



Intricate Entanglement: The ICC and the Pursuit of Peace, Reconciliation and Justice in Libya, Guinea, and Mali

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Abstract

International justice is not merely a function of legislation and adjudication. It depends on the extent to which it is viewed as legitimate by litigants and others based on perceptions of the relationships of the operations of existing regimes of dispensation of justice. This is a reflection of the operations of the institutions of justice and those of the international order: including but not limited to the actions of judicial authorities and other judicial auxiliaries and intermediaries who give effect to justice through their interpretation and application of the law. From this perspective, justice extends beyond the ability of courts to specify the legal, material and moral dimensions of an offence. International justice has social ends that are easily undermined by self-interested attempts to delegitimize judicial institutions – a charge often levelled at the African Union – but also by the desire of others to preserve, as a matter of political inherency, their own sovereign spaces. Above all, the social ends of social justice, which is the end of international justice, is undermined by elevating judicial or punitive justice over larger social goals – as the examples in this article suggest.

Résumé

La justice internationale n'est pas simplement une fonction de législation et de décision. Elle dépend du degré auquel elle est vue comme légitime par les parties au litige et d'autres, partant des perceptions des relations des fonctionnements des régimes existant d'administration de la justice. Cet article est une réflexion sur le fonctionnement des institutions de justice et de celles de l'ordre international, y compris, mais limité aux actions des autorités judiciaires et d'autres auxiliaires judiciaires et intermédiaires qui donnent effet à la justice à travers leur interprétation et application de la loi. À partir de cette perspective, la justice va au-delà des tribunaux à spécifier les dimensions

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juridiques, matérielles et morales d'un délit. La justice internationale à des buts sociaux qui sont facilement fragilisés par des tentatives de son intérêt propre à délégitimer des institutions judiciaires – une accusation souvent formulée à l'Union Africaine – mais aussi par le désir des autres à préserver, en tant qu'élément d'inhérence politique, leurs propres espaces souverains. Par-dessus tout, l'objectif de justice sociale, qui est le but de la justice internationale, est fragilisé en élevant la justice judiciaire ou punitive au dessus des buts sociaux – comme le suggère les exemples dans cet article.

Introduction

International criminal justice (IcJ) and the International Criminal Court (ICC) face a number of significant challenges today. Many of these challenges have appeared in the relationship between 'Africa', represented by the African Union (AU), and the ICC (Roth 2014). At first glance, the implied tension between these two organizations has a simple cause: an opposition between the ICC, viewed by its proponents as an institution created to end impunity around (international) crimes, and a continent perceived by its critics as seeking immunity from prosecution for actual and potential culprits (Halakhe 2014). In fact, Africa and the ICC are involved in a deeply complicated, contentious and entangled relationship around international justice (Clarke 2014). This relationship is mediated by conflicting interests and expectations reflected in the actions of the two contenders (Maunganidze 2012). It would be therefore simplistic to assume that the African Union's opposition to some ICC actions and modes of operation exhaust all African views of the ICC. In fact, African views of deficiencies (and yes biases too) in the operations of the ICC may not be too easily dismissed in the main.

It is without question that the AU is integral to the global consensus around the ICC and IcJ. Africa retains the distinction of being the most implicated in actions prohibited under the Rome Statute (RS) – the founding law of the ICC. This singularity has elicited a number of reactions from interested observers from the United Nations Security Council (UNSC) to transnational humanitarian organizations who had been tempted to place Africa under political and legal receivership: a form of modern trusteeship in which the only acceptable position for Africa and Africans is to acquiesce to 'injunctions' to prosecute under the threat of sanctions and/or referrals to the ICC. These injunctions have mostly been framed as moral imperatives: 1) to 'end impunity' and 2) to render justice to the victims as cornerstone of IcJ (OTP 2007). As it happens, the protagonists of IcJ also include victims and perpetrators but also those acting on their behalf in judicial proceedings. They also include referees; prosecutors and their intermediaries; defence lawyers and national and international authorities; and, evidently, judges and the

international community of states and international society writ large. One would not expect these parties to have uniform interest in justice, even if the events and circumstances in question fall under the general rubrics of genocide, war crimes, and crimes against humanity. These entities adhere principally to the principle of 'ending impunity' in regard to preeminent crimes.

The quasi-theological principle of 'ending impunity' has generated unanimity as to the ends of justice, particularly whether it is to 'avenge' or placate 'victims' or produce a broader form of justice in the interest of social peace. Regardless, Africa has emerged as the space for legal, moral and political experimentation. The purpose of this essay is to investigate, first, what it means to uphold the general principles of law and international jurisprudence in situations arising from civil wars and political protests and, second, whether one may do so without losing sight of the moral purpose and constitutionality of justice afterwards. The first stresses, but not exclusively, judicial neutrality; prosecutorial independence and impartiality; transparency and the avoidance of conflicts of interest in the collection and processing of evidence. The second pertains to the constitutional alignment of the moral purpose of justice (social peace) on the constitutive dimensions of its object: social existence and its life forms.

This essay is mainly predicated on it being the nature of international crimes that they are committed in times of war, conflict or political contestation by unincorporated or incorporated bodies of multitudes, all of whom are neither indictable nor innocent and yet have followers, associates, and sympathizers within the body politic. Whatever one may think of the conduct of particular parties, therefore, the claims leading to crimes are not always illegitimate. The particular actions may be. While these are the titular objects of ICC proceedings, judicial interventions may reflect on the underlying claims of conflict and therefore may have larger social, moral and ethical implications. In short, it is not entirely unreasonable to imagine that the prosecution of international crimes and the resolution of the underlying political conflicts are more often than not intertwined. This latter point remains central to the AU's ambivalence toward the ICC: that is, whether the 'end of impunity' must necessarily transit through the 'avenging of victims' or whether there is a necessity whenever possible to resolve the political conflicts leading to the crimes in conjunction with other modes of individualized forms of justice: compensation, satisfaction, apologies, reconciliation, restitution and the like.

