Judicial Imperialism

The Politicisation of International Criminal Justice in Africa

Professor Tim Murithi

"...timely and relevant..."
Professor Klaus Bachmann

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IJR THE INSTITUTE FOR JUSTICE AND RECONCILIATION
Fanele (Zulu; Xhosa; Zulu): necessary. This is a necessary book.

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Chapter 1

Introduction: The Dilemmas of International Criminal Justice

Introduction

The International Criminal Court (ICC) was established as a permanent independent institution to prosecute individuals who have orchestrated the most serious crimes of international concern including genocide, crimes against humanity and war crimes. The Rome Statute, which came into force on 1 July 2002, is explicit on the role of the Court in exercising a criminal jurisdiction over perpetrators of these crimes. The ICC system, which includes prosecutors and judges, has consistently reiterated that it does not engage in the 'politics' of the country its perpetrator(s) originates from and that it is a judicial institution. Yet, the ICC has, in fact, entered the political fray with potentially disastrous consequences for the people of situation countries going through fragile recovery processes. This book is concerned with how the politicisation of the ICC's interventions can destabilise the fragile country situations if they are not managed effectively and lead to the further loss of innocent life.

The establishment of the ICC was a uniquely powerful idea given the history of violence that punctuates human history. The intention was for the ICC to apply an even hand in prosecuting individuals for the 'most serious crimes of international concern'. However, the first decade and a half of the ICC's existence witnessed instead a biased approach to prosecuting individuals accused of perpetrating war crimes. In this initial period of the Court's existence, Africa was the only continent from which individuals received ICC rulings.

This suggests that the ICC was being deployed as a political tool by global powers, through the manipulation of the United Nations Security Council (UNSC) by its permanent member states (USA, France, UK, Russia and China), as an instrument to discipline, punish, control and dominate those individuals that they deemed to be aligned against them. In effect, the ICC became an instrument for perpetuating 'judicial imperialism' at the global level in order to discipline, punish, control and dominate political and military opponents. At the national level, a number of African leaders also instrumentalised the ICC as a tool to marginalise and dominate their political opponents.

In 2002, the same year that the ICC was established, the United States Congress passed the American Service Members Protection Act (ASPA), also known as The Hague Invasion Act, which gave the US President the power to 'use all means appropriate and necessary to bring about the release of any US or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court'. In theory, this US law can be invoked to rescue US personnel from their docket in The Hague. This US law is still on the statute of its judicial system. Even though the US has not acted on this law, it is not beyond the realm of imagination for a narcissistic, erratic and power-mongering president in the White House to issue such an order to invade the headquarters of the ICC to rescue their personnel who are deemed to be above the reach of international criminal law. Furthermore, when questioned about the remit of the International Criminal Tribunal for Yugoslavia, the late Robin Cook, former British Foreign Affairs Secretary, in the Labour party government stated

flippantly that 'if I may say so, this is not a court set up to bring to book prime ministers of the United Kingdom or presidents of the United States'.[1]

In 2011, following the violent overthrow of the authoritarian leader of Libya, the late Muammar Gaddafi, the North Atlantic Treaty Organisation (NATO), led an indiscriminate bombing campaign in which the lives of ordinary Libyans were lost. These indiscriminate carpet bombings of human beings going about their daily lives reveal the failure of the international criminal justice system and the global governance architecture as it currently stands. There has been no prosecution of US, French, British or NATO officials and personnel, because of their self-proclaimed assertion to determine who the referents of 'justice' are and thus also determine those 'Wretched of the Earth' who will be denied any form of redress and accountability.[2] The lawyers, judges and legal analysts who intentionally ignore these glaring global injustices are also serving as agents of judicial imperialism, who falsely believe that they have a vested interest in sustaining this system even though it is perpetuating global inequality and undermining a basic principle of equality before the law.

This book argues that the noble intention that underpinned the establishment of the ICC was gradually undermined by the politicisation of the referral of cases by the UN Security Council, and heads of state, as well as the selection of cases by the office of the prosecutor, under its first incumbent Luis Moreno-Ocampo.

