Justice on the immunities of state officials within the rubric of international law.

On 22 November 2013, there were early indications that the ICC system was open to addressing the concerns of African countries when the 12th Session of the Assembly of States Parties to the Rome Statute of the International Court convened a special segment, at the request of the African Union, on the theme of 'Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation'. The speakers included the former AU Legal Counsel, Djenaba Diarra, and the Kenyan Attorney General, Githu Muigai. Diarra commended the Assembly of States Parties for convening the debate and then went on to reiterate her organization's concern about the failure of the ICC to undertake prosecutions outside Africa, as well as the impact of international criminal proceedings upon efforts to promote peace and stabilize regions. Muigai argued that immunities for sitting heads of state already exist in domestic jurisdictions and that it would be anachronistic for them not to be recognized and implemented at an international level.

### **Rome Statute Provisions: Sequencing of Punitive Justice to Enable Peace-building**

The mandate of the ICC is unambiguous, as stated in Article 1, in that it seeks to 'exercise its jurisdiction over persons for the most serious crimes of international concern' (Rome Statute 2002: Article 1). Article 5 lists these as: a) the crime of genocide; b) crimes against humanity; c) war crimes; and d) the crime of aggression (Rome Statute 2002: Article 5(a)–(d)). The mandate of the Court is therefore to prosecute individuals who commit these crimes either acting alone or in concert with others. Therefore, in this sense the function of the ICC is to mete out retributive or punitive justice. It views atrocities of 'international concern', as requiring a process of redress, so as the Preamble to the Rome Statute states 'to put an end to impunity for the perpetrators of these crimes and to contribute to the prevention of such crimes' (Rome Statute 2002: preamble). In effect, the ICC views itself as having a preventive and deterrent role through its rulings (Cassese, Gaeta and Jones 2002).

Whilst the Preamble of the Rome Statute however also recognizes 'that such grave crimes threaten the *peace, security and well-being of the world*' (Rome Statute 2002: Preamble) the Statute does not further elaborate how the Court will contribute towards advancing 'peace' in the broader sense beyond ensuring that the perpetrators of these crimes are punished. In fact, the Rome Statute does not engage with the issue of peace beyond making this point in the Preamble.

The Rome Statute does not explicitly articulate a definition of justice, but it does tacitly allude to the need for international justice to 'put an end

to impunity' and redress the effects of 'unimaginable atrocities that deeply shock the conscience of humanity' (Rome Statute 2002: Preamble). The Rome Statute does indicate that the ICC is 'complementary to national criminal jurisdictions' (Rome Statute 2002: Preamble). However, it does not refer explicitly to other quasi-judicial mechanisms such as truth commissions. Therefore, there is scant guidance within the Rome Statute as to whether the ICC can complement and enable national restorative justice processes. In effect, there are no explicit provisions within the Rome Statute to provide an insight as to whether there should be the sequencing of the ICC's criminal jurisdiction with the domestic efforts of truth commissions and other restorative justice processes. In September 2007, the Office of the ICC Prosecutor issued a 'Policy Paper on the Interests of Justice' in which it acknowledged that 'it fully endorses the *complementary role* that can be played by *domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of broader justice*' (OTP 2007: 8). More specifically, the Office of the Prosecutor 'notes the *valuable role* such measures may play in dealing with large numbers of offenders and in addressing the *impunity gap*' (Ibid.).

### ***Deferral of Investigation or Prosecution***

Specifically, with reference to the deferral of investigation or prosecution, Article 16 states that 'no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect' (Rome Statute 2002: Article 16). Article 16 of the Rome Statute implies that the initiation, or the threat of the initiation, of an ICC prosecution is part and parcel of the range of provisional measures that the UN Security Council can call upon. The framers of Article 16 of the Rome Statute included the reference to Chapter VII of the UN Charter because it is traditionally associated with the body's authority to impose punitive sanctions.

### ***Sequencing and the Interests of Justice***

Another stipulation within the Rome Statute which can provide a basis for sequencing retributive and restorative justice is outlined in Article 53-1(c) which states that the Prosecutor can decline to initiate a process if he or she determines that after 'taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice' (Rome Statute 2002). As indicated earlier the Rome Statute does not proffer a definition

of justice beyond making reference to what it should be seeking to redress – namely impunity for serious crimes of international concern. Therefore, the reference to the ‘interests of justice’ in Article 53 of the Statute opens up the possibility for a broader interpretation of the notion of justice. Article 53 effectively gives the Prosecutor the discretion to decide on whether there are ‘substantial reasons’ not to initiate an investigation.