I have three objectives. The first is to test the validity of AU objections to the modes of operation of the ICC against 1) notions of justice professed and promoted by the UNSC and executed by the ICC; 2) demands by transnational and domestic human rights organizations professing to represent

victims; 3) the moral credibility of agents of IcJ competing with or opposing African states in their claims to jurisdiction; and 4) the transparency of the motives of those who would refer African cases to the ICC. The article also offers an opportunity to clarify competing African positions and interests on international justice in conjunction with the underlying jurisprudence. My second objective is to highlight flaws in the jurisprudence emerging from the ICC's Office of the Prosecutor (or OTP) in actual cases involving Libya, Guinea and Mali that may validate AU positions. In the final instance, I return to political, moral and ethical questions that lay at the edges or external walls of justice and sovereignty, in psychic, symbolic and cultural spaces beyond the control of self-proclaimed trustees of international justice, the state and judicial entities that must necessarily figure in the evolving jurisprudence of IcJ. The latter spaces are the domains of different forms of justice whose ethics extend far beyond the capacities of the administrators of justice. They are also the ultimate spaces of the enactment of social peace.

Illusions and Disillusions of IcJ

From a certain absolutist perspective in legal positivism, the parameters of IcJ are as clearly stipulated as the facts of international crimes are easy to establish through the proper application of judicial norms and procedures. This positivist view is based today on the well-worn narrative that the Nuremberg and Tokyo trials established judicial precedents with which to confront crimes associated with war: the crimes of aggression, war crimes and genocide and, lately, crimes against humanity – most of which fall within the jurisdiction of the ICC. From this perspective too, the Geneva Conventions further outlined the obligations of combatants and in so doing the material, moral and political dimensions of international crimes. Consistently, the ICC, particularly its OTP, maintains that the implementation of IcJ merely requires 1) a straightforward application of the rules and procedures outlined in the RS and existing jurisprudence and 2) the goodwill and cooperation of sovereign states, their agencies, international lawyers and citizen advocates (OTP 2010).

This positivist schema, however, does not exactly correspond to the manners in which IcJ takes form in practice. The latter does not depend solely on the strict application of and/or compliance with the letter of the law and attendant judicial procedures. Any law or legal text necessarily contains gaps, aporias, ambiguities and contradictions that result from compromises and deals made at the moment of legislation. The function of the court is not to flatten the language of the law but to align its own implementation with the purpose of legislation: universal justice. It follows that the coming

into form of the symbolic image of justice – articulated in terms of either justice, fairness, equity or the like – necessarily requires judicial actualization by adjusting application in manners that eliminate inconsistency or the appearance of discrimination. In this sense, the embodiment and the spirit of law lives on through jurisprudence, the interpretation of the law and its authoritative translation into a common good.

The idea of complementarity, for instance, is not simply to defer to municipal courts; it is giving actuality to the need for co-production of international justice; a needed recognition of legal pluralism, and an aspiration to a jurisprudence reflective of multiple realities. In this sense, the purpose of the deference and autonomy afforded to municipal courts would be to enable legal insights and the authorization to experiment toward the expansion of international law. Indeed local judicial authorities have a singular advantage over international judicial organization in that they have access to the relevant cultural idioms of justice as well as local vernaculars of the relevant morality. It is these idioms and vernaculars that give a sense of inclusion in and ownership of the law by all interested parties, including victims and perpetrators. As the result of individualized translations, these idioms and vernaculars give effect to proximity to the law as well as a sense of participation in the production of IcJ. In short, the relationship between law and justice is mediated by the idioms of implementation which are more directly accessible to legal subjects as measures of the conduct and performance of enforcement by various authorities.

From this perspective, justice is first and foremost an institutional answer to deeper moral and political questions about global constitutional life. Judicial justice gives specific applications to these larger moral questions as they emerge in the particular context of specific cases. However, judicial justice is neither sufficient nor altogether without its own problems. As has become apparent in ICC interventions in Africa, international judicial justice can in fact subvert the larger goal of just and peaceful existence. First, it is a justice that applies selectively to the signatories of the RS alone. The paradox here is that whereas ordinarily the sovereign is bound only by its own will, the RS is applied to peremptory norms of international customary law that admit no derogation. Worse, the non-signatories number hegemonic states, including permanent members of the Security Council, that would normally refer other states for violations: China, Russia and the US. Their own state officials, military and paramilitary officers, and citizens are thus exempt from a process that they deem indispensable to international stability and peace.

The implied double-standard gives sustenance to the idea of international duplicity in the administration of justice. This is not simply a matter of

perception as Europe (from Belgium to the United Kingdom) and the US have actively undermined the idea of universal justice; the one by abandoning the principle of universal jurisdiction and the other by seeking immunity for, or the non-application of Articles 27 and 98 of the RS to, their own officials or security personnel. In effect, ICJ has become an arena of political transactions where immunities are afforded to some, favours rendered to friends, while the rest are targeted for punishment with prosecutorial zeal. It is no wonder that attention has now turned to prosecutorial zealotry and malfeasance. I identify three such areas below: the terms under which ICC initiates investigation under the *Proprio Motu* clauses (RS, Articles 15 and 53); the determination of gravity, or the criteria for moving beyond preliminary investigations (deGuzman 2012); the selection of intermediaries (who provide information to the OTP and receive communications from it); and the selective use of existing jurisprudence particularly in regard to its own autonomy and agency in the development of international criminal law (ICL) (Turner 2014). It is worth noting in passing, for instance, that while the ICC has been reluctant in its historic responsibility as the designated world body to develop jurisprudence in ICL towards universality, it was willing to take up the case of post-electoral violence in the Kenya case even in the absence of referral by either signatory powers or the UNSC. In contrast, the ICC found refuge in jurisdictional questions while rejecting broader responsibility to the international community by refusing to open investigation into the 2008-09 Israeli military intervention in Gaza. All this is to suggest that it is impossible at present to detect what has and will become of some of the most basic tenets of the administration of justice: good faith, equity, reasonableness, proportionality, legal certainty, and equality before the law.

The ICC often feigns ignorance of the impact of the most basic organizing principle of the international order, namely a form of hierarchy to which all other principles are subordinated. This singular hierarchy is the primary mechanism of authorization for the enjoyment of the general goods, including sovereignty. It is born historically of affective terms or conditions that are based on geography, political assets, and, yes, race. The ICC cannot review or overturn the resulting affectations and politics through individual cases. The ICC is not a 'Supreme Court' with the explicit powers of judicial review. But it would be absurd to grant that the ICC can effectively interpret the law (in this case, the RS), within the bounds of legitimacy, without a modicum of attention to the operations of the law itself. This subtler form of judicial review is intrinsic to the general principle of equity and equality before the law. It is also the single most important ingredient of legal certainty, judicial reasonableness and predictability.