While legal analysts assess the ICC system through a legal lens, this book utilises a political prism to examine the instrumentalisation of international criminal justice by both global and local actors. Even though the ICC system prefers to assert the fact that it only intervenes on the basis of legal criteria, the Court is in fact a tool for coercion, control, manipulation and dominion in the hands of both global hegemonic actors and national politicians. Global hegemonic actors and national politicians have politicised the court in order to pursue their own self-interests of targeting enemies and protecting cronies. This book further argues that within the international sphere the

politicisation of international criminal justice amounts to a form of judicial imperialism. This book assesses the cases of Sudan and Kenya to illustrate how the ICC system has become a compliant political tool in the hands of the powerful, notably the Permanent Five members of the UN Security Council. The book also examines the cases of Uganda and Côte d'Ivoire to illustrate how the ICC system is subservient to national hegemonic agendas.

A key theme that the book engages with is the de-legitimation of the ICC – globally, regionally and nationally. This book proposes a number of recommendations on how the 're-legitimation' of the ICC system, and international criminal justice more broadly, can be achieved. Specifically, the book suggests that a genuine commitment to concurrent jurisdiction is necessary in order to enable different accountability mechanisms, at the international, regional, national and communal level, to function in support and in tandem with each other. Specifically, the book assesses the emergence of the African Court of Justice and Human Rights, but suggests that from being committed to pursuing victim-driven justice, the Court replicates the politicisation at a regional and pan-African level. The book suggests that the utility of tradition-based justice systems should be considered a core pillar of the system of concurrent jurisdiction, rather than as a less satisfactory variant of justice that does not live up to an illusory 'international standard' of global criminal justice. The book further argues that the de-legitimation of the ICC, at the international level, can only be addressed through the radical transformation of the global constitutional order. This book concludes by offering a radical vision of how this global constitutional order can be brought into existence. The book suggests that while the establishment of the ICC was a noble step forward for humanity, as far as the pursuit of human dignity is concerned, it was only part of an incomplete global project to redefine the governance of the planet.

The utility and functionality of international criminal justice

There is no justification for war crimes, crimes against humanity, genocide or crimes of aggression. Furthermore, one would never want to see the repeat of the Holocaust, Rwandan or Serbo-Croatian genocides. So what the Rome Statute can achieve in terms of prosecuting and punishing the individuals who are most responsible for these crimes should be supported. However, these crimes are almost always political or ideological in nature. To commit crimes on the scale that is being addressed by the Rome Statute more often than not requires the instrumentalisation of a state or state infrastructure. Therefore, the perpetrators operate from a political platform and utilise political reasoning for the crimes they commit. International criminal justice is invariably almost always dealing with post-war or post-conflict situations as well as post-authoritarian contexts and it is sometimes implicated in peacebuilding processes. The question becomes how international criminal justice and peacebuilding processes can proceed in a mutually complementary manner.

The legal and political prisms

It is important to recognise that any given situation can be assessed through either a legal or political lens in a war or authoritarian rule situation. Through a legal lens, those who are most criminally responsible should be prosecuted for orchestrating the mass atrocities, which challenge the conscience of humanity. Through a political lens, those who are criminally responsible are more often than not the leaders of state armies or non-state militia, and they are integral to a peacebuilding process. The question of which process should proceed first, or whether both can proceed in tandem, is the vital question that this book argues should be at the forefront for international criminal prosecutors, politicians and peacebuilders alike. This is a question that the United Nations, ICC, AU and other inter-governmental organisations are unable to provide a definitive answer to.