### *The Statute of Limitations and the Sequencing of Justice*

As far as the non-applicability of the Statute of Limitations is concerned, Article 29 states that ‘the crimes within the jurisdiction of the Court shall not be subject to any Statute of Limitations’ (Rome Statute 2002: Article 29). In effect, as far as the ICC is concerned there is no time limit imposed upon the prosecution of individuals who commit atrocities and the most serious crimes of concern to the international community. This therefore provides an opening as to how ICC prosecutorial interventions can be sequenced with national efforts to promote restorative justice. Specifically, given the fact that there is in effect no time constraint on when the ICC can initiate, implement and conclude the prosecution of perpetrators, there is thus scope for the Court to sequence its interventions in ways that enable other peace-building process such as the establishment and operationalization of restorative justice processes to take precedence.

## **The Second Chief Prosecutor and the Prospects for the AU-ICC Relationship**

In December 2011, the Assembly of States Parties appointed Fatou Bensouda, former Attorney-General and Minister of Justice of the Gambia, as the consensus choice for the Office of the Prosecutor. Bensouda was a key member of the Ocampo team, as the Deputy Prosecutor in charge of the ICC Prosecutions Division, and it is unlikely that she will digress significantly from the parameters stipulated in the Rome Statute.

### *Ocampo’s Judicial Politics*

The former Chief Prosecutor Ocampo was emphatic that he did not ‘play politics’, but it was all too obvious that he was more enthusiastic about initiating prosecutions in African cases only, not even undertaking preliminary investigations into alleged war crimes in Gaza, Sri Lanka and Chechnya, due to the politically sensitive nature of such actions. The Office of the Prosecutor has conducted preliminary investigations in Afghanistan, Georgia, Colombia, Honduras, Korea and Nigeria. However, in Ocampo’s



version of international justice these preliminary investigations took on an air of permanency. 'Permanent preliminary investigations' are essentially a technical way of avoiding launching prosecutions indefinitely.

The historical discrepancy in Ocampo's behaviour and attitude towards non-African war crime situations was not lost on African leaders. In fact, this fuelled allegations that the ICC Prosecutor was implementing a thinly veiled pro-Western neo-colonial agenda, even though he was emphatic in denying this. Critical scholars like Adam Branch have argued that there is no valid reason why Ocampo could not have instigated prosecutions in non-African countries during his tenure (Branch 2011, 2012). As a consequence, Ocampo's version of the execution of the Court's mandate was viewed with suspicion by some actors in Africa, as a form of 'judicial politics' and at a more insidious level a virulent form of 'judicial imperialism'. For example, Ocampo's indictment of six individuals with regard to the crimes against humanity committed during Kenya's post-electoral violence was one of the ways in which the Court was used as a tool for political opportunists to dispose of opponents. The appointment of Bensouda as the Prosecutor was a move calculated to appease the African members of the Assembly of States Parties, and to communicate the notion that it does not view the Court as advancing an anti-African agenda and that the ICC is not a neo-colonial instrument of judicial imperialism to curb for disciplining the 'untamed and still barbaric' African landscape.

### **Parallel Mandates: ICC, AU and the Prospects for Holding Leaders Accountable**

The AU constantly 'reiterates its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union' (African Union 2000). According to officials of the AU, what the body takes exception to is being constrained by how other international actors choose to fight impunity on the African continent.<sup>1</sup> The organizations diverge in that the AU is a political organization and the ICC is an international judicial organization. In this divergence lies the key to how the two organizations go about 'addressing impunity and ensuring accountability for past violations, atrocities and harm done'. The AU, by its very nature, will gravitate first to a political solution and approach to dealing with the past, which places an emphasis on peace-making and political reconciliation. The ICC, by contrast, will tend to pursue international prosecutions, because this is written into its DNA, the Rome Statute. On paper it would appear that the two approaches may never converge.

Indeed, both the AU and the ICC, both of which have in fact been practising a variant of 'political justice' and 'judicial politics', need to

re-orient their stances. The AU needs to move away from its exclusively political posture towards embracing international jurisprudence and the limited interventions by the ICC. Conversely, the Court needs to move away from its unilateral prosecutorial fundamentalism and recognize that there might be a need arrange its interventions in order to give political reconciliation an opportunity to stabilize a country.