Without equity, equality, and judicial reasonableness and predictability, the other terms upon which the ICC seeks vindication of its authority – the law, morality and the materiality of crimes – remain meaningless. It does not take a ‘genocidal genius’ to draw out the ironies in arguments presented against AU reluctance to cooperate with the ICC: that African states are legally obligated to submit to international scrutiny for criminal activities because of their obligation under international treaty law; that Africa is in ‘need’ of greater attention because it lacks the judicial institutions and the will to prosecute ‘its own’ criminals; that complementarity still allows African states to demonstrate that they can punish perpetrators; and that the international community, particularly the victims of crimes, need to put an end to impunity. In theory, and from any standpoint but the ones already noted above, these arguments are meritorious and legitimate. Taking them collectively and in practice, however, these arguments have generated the spectre of subordination and subsidiarity of African sovereignty, even if leaving aside the charge of double-standards described above.

These counter-arguments lose their potency when, as they must, they are projected through universalist discursive frames. In this moment, the case may be presented that there should be neither solace nor judicial reprieve from prosecution for peremptory crimes nor inherent liability for moral rectitude in ratifying the RS. Likewise, while it is true that African states may lack the institutional capacity to administer justice in cases of say crimes of war, or crimes against humanity, there is not a single country or region of the world that has mustered the political and moral wherewithal to adequately judge its own rulers according to universal norms in times of war or emergency. It stands today, for instance, that the US and the EU have defended immunity for (democratically-elected) heads of state while in office; that they have objected to the idea that there may be a hierarchy of jurisdictions in which state courts act as subordinates to international organs as a matter of subsidiarity; and that they are protective of their servicemen and women such that they do not surrender them for trial to any other judicial organs but those they themselves have instituted nationally for such purposes.

The schematization of IcJ today calls for broader ethical and moral discussions than has happened thus far. In the meantime it is inescapable that hegemonic powers divided the moral universe of justice between, on the one hand, those whose will alone serves to legislate but are not be subjected to the terms and strictures of the law and morality, and, on the other, those who are criminally convictable but are not allowed to legislate or even clarify for themselves the terms of law and morality. This is not a red herring; it is a fact of imperial and colonial tradition in which the West acted as non-indictable trustees, free to set policy for themselves as a matter of sovereignty, while

setting legal and moral limits to what others may or may not do as a matter of imperial interest. This reality is not offset by criticism that the AU is a club of largely unelected heads of state who do not hesitate to turn their guns against their own people.

Imperial Folly, International Justice

It does seem that there is more to sovereign inherency than critics of the AU allow that give justification to the idea of preserving moral spaces for autonomous self-regulation in the domains of law, ethics and politics. Understood as a right to self-determination, sovereignty actualizes spatial and cultural norms bearing on responsibility and judgement that are neither misguided nor mistaken. On the contrary. Self-determination is a conduit to the inherent goodness of multiplicity, pluralism and inclusion. From this perspective, Africans (and the AU) may legitimately postulate, and indeed pursue the idea that justice extends beyond the ability of courts to specify the legal, material and moral dimensions of non-normative behaviours and, correspondingly, to adjudicate or apply abstract rules. Nor is it *necessarily* a surreptitious attempt to subvert peremptory customary law or the RS to argue that reconciliation and peace are integral to justice. The latter form of justice may obey a cultural logic that is foreign to those to whom judicial justice and penal retribution is the only functional mode of justice, but it is neither alien, illegitimate nor irrelevant to the individualized form of justice that is familiar to most good liberals.

There is much history and logic in favour of the AU's position. Historically speaking, attempts by outsiders to resolve African problems with total disregard for their socio-political contexts have backfired. The most recent case of this is the rejection by the UNSC in 2011 of the AU proposal for political transition in Libya (Grovoqui 2011). Neither the mandate of the UNSC, nor NATO intervention, nor ICC indictments have stabilized Libya after the fall of Mohammar Gaddafi. The impulse of these organizations was, of course, to rectify the situation in Libya, but it is now clear that their actions lacked foresight, pragmatism and wisdom. It is not a minor point to ask whether there is an historical pattern that sets Africa apart, wherein political experimentation is allowed to proceed without full consideration of the consequences where it would not have been the case elsewhere (Bonneuill 2000). The Congo Free State experiment, the mandate and trusteeship systems, the responsibility to protect as practised in Libya have all been political experimentations that failed the people in the relevant spaces – miserably. The answer to the question of why these experiments are allowed to proceed without due regard to their potential consequences is indeed central to the debates animating the division between Africa and the ICC and its supporters. The division runs

through 1) the charge emanating from Africa of an ICC 'Africa obsession' that highlights regional prosecutorial disparities; 2) the conduct of the OTP before and after indictment of alleged perpetrators; 3) the relationship between the ICC and national judicial organizations; 4) the relationship between the OTP and civil society intermediaries; and 45 the decision of the African Union to suspend collaboration with the ICC resulting from its indictments of presidents al-Bashir of Sudan and Kenyatta of Kenya.

It would be disingenuous for anyone to entertain the view that political entities that exempt themselves from review by the ICC could unquestionably refer ring signatories on the grounds that there should be no impunity for peremptory crimes. Equally disingenuous would be the proposition of non-derogation for the intended purpose of deliberations on the legal, ethical and moral consequences of the prescribed steps. I suspect that the singular focus on prosecution could turn out to be disastrous for Africans, not least because the consequences of prosecution in volatile political environments are yet to be fully measured. Already, the first ten years of the ICC have revealed severe flaws and gaps in the RS. These analyses have also revealed insufficiencies in the operations of the Court, particularly with regard to the actions of the Office of the Prosecutor (OTP) and to the conduct of trials. A number of essays have highlighted some crucial problems in this sense, however they all seem to treat these problems as so many technical or institutional deficiencies to be fixed overtime by adjusting existing judicial processes and mechanisms of Icj. To wit, some have imagined the problem of Icj to be solely attributable to either ICC hesitation to creatively broaden its mandate under its founding RS (Jurdi 2010; Grewal 2012). Others have noted the failure of the ICC to implement or execute specific articles and/or clauses of the RS either forthrightly or to the letter (Deguzman 2012; Iverson 2012; Amnesty International 2010). The vast majority of critics, however, have espoused the view that the crisis of Icj arises from the failure of signatory states to assist the ICC in its implementing (Mariam 2014).