Given the existence of legal, political and peacebuilding prisms,

it becomes evident why there is such a broad range of opinion about the interventions of international criminal tribunals. Often the political and peacebuilding perspectives have a tendency to converge, but not for the same reason. The politicians are focused on political expediency and they cynically manipulate people and institutions to achieve their goals. This is the nature of human politics in the 21st century. Peacebuilders are concerned with creating the conditions for human freedom and dignity across the board including challenging conditions and institutions that are not conducive to promoting peace. Peacebuilders argue that there are circumstances in conflict situations which might not always be conducive to pursuing prosecutions of suspected warlords. In conflict situations, one will always be dealing with warlords on both sides of the dispute, and there are often no innocents in these theatres of violence. The perpetrators of human rights violations can be found on the side of the state or government, even democratically elected regimes, among military troops or within non-state militia. When you sit down to make peace you are always dealing with people who have spilt blood on all sides. When Mandela sat down with the apartheid generals he knew they had spilt a lot of blood during the apartheid regime. As a consequence of the myth-making and the distortion of history and historical competitions, we have conveniently forgotten that Mandela was the first military commander of Umkhonto we Sizwe (MK), after realising that legal and political campaigns were not convincing the apartheid regime to change its ways. Mandela was essentially a warlord, whose cause in the eyes of many was a just cause, which was the struggle against the apartheid regime. This point is necessary in order to illustrate that most warlords view their cause as a just one, even if we may agree or disagree with their perspective. There are some warlords whose objectives cannot be justified using any scale of justice. Hitler's genocidal excesses during the Second World War are an example but there are many others too. But more often than not, you need the warlord to make peace. Mandela made the transition from lawyer to warlord to one of the world's most accomplished peacebuilders.

South Africa chose the path of peacemaking, peacebuilding and democratisation rather than pursue the prosecution of the architects of apartheid, who are now living comfortable lives, while their victims languish in abject poverty. Except one or two token individuals who were prosecuted for assassinations such as Eugene De Kock, who paradoxically was recently released from prison 21 years into South Africa's democracy. Should we be preaching to other societies that they must pursue the path of prosecution, when we didn't take it ourselves? Would that be hypocritical? All of this is to illustrate that there are no easy answers when it comes to issues of peace and justice.

The peace and justice dilemma: Sequencing restorative and retributive justice

In the absence of clear leadership and direction on this issue of the tension between peace and justice, which the Review Conference in Kampala also failed to provide unambiguous guidance on, we have a fractured debate and we have the standoff between the ICC and the AU, which has continued to deteriorate. The question is whether this relationship can be rescued or whether the situation has got to the point where there is, at least on the AU side, a political standoff and stance that is now in an uncompromising and non-cooperative mode. The AU policy of non-cooperation with the ICC still stands. The opening of an ICC office to the AU in Addis Ababa is still being blocked.

The challenge is that 'dealing with justice in conflict management is a very delicate issue. One has to strike a balance between seeking agreement with the key stakeholders – who often include war criminals – and administrating justice'.[3] This is often a tricky exercise because 'trying to do the latter at the wrong moment can lead to a continuation of violence and cause more harm to civilians'.[4]

Peacemaking is future-oriented in the sense that it strives to prevent violence that could transpire and cause the death of innocent civilians. International criminal justice by definition is concerned with the prosecution of human rights violations that have already transpired

through a process of due process, while upholding certain legal criteria and issuing a judgement for past transgressions. Consequently, there is a natural tension between these two processes, and trying to undertake them in tandem can occasionally generate a conundrum. In war situations, individual responsibility for mass atrocities more often than not resides with the leaders of factions or military organisations, who might simultaneously be involved in peacemaking processes.

The notion of justice remains an essentially contested concept.[5] In fact, there are multiple dimensions to justice, but namely, retributive justice and restorative justice. Retributive justice seeks to ensure prosecution followed by punishment for crimes or atrocities committed.[6] Restorative justice strives to promote societal harmony through a quasi-judicial process of truth telling, acknowledgement, remorse, reparations, forgiveness, healing and reconciliation. Retributive or punitive justice is generally administered by a state-sanctioned legal institution or through the remit of international law. Restorative justice draws upon a range of mechanisms including truth commissions and other societal reconciliation institutions.[7]