On 30 June 2014, at its Annual Summit of the Assembly of Heads of State and Government in Malabo, Equatorial Guinea, the AU issued the Malabo Protocol, which extended the jurisdiction of the African Court of Justice and Human Rights to cover international crimes, along the lines of the Rome Statute. Consequently, when fifteen AU state parties ratify the Malabo Protocol it will come into effect, granting international jurisdiction to the continental court. On 30 January 2015, the AU Assembly of Heads of States and Government began the process of ratifying the Malabo Protocol. However, whether the African Court is empowered with such continental jurisdiction is beside the point; the key issue is that the continental body views its relationship with the ICC as having deteriorated to such a point that it is exploring actively how to make the Court's presence in Africa an irrelevance in the future. International organizations such as the League of Nations have folded when their members effectively ignored their mandates. Will the ICC suffer the same fate?

This question became more poignant when on 5 December 2014 the ICC Prosecutor Bensouda issued a statement indicating that she would withdraw the charges against Kenyatta noting that she 'did not consider the available evidence to be sufficient to be sufficient to prove Mr. Kenyatta's alleged criminal responsibility beyond a reasonable doubt' (ICC 2014). Bensouda reiterated that she was 'guided by the law and the evidence' and 'not any other consideration', which was an attempt to assuage any fears that she may have made the decision for political reasons. Kenyatta issued a statement immediately also reiterating what he had stated all along that the case against him was fabricated by his political opponents and their Western backers in Washington. Ultimately, Bensouda's withdrawal is a political victory for Kenyatta and now places the ICC on a more precarious footing in terms of its relationship with Africa.

### **The ICC and Africa: Beyond the Impasse**

The need to address impunity is not in question. The question arises as to whether any trust can be ascribed to an international criminal justice system that seems to have created a two-tiered framework, one for the weak and one for the powerful. Specifically, if selective justice is applied what

will be done about the impunity of the powerful countries, notably the P5, who are paradoxically amongst the leading purveyors of violence on the planet. In addition, it is important not to adopt a position of prosecutorial fundamentalism and blind adherence to the principle of pursuing impunity when the trade-off is ongoing violent conflict and the potential death of thousands of people, notably African citizens. The Court's Chief Prosecutor, Fatou Bensouda, needs to appoint a senior political adviser to act as a liaison with political organizations such as the AU. It should be noted that there are diverging opinions about the ICC within the AU. Botswana has publicly disagreed with the AU's decision not to cooperate with the Court, quoting its international obligations under the Rome Statute. Francophone countries within the AU, still besotted with and in some cases beholden to the influence of their former colonial power France, have adopted a lukewarm stance when it comes to confrontation with the ICC. Indeed, in December 2014, the Senegalese Minister of Justice, Sidiki Gaba, was appointed as the President of the ICC Assembly of State Parties. Given Bensouda's position as Chief Prosecutor, there is a Sene-Gambian axis at the helm of the ICC system, which should play into the hands of the AU – in theory. Yet this has not led to the thawing of relations between the ICC and AU. South Africa has also reiterated its commitment to upholding its legal obligations as a State Party to the Rome Statute. These diverging opinions could be leveraged to assist with efforts to accredit the ICC to the AU headquarters in Addis Ababa. Bensouda should also issue a series of OTP Policy Papers on sequencing the administration of justice to enable the promotion of peacebuilding, particularly in countries still affected by war.

## **Global Power and the Corruption of International Justice**

### ***The International Criminal Justice System: A Question of Legitimacy***

According to a number of African governments, a court that does not apply the law universally does not justify the label of a court (Branch 2011: 213). This is particularly important if the jurisdiction of the Court does not apply to some Western or P5 countries that are actively engaged and operating in African conflict zones. What would happen if a citizen of these non-signatory states to the Rome Statute commits war crimes in Africa; who will administer international justice in those particular cases? Although pursuant to the territoriality principle that the ICC would have jurisdiction over such crimes if committed on the territory of an African States Party to the ICC Statute, African leaders seem to be convinced that the Court would not take up the cases, in the same way they seem to be convinced, which has

subsequently proven to be accurate, in believing that the UNSC would not take any step in deferring the prosecution of the Kenyatta and Ruto cases. This glaring discrepancy undermines the evolving international justice regime and reverses gains made on constraining the self-serving agendas of powerful countries, particularly where their relations with weaker states are concerned. The view in Africa is that if one demands accountability for African leaders then the same justice should be demanded also of Western, Russian and Chinese leaders, particularly in situations where there is the perception that these leaders have committed the most serious crimes of international concern (Schabas 2010). In the absence of an overarching system of global political administration or government, international criminal justice will always be subject to the political whims of individual nation states.