The Libyan case demonstrates that Icj is often mobilized by the desire to punish without ethical and social purpose. It shows that political expediency – and not international morality – has often been instrumental to the modes of referral practiced by the UNSC. In this case, as in many, calls to prosecute often resembled emotional manipulation and not a plea for creating a stable and rule-bound context in which the alleged crimes of the Libya government could be investigated and the alleged purity of motive of its opponents verified. The calls for intervention by the UNSC and the ICC followed outrage at statements made by the then Libya Guide, Gaddafi, that he would crush his opponents like cockroaches and the imputations to his regime of gruesome violations of human rights.

To be sure, Gaddafi's statements gave sustenance to much worry about violence and human rights abuses prior to intervention. However, the UN Security Council's account of politics and political life in Libya then was wilfully jaundiced. In fact, the interpretations given to UNSC resolution 1973 by the intervening coalition made it abundantly clear that there were ulterior motives fuelling the haste to intervene. For instance, the 'Arab Spring' that had broken out across the Arab world was met with state violence in a variety of countries, most notably in Bahrain and Yemen. In Egypt too, the army had committed gross violations of human rights. The question then became: why Libya? Why the particular actions being proposed? And why was the AU being systematically side-lined? These questions had uncertain answers. The crimes imputed to Gaddafi, although surely gruesome and the cause of the revolution, belong to a past during which the Libyan Guide was welcome in Western chanceries. In addition, the nature of the crimes was not beyond any threshold set in other countries undergoing revolution.

The rest of the story is well known. Gaddafi did have dangerous weapons but, contrary to all imputations of unreasonableness and instability, he did not use them against the protestors. These weapons are now in the hands of Libyan militias, autonomy-seeking Sahelians, and, yes, terrorist organizations. There was a siege of a large metropolitan area in Libya, but not in Benghazi, which the West had proclaimed was under threat of bloodbath. The siege and bloodbath took place in Sirtre, Gaddafi's home town. The siege lasted four months and was executed with the support of NATO forces. Zuma's mediation and the AU proposal for political transition would have side-lined Gaddafi as transitional leader but included his son and heir as spokesperson for their region and tribe. This was rejected by the US, France and Britain in favour of proposals by Qatar and other Gulf states to simply overthrow Gaddafi. Gaddafi was overthrown and peace did not materialize. What was anticipated as rule of law became, rather, rule by militias, and summary execution of their opponents has continued as in Gaddafi's time, only more spectacularly and unpredictably, to which the summary executions of Gaddafi and his children, some of which can still be viewed online, can testify.

The stories of the 2011 Libyan revolution and of Gaddafi's reign thus unfolded with the differential play of subjects and the attendant significations of their respective actions. In this play of (liberal-)democratic champions (the proper role of the revolution and who properly represents the Libyan people and its desires) and deviants (the regime, its political ideology, its model of national unity, and foreign policy actions) a duality was constructed, bearing the starkest of contrasts. This differential play of sets of good subjects and bad subjects occurs in conjunction with the signification of their respective actions as being responsible, grave, transparent and normative, and/or their

opposites. These plays and games manifest themselves differently for different subjects at all levels of political deliberation and judicial proceedings. In Africa, where these operate differently than they do in Europe and elsewhere, claims of goodness and evil, rightness or wrongness, appear in logical sequences that include proximities or distances of subjects and actions under consideration, on the one hand; to and from Western subjects and/or norms, on the other. All descriptors of events proceed from the underlying logics. Hence, 'people', 'revolution', 'justice', and the correctness of the cause can only apply to militias that seek Western advice and support and whose call is answered by the West. By contrast, negative connotations were ascribed to everything Gaddafi did: from nationalizing oil to supporting the AU and promoting African unity, to building mosques and factories throughout Africa. These actions were by the requirements of the play of difference and signification both corrupt and ill-intentioned or indicative of a *folie de grandeur*, a 'Napoleonic' complex, or a troubling ambition that had to be curtailed. It is in fact impossible to imagine in this logic – and the associated discourses and structures of attribution – that an African state, any African state, may legitimately claim to act strategically in accordance with its own self-defined national interest. Finally, within the same play of difference and signification, it would be impossible to allow that Gaddafi might be trusted to reform either by necessity or dint of reason – a deathbed conversion of sorts.

The ICC may be imagined to be above this political drama (or tragedy, depending on how one views it). Yet, here too, the manner in which evidence is constituted bears fingerprints of the prior or framing political discourses. This is to say that the triggering events that lead the OTP to assume that a threshold of gravity has been crossed; that there is evidence of a criminal enterprise; that there is widespread and systematic attack on any group are often represented within the ideological lenses described above. They necessarily assume at some basic level irrationality, danger and risk flowing from one direction to another. To return to the Libyan case, the indictments and orientations of ICC inquiries seem to mistake political uncertainties and moral ambiguities for legal certainties and factual clarity, and vice versa. For instance, while the implication of Saif al Islam is yet to be demonstrated in court, it is a fact that Moatassem-Billah Gaddafi was last seen in a cell with thorn shirts and pants, clearly under arrest by revolutionary militias. He was later found dead shortly afterwards and his body joined with that of his father.