Both retributive and restorative justices have a central concern with preventing the impunity of perpetrators who have committed atrocities. Restorative justice, however, has a more direct impact on the condition of the perpetrators, because it summarily imposes a punitive sentence, which is evident for all to witness. The impact of restorative justice is more elusive, as victims and perpetrators are often engaged in a series of face-to-face interactions designed to achieve the objectives highlighted above. The fact that the outcomes of restorative justice processes are generally less dramatic than those of retributive justice means that their efficacy is generally more suspect and unquantifiable to external observers. However, we should not lose sight of the fact that both forms of justice address the issue of impunity. Impunity in this context is understood as the condition in which there has been no redress or reckoning of the past atrocities and injustices committed by a perpetrator. Retributive justice prevents the immediate impunity of the perpetrator of crime through punishment and serves

as a warning for those who may be inclined to commit atrocities in the future. Restorative justice also addresses impunity by compelling the perpetrator to undergo a revelatory and confessional process of transformation, which means that he or she has not 'got away' with the crimes that they committed but rather atones for them.

The debate over whether either a retributive or restorative approach to justice should be deployed in the aftermath, or at the point of a conclusion, of a war has not been resolved definitively. Nor can this debate be resolved definitely, because the type of justice that might be appropriate in the context of one country cannot be transplanted to another. In this regard, there is a certain degree of context-specificity in the administration of justice. A combination of retributive and restorative processes of justice can be deployed to address the needs of a society in transition. Therefore, transitional justice can be understood as the legal and quasi-legal processes, mechanisms and institutions that are operationalised to address the reality of past crimes and lay the foundation for more equitable and just societies. In practice, transitional justice frameworks are put in place to enable a society to make a transition from a previously oppressive to a more open, pluralistic and democratic dispensation.

The sequence in which either retributive and/or restorative justice processes are initiated is also not a precise science. In the majority of cases, retributive and restorative justice processes might be instituted and operationalised simultaneously. In some instances, failure of a government or a society to embrace a restorative approach to justice and reconciliation can require the establishment of an international retributive/punitive justice process. In other instances, the demands of a restorative justice process with its emphasis on truth telling and the collective psychological transformation of promoting forgiveness and reconciliation means that efforts to administer punitive measures may need to be carefully sequenced so as not to disrupt these healing processes. 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 respective country is a state party to the ICC or if the issue is referred to the Court by the United Nations (UN) Security Council. It is often the case that these individuals and leaders are the very same people that are called upon to engage in a peace process that will lead to the signing of an agreement and ensure its implementation. Characteristically, most peace agreements will have provisions for peacebuilding and, within this process, a framework for promoting restorative justice through the form of truth commissions as a means for promoting national reconciliation.

A punitive approach to justice cannot deal with the grievances that often underpin structural violence, identity conflict and the economic marginalisation of the majority of people in war-affected countries and thus establish a sustainable basis for peace.[8] It will however, prosecute key individuals who had the greatest responsibility for committing atrocities. Therefore, there is a need to adopt a strategy to ensure sequencing how a punitive approach is instituted in the context of transitional justice.

Sequencing in transitional justice requires the deliberate operationalisation of a coordinated retributive or restorative justice process in order to ensure that stability and ultimately peace is achieved in a given country-specific context. In the international justice for a, at least two camps have emerged, those that adopt a fundamentalist approach to prosecution and those that advocate for a more gradual approach predicated on giving time to peacebuilding and reconciliation to take root. Prosecutorial fundamentalism is not a misguided school of thought and its intentions are noble as far as they attempt to ensure that those who bear the greatest responsibility for war crimes, crimes against humanity and genocide are summarily brought to book. However, prosecutorial fundamentalism, like all other fundamentalisms, can be blighted and become subsumed by a narrow, legalistic desire to bring the accused to justice. A more nuanced approach would suggest that there is a time and a place for prosecution and, in the context of a civil war, it may not always be immediately after the cessation of hostilities between the belligerent parties. At this point in time, the

tension within the country tends to be uncharacteristically high and any attempt to prosecute individuals and leaders can often be, and sometimes is, seen as an attempt to deliberately continue the 'war by other means' by targeting the main protagonists to a conflict. Effectively what is called for in these situations is a period of time in which the belligerents can pursue the promotion of peace. In such a situation, the efforts to promote peace, including its restorative justice dimension, would have to be given precedence to the administration of punitive justice. This is with a view to laying the foundations for the stability of the society.