### ***The ICC's Subservience to Global Political Imperatives***

William Schabas has argued that the ICC has 'moved into dangerous political territory by jeopardizing its base of support among the African States' in the specific case of the arrest warrants issued with reference to Darfur (Schabas 2010: 149). Schabas is identifying a key concern that has begun to taint the supposedly well-intentioned interventions by the ICC, namely the notion that the Court is somehow politically motivated. The cases with respect to Darfur were referred to the ICC by the UN Security Council, which is effectively dominated both diplomatically and financially by its Permanent Five (P5) – China, France, Russia, the United Kingdom and the United States (Happold 2006). Given the historical fact of the politicization of the actions of the Security Council, not least its failure to act during the April 1994 Rwandese genocide, international observers and other countries have intimated that even this deferral was tainted by political imperatives. This exposes the ICC, which is supposed to be an independent Court, as a useful tool to achieve the Security Council's objectives if it cannot fulfil them by other means.

The failure of UNSC to refer Syria to the ICC between 2013 and 2014, despite the commission of specific war crimes, such as a chemical weapon attack in Damascus in September 2013, exposes the fact that when it comes to international criminal justice the legal criteria for criminal liability are not sufficient for a case to come before the ICC for prosecution. As far as the innocent civilians, notably war-affected children in Syria, are concerned, international criminal justice was sacrificed at the altar of geo-political expediency by the very same P5 member of the UNSC who proselytizes to other nations. In May 2014, the US Ambassador to the UNSC, Samantha Power lamented before the Council that 'our grandchildren will ask us years

from now how we could have failed to bring justice to people living in hell on earth'. This was in the context of an argument in favour of referring to the situation in Syria to the ICC. Yet US congressional records reveal that the US has actively campaigned against the ICC all along. The US instrumentalizes the ICC in the worst way possible and according to Somini Sengupta 'it is seen as supporting the body only when it suits the administration's foreign policy agenda, using the threat of prosecution to skewer its foes while protecting its friends from its reach' (Sengupta 2014: 1). This suggests that in the eyes of the US administration the ICC is a useful tool to advance its imperial agenda. This fact alone should raise serious alarm about the ICC which was established to confront impunity. In addition, the US has not ratified the Rome Statute, which reveals the hypocrisy of on the one hand talking up the merits of international law, while surreptitiously undermining it on the other. The ICC is now an extension of global politicking and a terrain of power contestation. International law is only a secondary after-thought. This is in line with the US predisposition to global rules, which it has always believed were a ploy utilized by weaker nations to constrain its actions and full spectrum-dominance of the planet. As the international lawyer, Philippe Sands has argued the US's 'approach to the ICC is symptomatic of a more generalized opposition to international rules and to multilateralism' (Sands 2005: 48).

Schabas argues that 'it is fine for the Court to provide a service to the Security Council, but it must understand that when it does so, it becomes necessarily subservient to political imperatives' (2010: 147). Sengupta argues that in light of the ICC's evident instrumentalization 'such actions have also politicized the notion of international criminal justice and in turn undermined its credibility' (2014: 2). Fanon warned following the UN debacle in the Katanga region of the DRC, that 'in reality the UN is the legal card used by the imperialist interests when the card of brute force has failed' (Fanon 1964: 195).

The issue is no longer whether international criminal justice and the ICC are beholden to global power, the issue now is whether the ICC is subservient to global power. The secondary question is whether it is effectively being utilized as a form of legalized coercion of African countries. Niall Ferguson the controversial British historian made the argument that 'the experiment with political independence, especially in Africa, has been a disaster for most poor countries ... might it not be that for some countries some form of imperial governance ... might be better than full independence, not just for a few months or years but for decades?' (Ferguson 2004: 46).

### ***The Dilemma for International Civil Servants at the ICC***

The tragedy is that there are extremely capable individuals, including Africans, who are working as international civil servants within the ICC who remain silent despite the evidence of the gradual corruption of their institution. Such officials need to make the argument in defense of the independence of the ICC. If they feel that they do not have the autonomy or freedom to make these arguments, and if they continue to hide behind the argument that they are administering objective and neutral justice, then they will be guilty of practicing self-evident double-standards and hypocrisy in light of the operationalization of the ICC's politicized actions. Such staff members, not least members of the Office of the Prosecutor of the ICC, need to grow political antennae, and acknowledge the highly politicized milieu in which they operate. ICC officials need to become political actors. Otherwise they become lackeys and modern servants to the global paymasters; they expose themselves to the allegation that they are obsessed by the 'paraphernalia of power', while in fact they are mere instruments and pawns in a much larger game of legalized coercion.