Two logical questions flowing from international criminal jurisprudence might be posed here. The first, proceeding from the precedent set in the case of Charles Taylor linking criminal activities to the larger enabling political context, is whether NATO may be assumed to have aided in the systematic

physical decimation of the Gaddafi clan in providing material assistance and military support to revolutionary activities. The second is whether it is proper under any circumstance to proceed with the trial of Saif while there was no standing indictment for the murder of his relatives? The ICC has not entertained the first question. It has maintained that it intends to indict criminal activities by the revolutionaries but that it must proceed with deliberate intent and sequentially, according to its own priorities and in the interest of justice. Meanwhile, the ICC has acceded to complementarity in the Libya case by allowing the new government to try Saif. This might technically be taken as an admirable approach, if in fact the relationship between the suspect and the new government was different from how it currently stands. In the present context, the revolutionary government can take its revenge on a remaining member of the Gaddafi family under legal guises authorized by the ICC and the UNSC – granting a kind of justice to the victims of Gaddafi's reign, as it were. In the meantime, we can take stock of the fact that the political experiment that was Western intervention in Libya failed and that the ICC prevarication afterwards has dispensed with any hope that impartial justice will be done – ensuring that private vengeance in that country, both individualized and organized, will continue unabated until the parties return to the AU initiative that the 'revolutionaries' once rejected: national reconciliation and power sharing during political transition.

The Risks and Limits of Prosecution for the Ends of Justice

To the extent that judicial legitimacy depends on whether different parties feel vindicated or not, legitimacy is thus a question of the cultural logic of judicial proceedings and decisions, and whether these correspond to the values, interests and expectations of the communities affected by ICC interventions. Hence, the end(s) of justice must correspond to certain ideas of moral rightness with rationalities that may well exceed those of judicial processes. Depending on one's life world, such rationalities may in fact privilege social peace, reconciliation, and equitable constitutional life over the terms of judicial justice (the latter being understood as the administration of the law based on contrived histories of political life that strip the events recounted therein of their more dynamic dimensions). This is the risk that the ICC runs in its current adjudication of events in Guinea on 28 September 2009.

If the Libya experiment shows that not all political and/or legal experimentation should be taken up unquestionably, it should also alert initiators to what might arrive in other contexts if political injunctions and legal initiatives are embraced without reflection. Guinea-Conakry is one of those places. Much like Libya, Guinea was led by a left-leaning progressive

leader with an irrepressible authoritarian bent from independence in 1958 until 1984, the year of his death. Sékou Touré was also on the other side of the Cold War, alternating his alliances from the Soviet Union to China to the Non-Alignment Movement.¹ The main opposition to Sékou Touré largely derived from the region that benefited from colonial education and alliances more than any other. By independence, the Futa Jallon boasted more intellectuals and businesspeople than any other region. Its elites were also more connected than any other, benefiting from a regional diaspora of professionals and traders in the sub-region as well as connections abroad in countries where countless Peulhs (or Fulahs, Fulanis, also Fulbè²) received their education.

With the overthrow of Togo's Sylvanus Olympio in 1963, Touré began to suspect the onset of a new era in African politics. In 1964, he accused his generals of attempting a Togolese scenario. Touré's worst nightmare was realized in November 1970 with the NATO-assisted invasion of Guinea. This nightmare turned into a murderous paranoia for all, particularly the Peulhs. Pointing to the presence of some Peulh elites on the list of a Portuguese-approved potential government, Touré subjected Peulh elites to a horrific witch-hunt. There were the torture chambers of Camp Boiro; the cleansing of the bureaucracy of suspected disloyal Peulhs; the barring of Peulhs from foreign scholarship, among other familiar atrocities of humanity and justice. In reaction, Peulh elites abroad and in Guinea set to memorialize what had been an actual persecution. Yet, as is often the case, one must apply caution towards the gaps that might separate narratives of what is said to have happened and what actually happened. It suffices to say that politics in Guinea had many more protagonists and antagonists than appear in accounts that focus on Touré, his Peulh opponents and the political coalitions that supported each side. This is pertinent to the manner in which the apparent persecutions of the Peulhs appear in statements and communications around the events of 28 September 2009 in which the vast majority of the rape and murder victims were also Peulh.

To be sure, much that was reported to have happened – murder, rape and torture – rings true. Having lost its freedom-fighting social revolutionary ethos upon the death of Touré, the national army had become a personal political instrument under Lansana Conté. Not only used as a labour supply for the Contés' farm, the army had also become an arm of his political party to be used against opponents. By this time, as divisions of this army returned home from interventions in Liberia and Sierra Leone, rape had become one of the instruments of warfare that it frequently deployed. Mass rape was thus a time bomb ready to explode before the public eye, and it did. In the meantime, the army had also become a repressive killing machine for Conté

and his party. In fact, a mere two years before 28 September, in March 2007, the army had fired on students and merchants in a local market in the capital killing more than 100 people (HRW 2007). If the OTP maintains that any collective decision to repress public assembly by the opposition is evidence of conspiracy, then it would have to investigate the events of March 2007 in the interest of justice: the same army, the same method, the same offence. In both events, the decision to tolerate political assembly and social protest was made at the highest level. In both instances, the leadership of the government was structured around one ethnic group such that ethnic slurs and harassment became a staple of state tactics of intimidation. In both instances, repression was systematic and attacks against individual opponents had the stink of ethnic hatred. The similarities between the two events would hold irrespective of which legal criterion of liability were invoked.

No one expects the ICC, or any court for that matter, to cure all that ails a country through a single prosecution and trial. However, if one were to follow some of the logic of prosecution in Guinea today, one would have to conjoin the events of 2009 and 2007. This is because the much dubious theory of joint criminal enterprise and its modes of liability seem to be at play in this case (Sliedregt 2012). In this instance, it is assumed that the entire leadership of the state had conspired to perpetrate the killing and rape. I am actually inclined to support such a view, *prima facie*, until proven otherwise. To prove this case, however, one would have to grant that a criminal enterprise or a conspiracy to engage in one exists whenever a prosecutor can prove the existence of a decision to confront a crowd. But, surely, the court cannot expect to find an order from the highest level of government directing the commission of rape! To believe that it could would be to dangerously misunderstand the nature of sexual crimes and their association with historical forms of masculinity, patriarchy and other dubious ideologies that women face under the conditions of state- and capital-centric political life.

The ICC risks credibility, however, in prosecuting one event and not the other. Correspondingly, it matters what principle of liability is applied to 28 September, whether the leadership of the army is held to be liable because it has normative control over the organization, or whether specific individuals are held to account because they participated in a crime whose commission cannot be said to have been specifically mandated, in which case they were merely accessories to the crime. The applied jurisprudence in the case to characterize the event that the OTP chooses to prosecute would be held up as a mirror to events in 2007 and beyond, during which time Guinea was signatory to the RS. In any case, the OTP is bound to establish criteria for given priority to one event over another. The fact of referral, which the OTP has so often branded,

may satisfy the ICC initiates and the victims of 28 September but it only adds a political dimension to prosecution and a sense of crisis to the victims of March 2007 and the elements of the army now prosecuted by the ICC, rather than inoculating the court therefrom. As a technique of judicial dissuasion, this hardly sets the ICC on solid political and moral ground.

To the extent that one might wish to isolate the events of 28 September from those of March 2007, one would, perhaps futilely, but crucially need to account for the haunting presence of discourses implicating the victims' identities. By definition then, and in politically poignant ways, one would need to perform the same exercise with regard to the accused. In this sense, it is indeed inescapable that the vast majority of the victims, women and children, were Peulhs, and that this had added a powerful emotional content to the need to act that brings in a prior history of persecution. This fact has several dimensions with an inescapable optic that 28 September seems to have mobilized in many sensible souls – women and men of all ethnic groups and political and religious persuasions because of the heinous nature of rape. What is imperceptible to the untrained ear of an outsider, though, is that those who are accused of the rape, the so-called *forestiers* (or forest dwellers,) have historically been the objects of social contempt in Guinea on account of their non-religiosity, animism, and all other epithets that go along with the ways in which their identity is often framed. It is also the case that, among some of the intermediaries, the thought of being at the receiving end of violence by the *forestiers* was particularly galling because of its implied lack of morality. It is not lost on the *forestiers* that their paganism and animism has worked against them, from the time of colonialism when they were denied education. They are even accustomed to hearing that the crimes of morality committed on 28 September could only have been committed by them alone.

This is the set up. One sense of victimization (by the state) comes up against another set of victimization (this time social). One kills the body by physical death. The other kills the soul by social ostracism. Although I hold this only anecdotally, it is my contention that many *forestiers*, whether relatives or not of the accused, would readily proclaim that the vast majority of court intermediaries providing evidence to the OTP are either themselves ethnically Peulh, or are plugged into networks whose Guinean members or affiliated are predominantly Peulh (as are the majority of Guinea's human rights NGOs), or at minimum have been exposed to the predominant Peulh narrative of victimization. Apart from occasional appearances of conflicts of interest, there are no absolute moral, ethical and/or legal grounds to *a priori* doubt the credibility of these entities. Yet, for people who do not possess the language to articulate what they see as an injustice, conspiracies might

just be plausible. To add to the sense of unfairness, *forestiers* can point to the absence of their members among elements of the army and the police that had been responsible for state repression since independence. For these and other reasons, they now remind themselves, in private and not-so private murmurings, of frequent instances of murders of their members in the Futa Jallon on account of their apparent animism, a theological 'transgression' for which they would also be denied burial in cemeteries that contain Muslims.

The two senses of victimization and the concomitant crimes are far from being alike. I relate them simply to point to an historical irony in which the *forestiers* – thought to be the least educated, pagan or animist, with no significant political or economic power – would bear the brunt of punishment for the crimes of the postcolonial state. Moussa Dadis Camara, it is known, stumbled into leadership in Guinea by sheer accident of fate and his reign lasted barely two years. Whatever may be said of his leadership, however, the *forestiers* had not been associated with state violence in the entire modern history of the country. The obverse is true. They have been recipient of state violence but unfortunately, as they will let you know, this is a violence that has not recorded the murder of political leaders prior to independence, violent campaigns of interdiction of their rituals of initiation, a political history of repression of uprising, and so on.

There are many reasons why the army in Guinea needs restructuring and discipline – the latter literally and metaphorically – and the entire political class of Guinea needs a moment of self-examination for their role in state violence that even precedes independence. I doubt very much, however, that a judicial proceeding that focuses on the liability of a limited few in a singular event will be a proper and sufficient venue for that kind of examination. This is why I am especially compelled by alternative options that prioritize social peace over vengeance for a rather isolated set of victims, who no doubt have suffered as a consequence of these more complex and endemic social dynamics. Regretfully, the Peulhs have much more to lose in a judicial process that looks like a witch hunt against an otherwise marginalized minority. While the Peulhs are particularly vulnerable, they are still the most mobile segment of the population in Guinea both within and without, the wealthiest, the most educated, and the most networked. The *forestiers* find themselves in the exact opposite situation. Fewer of them live outside of the Forest region and the capital of Guinea, Conakry. Fewer still live in the Futa Jallon. They have fewer relatives and no significant property or place outside of their own region. It is not an exaggeration, therefore, to say that the Peulhs have vested interest in social peace in Guinea. The extent to which the ICC can and will be able to facilitate such a peace in seeking vengeance for the Peulhs remains, at best however, quite unclear.

Prosecution as a mode of social and political dissuasion thus often displaces the forms and spheres of conflicts, driving their overtly political forms toward more insidious inter-communal violence for which no leader and organization can be blamed in isolation. The number of people who have died in Guinea from 'spontaneous' outbursts of violence against the Peulhs, for instance, can be numbered in the thousands. These victims are not the sympathetic, highly educated and politically connected Peulhs. They are small peddlers, handymen (and women), bakers and the like, who pay the price for communal resentments that find no political resolution and are therefore driven toward darker psychic zones and physical responses. Unorganized, triggered by everyday encounters, and with no visible premeditating agents, these forms of violence are at present unclassifiable as crimes against humanity and/or genocide. They claim, however, far more victims than can be accounted for, victims who will find little hope in the prosecution of a very limited number of state officials on the basis of an incident that brackets off these everyday violences as inconsequential, not to mention similarly symptomatic massacres.

Lacunae of Justice: Investigation, Prosecution and Partiality

The politics of aspirations towards and practices of IcJ are often fairly obvious, as should now be clear. In the case of Mali, for instance, Prosecutor Bensouda clearly stated that it was in the interest of justice to 'play its part in supporting the joint efforts of the ECOWAS, the AU and the entire international community to stop the violence and restore peace to the region' (OTP 2013). This admission has political and ethical implications beyond the referral process. Again, the OTP: 'Following the referral of the Situation in Mali by the Malian State, the Office may investigate and prosecute any crime within the ICC jurisdiction committed on the territory of Mali since January 2012. In the course of the preliminary examination, the Office has identified potential cases of sufficient gravity to warrant further action' (OTP 2013). *Prima facie*, this last point is a simple one, but in actuality it comes up against the objectives, actions and expectations of, first, the government of Mali and, second, the external actors named above. One question that emerges is whether the ICC can in fact investigate the referring agent, the state, which is party to the conflict in northern Mali.