### **Conclusion**

The ICC is a court of last resort and not a court of first instance. Ideally, national criminal jurisdiction should take precedence in efforts to address impunity. While the Preamble to the Rome Statute recognizes 'that such grave crimes threaten the peace, security and well-being of the world' (Rome Statute 2002) it does not elaborate how the Court will contribute towards advancing 'peace' in the broader sense, beyond ensuring that the perpetrators of these crimes are punished. The Rome Statute does not make any special provisions for restorative justice, peace and reconciliation processes. This is clearly an omission that needs to be rectified given the highly volatile and politicized situations that the ICC has become involved in and may in future engage in. The merits for sequencing should be informed by an understanding that there can be a constructive relationship between administering punitive sanctions and pursuing inclusive peace.

In Africa, the activities of the ICC have focused on exercising its criminal jurisdiction without engaging the wider issue of how its actions contribute towards consolidating peace. The Court's relationship with Africa and in particular, with the AU, deteriorated following the arrest warrant issued for President al-Bashir of Sudan, and worsened with the summons to President Kenyatta. The AU's policy of non-cooperation with the ICC is undermining the prospects for the development of international justice, particularly on the

African continent. The refusal of some countries to place themselves under the jurisdiction of the Rome Statute means, according to African governments, that the ICC will fall short of being a genuinely international court. Some African governments view this limited and restricted mandate as undermining the principles of international justice. The former ICC Prosecutor Ocampo indicated to interlocutors that he could not apply the same remit of justice to cases in Chechnya, Iraq and Afghanistan because this would be difficult politically. Both Bashir of Sudan and Kenyatta of Kenya, as well as the AU, were able to politicize and pan-Africanize their criticisms of the ICC, to the extent that the dominant view in policy making circles in governments is that the reality of the ICC's interventions amount to there being one law for the powerful and another law for the weak, and selectivity in the administration of international justice. In the face of illegitimate global power, international criminal law becomes a legalized form of coercion, control and dominion, which some would consider to be a form of judicial imperialism. The international criminal court is neither international, in terms of its scope, nor has it upheld the basic tenets of impartial legal criteria in its summons and prosecutions. As such it does not live up to the nomenclature of being a 'court', the only word left in its appellations being 'criminal'. There is an element of 'criminal' failure of the ICC system, to the extent that there is criminal negligence of the needs of victims, due to its inability to serve as a truly international system for all victims.

There is a need for an increased understanding on the part of the Court and its officials of the utility and necessity of the issue of sequencing. The ICC needs to recognize the merits of sequencing and establish the necessary modalities to operationalize its interventions in a way that can complement efforts to promote restorative justice. This suggests that an attitudinal change might be necessary. A purely prosecutorial fundamentalism can cause more harm than good, but the opposite is also true, in the sense that an allergy towards prosecution can prevent serious atrocities from being addressed, which would impact upon achieving sustainable peace in the future. A *modus vivendi* between retributive and restorative justice needs to be found. A more nuanced approach to instituting cases is required, based on an assessment of what is in the interests of justice and what sort of justice should be pursued at what juncture to support peace and reconciliation processes. On this basis, the sequencing of retributive and restorative justice would thus contribute towards the overall goal stated in the Preamble of the Rome Statute to ensure the peace, security and well-being of the world.

There is an urgent need to chart a different way forward for the relationship between the AU and the ICC, if both institutions are to achieve the goal of

holding leaders accountable for mass atrocities. Both organizations need to recognize that while they are fulfilling different functions - delivering justice in the case of the ICC, and looking out for the interests of African governments in case of the AU - they need to find a way to ensure that the administration of justice complements efforts to promote political reconciliation.

In a contest between the implementation of international justice, which would hold leaders to account, and the securing the political interests of African countries, continued tension between the two organizations does not augur well for improving the relationship. The UN Security Council also has an important role to play to communicate formally with the AU on issues that have been raised in the Council relating to Sudan and Kenya. Ultimately, the UN Security Council is integral to charting a way forward for the AU and ICC, which will need to be predicated on addressing the perceptions of political justice and judicial politics that persist.

## Note

1. Off the record discussions conducted with AU officials at their headquarters in Addis Ababa, Ethiopia, March 2013.

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