The other, perhaps more contentious question arises from the OTP statement that militia and political factions of northern Mali 'passed sentences' and 'carried out executions without previous judgement pronounced by a regularly constituted court' (OTP 2013). The question here is the extent to which legal pluralism and cultural logics of justice may survive under the RS within either diminishing the universalist impulse of the ICC or

the sovereignty of the post-colonial state. Specifically, the conflict in Mali coheres around questions political autonomy and the ability of populations to maintain modes of life that correspond to their environment and moral horizons. It is not clear to me if the above objection, then, consists in the absence of officially-constituted courts, or if the intimation is that legally-constituted courts lawfully apply the law and whether execution is lawful under those circumstances.

There are significant gaps in the RS between, on the one hand, the commitment to justice enunciated in the law proper and, on the other, the manners in which enforcing authorities – such as the OTP, governments and UNSC – have thus far interpreted their own role in regard to the purpose of the law and justice. It is in this sense that the lack of independence and/or the apparent absence of autonomy of the OTP from political processes begin to gnaw at the credibility of the ICC. In Mali thus far, as it was in the case of Côte d'Ivoire, the rubrics of war crimes and crimes against humanity have appeared in the OTP communications and actions completely detached from their political context. It is incredulous, really, to imagine the criminal activities attributed to entities in the north, without regard to the politics in which they are rooted. As a result, the indictments in those cases have necessarily aligned with the interests of the governments in place and their allies, principally France, the UNSC, and to a lesser extent, ECOWAS.

To say that the populations in northern Mali continue today to be at risk 'of yet more violence and suffering' as Prosecutor Bensouda has said, takes on a quality of banality coupled with an acceptance of the political dynamics and normative boundaries in the region since the inception of the Trans-Sahara Counter-Terrorism Partnership (TSCTP), initiated by the US with NATO support, that has transformed this region into a hunting ground for real and imagined Al-Qaeda affiliates. Before the advent of this initiative, Mali managed to contain tensions between the many Sahelian populations, significantly, in the face of a harsh climatic environment and attendant lack of resources. Trade and the ability to move and to farm have been caught up with the related quest for life. In 1996, the larger factions of the populations of northern Mali seemed to be satisfied that the central state had given due consideration to their concerns to preserve identity, culture and interest in the region. They therefore entered into a peace compact that led to the Flame of Peace being built from more than 3,000 weapons that the Tuaregs voluntarily surrendered in a wager for peace.

One is led to suspect, therefore, that the current intransigence of the central state in its non-concession posture toward the Tuareg is partly the result of the TSCTP. Namely, arms and technological supplies from the

US and NATO encouraged the Malian army's ill-informed confidence in its ability to defeat the Tuaregs militarily. This posture has inevitably had political and constitutional implications. The political consequence has not merely been to negate the possibility of peace between the central government and its constituents units. It has also surrendered centuries-long traditions of institutional bricolage that made an uneasy coexistence possible (Grovgui 2010). The difference between the current political environment and the one that existed prior to the TSCTP is the role of the state and the manner in which the state understands its constitutional obligations. Prior to the current neoliberal state, the developmental welfare state had built-in ethos of entitlements, solidarity and therefore responsibility of government to the citizenry. Constitutionally then, the state could not demand total subordination from entire regions because the possibility of development depended on institutional collaboration and cooperation. Until recently, the constitutional requirements of the state had acted as vessels through which memories of prior collaboration among the diverse groups in Mali were recalled. Historically, in fact, sedentary populations in the south of Mali and the more nomadic ones in the north had agreed to share resources through informal and formal understandings such as the *Dinah*. These attendant reflexes have vanished under a neoliberal, securitized state where the priorities have shifted toward state arbitration of the ends of different forces within so-called civil society, industry and capital. Where once the requirements of life preoccupied the state, today those of capital, industry and the army – to invest, produce and protect property and the interest of the state – seem to have come to the fore, above all else. There are therefore rebellions in the Sahel that have to do with the degradation of the environment, of life and of human activities outside of industry. There are also rebellions that have to do with the preservation of culture and religion that have nothing to do with Al Qaeda.³

The situation in Mali is the clearest evidence yet that the ICC is implicated in a larger normative political project, beginning with the emergence of geopolitical justifications for referral, and extending to the Court's own algorithm of what it takes to be prosecutable offenses and subjects. The government's referral request, whereby the OTP is invited to interminably investigate potential crimes, undercuts the latter's investigatory prerogatives insofar as it provides a list of offences while at the same time pointing to government antagonists: murder, mutilation, cruel treatment of persons and torture, summary trials and executions, pillaging, and rape, and the intentional destruction of protected objects such as cultural artefacts, monuments and archives. As we have seen in all cases of civil wars and the breakdown of law and order upon the collapse of state institutions, it would be hard to imagine that the army and government-affiliated groups would not also be implicated

in such actions, with the possible exception of the intentional destruction of protected objects. It is no cheap cliché to demand in this sense then, to demand that to the extent that judicial justice has to be part of the process of bringing order and stability to the region, that its administration has to be seen to be fair. For the inhabitants of the north, this would mean that there is no separate justice for the state and all other actors in the region including peace-keeping forces. Consistent with the cases of Libya and Guinea, one can say of Mali that possibility of fairness is foreclosed when the identities of subjects and their political agendas – and not their criminal deeds – are the starting point of prosecution.

In any case, Mali cannot afford an ICC that succumbs to either geopolitics (by aligning itself with the interests and desires of hegemonic powers) or strategic moralism whose affectations ooze of mere lip service to the plight of victims. The obligation imposed by legality to fight impunity in accordance with the spirit of law and justice has transmuted into a weak, and dangerous, legalism. That is, in the ICC's investigation of Mali one finds only a pretence to strict adherence to the principles of law, but an adherence that ultimately vacates the law from its spirit of social peace and reconciliation in favour of judicial crusades against the 'orphans' of the new world order: those rendered invisible to the structure of interests, values and norms favoured by the hegemon of the international order. This understanding of the end(s) of justice may be legal but its relation to the idea of IcJ, and therefore its lawfulness, may be suspect. Indeed, there are equations emerging, not least for Africans, that point to the 'unlawfulness', *sui generis*, of the actions of the OTP in which complementarity morphs into conspiracy (however soft and unintended); referrals resemble the onset of a rendition of one side to the other; the determination of gravity becomes character assassination; the interest of justice is expressed by taking the side of the culturally-legible sympathetic figures: rape victims; propertied classes; well-connected elites; and assimilated ethnic or racial groups.

If this scenario were to prevail in Mali, the ICC would have laid the grounds for further rounds of recriminations and conflicts in the future. The only way to avoid this scenario will be for the ICC to establish its identity as explicitly and markedly independent from *all* parties to the conflict, and particularly the referees and intermediaries who would make submissions to the court. In the case of Mali, the referee would be a central state which has, in effect, failed to convince a significant portion of its citizens in the north that they are concerned with the constitutional compact from which it draws its supposedly legitimate authority. A second parameter, connected to the first, stands in contradistinction with ICC doctrine regarding the interests and desires of parties: that is the prioritization of an interest in social peace as the

functional principle animating the interest in justice. On this matter, the RS is altogether silent, insofar as it does not specify the factors or circumstances that should be taken into account in determining the interests of justice. For its part, the OTP stresses 'ending impunity' and the 'interests of the victims' as the basis of an interest in justice, which we have seen, often belies and avoids altogether the larger questions of social peace that are necessarily entangled with the basis of justice thus conceived. The contradiction stems from, on the one hand, those approaches the OTP understands to be the basis of justice, and on the other, the stress the OTP places on a variety of political factors in its prosecutions: protection or safety; stable political environment; physical and psychological well-being; and dignity. It would seem that interests and personal circumstances of victims and witnesses are not separable from the interests of society at large. The OTP's fraught insistence on the distinction has only compromised its own credibility at times, particularly when it seeks out the views of local religious, political and tribal leaders, together with those of non-governmental organizations and victims' representatives, in order to determine the interests of the victims even as it conducts its investigations. It is hardly a stretch, therefore, to say that the OTP is seen as, at best, a highly partial agency in these cases. At a minimum, it undermines a general principle of law according to which the accused have an equal interest in justice as the victims, albeit in separate measures.

Conclusion

In theory as in practice, justice exceeds the mechanics of its delivery. The concept of justice appeals to faculties that are understood to be shared by all human populations: sensitivity to injury by others; a sense of moral rightness; an acknowledgment of the utility of respect for laws and the rule of law; and an inclination to value peace and therefore to accept punishment, restoration and reconciliation as a sufficient outcome that follows criminal injury. In this final regard, the effectiveness of judicial justice is measured by the satisfaction found in its mode and mechanism of delivery, which need not be exclusively punitive (and indeed, are quite unsatisfactory when they are of a punitive nature). Satisfaction is a sensorial experience manifest at the time of 'delivery' of justice: it takes the form of a temporality that at once transcends and recodes the past (when the crime(s) in question were committed), so as to encompass and re-reflect the present (when the meaning of morality as legal interdiction and sanction is actualized), so as to condition the future otherwise from the course that might follow from the unresolved social, psychic and bodily trauma of the original crime (that is, allowing for the possibilities of better becomings for all parties). Justice thus is the cumulative and combined

effects of cognitive, sensorial, affective and emotional events that extend from the moment of the commission of crimes to prosecution; the setting into motion of post-indictment events; the operations of judicial and non-judicial processes; the collection of evidence; the trial and verdict; and the more intangible expectations for a better future.

The underlying dramas are thus not as individuated and individualized as the OTP suggested in its 2007 policy paper that seeks to set the objectives of judicial justice off from those of peace. The crimes of genocide, war, and against humanity are inherently political: from the selection of victims, to the modes of targeting, to their objectives of cleansing the body politic as 'sovereign' privilege, to their intended outcomes, which are of course the subordination or elimination of political or ethnic rivals. This is perhaps one of the reasons that the OTP relies on intermediaries, community leaders, and the like to both collect information and ascertain the interests of victims. Politics is not problem for the ICC, rather, it is the claim that the ICC is not subject to politics that is the problem, which is compounded by the appearance of extra-judicial pressures in execution of its mandates.

There are other reasons for Africans to worry about the direction taken by the ICC that are more related to the performance of the current staff of the ICC than its modes of operation alone. These can be found in ICC approaches to the ambiguities and silences of the law. The ambiguities are resolved through clarifications provided by the Court to itself as well as to others. This essay is not the venue for showing both the timidity and confusions created by the ICC with regard to its interpretations and understanding of the purposes of Icj and the RS. The more important question is what to do with silences in the law or, as is the case today, imperfections of the law. This is the area in which the AU is justified in asserting its sovereign will, in the process creating sovereign spaces for deliberations and adjudications of the legal, political and moral purposes of Icj. The AU is correct that the RS needs to be supplemented to include consideration of peace through reconciliation and constitutional reforms that satisfy victims, eliminate the causes of conflict, and create more stable political environments for all. This is not retaliation but wisdom. In the long term, it is the best chance that justice might have.

Notes

1. It is a matter of record that Sékou Touré had been hostile to Western interests during the Cold War. They had also supported national and independence movements that aligned themselves on either China or the Soviet Union. Touré had been a main supporter of Lumumba during the Congo Crisis, a backer of

the Algerian exiled government during the Algerian war. He sent members of his army, advisors, and technicians to assist the Marxist regimes of Angola and Mozambique.

2. Henceforth, I will use Peulhs to reflect the official designation.
3. There are of course, those rebellions seeking to turn the clock back to the times of the Jihad when empires and states were built around Islam, commerce and warfare. One of the great ironies of the situation in Mali, however, is that some of those groups that now identify with the cause of jihad acquired their weapons after Western intervention in Libya and the fall of Muhammad Gaddafi.

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