Given the multiple dimensions of retributive and restorative justice, a case can be made for a delayed initiation of prosecution by the ICC, in order to enable other domestic processes to lay the foundations for sustainable peace. A review of the Rome Statute can enable the ICC to sequence its retributive justice interventions in order to complement restorative justice processes.

The politics of the law

There are real and perceived political effects on the practice of international criminal law, which will impact its perceived legitimacy and viability. Louis Henkin argues that 'law is politics[;] law is made by political actors, through political procedures, for political ends'.[9] Van der Merwe observes that 'neither politics nor law is entirely immune from the other's influence'.[10] Griffiths argues that the notion of pure law is complete nonsense because judges 'are involved in making political decisions in many instances and […] as a lawyer you have to recognise that reality otherwise you are not doing your job.'[11]

Bachmann, Sparrow-Botero and Lambertz in their seminal book entitled *When Justice Meets Politics: Independence and Autonomy of Ad Hoc International Criminal Tribunals*, observe that 'international criminal tribunals are ... instruments of justice, like any other court ... but at the same time ... they are subject to power politics, political influences and international bargaining'.[12] Furthermore, they note that 'in the

past international criminal tribunals have often been instruments of victor's justice'.[13] Bachmann, Sparrow-Botero and Lambertz inquire as to whether there are 'additional objectives that the tribunal is supposed to achieve' and whether 'they belong to the legal, the juridical, or to the political realm.'[14] Bachmann, Sparrow-Botero and Lambertz suggest that:

> international criminal tribunals are more than just instruments of justice; they are important players on the international scene, which inclines (and sometimes even forces) them to engage in power politics, political games and bargaining with states, and politicizing their external actions.[15]

The intention of international criminal justice

There is a view that suggests that 'the idea of the ICC was ... to make sure that punishment against these crimes becomes a reality, irrespective of the status or political role of the perpetrators.'[16] Bachmann, Sparrow-Botero and Lambertz argue that 'the discretion every judge, no matter if municipal or international, enjoys is constrained by the need to ensure legitimacy for his verdicts'.[17] Consequently, 'it is the pursuit of legitimacy that makes judges vulnerable (and receptive) to external influences, whether political or social'.[18] Bachmann, Sparrow-Botero and Lambertz argue that a degree of agency 'lies with the chief prosecutor, since he or she is the actual agenda setter of the tribunal's internal decision-making process'.[19] They further suggest that if the leading prosecutor 'does not submit an indictment to a trial judge for confirmation, the tribunal remains passive ... hence, when it comes to the political initiative of a tribunal, the role of the chief prosecutor is crucial'.[20]

Pan-Africanism in context

Historically, pan-Africanism or the perception by Africans in the

diaspora and on the continent that they share common goals has been expressed in different forms by various actors. There is no single definition of pan-Africanism and in fact we can say that there are as many ideas about pan-Africanism as there are thinkers of pan-Africanism. Rather than being a unified school of thought, pan-Africanism is more a movement which has as its common underlying theme the struggle for social and political equality and the freedom from economic exploitation and racial discrimination.

It is interesting to note that it is the global dispersal of people of African descent that is partly responsible for the emergence of the pan-African movement. As Hakim Adi and Marika Sherwood observe in their book *Pan-African History: Political Figures from Africa and the Diaspora since 1787*, 'Pan-Africanism has taken on different forms at different historical moments and geographical locations'.[21] Adi and Sherwood note that what underpins these different perspectives on pan-Africanism is 'the belief in some form of unity or of common purpose among the peoples of Africa and the African Diaspora'[22]. One can also detect an emphasis on celebrating 'Africanness', resisting the exploitation and oppression of Africans and their kin in the diaspora as well as a staunch opposition to the ideology of racial superiority in all its overt and covert guises.

Pan-Africanism is an invented notion, predicated on the solidarity and self-determination of Africans everywhere.[23] In this regard, pan-Africanism is an invented notion with a purpose. We should therefore pose the question: What is the purpose of pan-Africanism? Essentially, pan-Africanism is a recognition of the fragmented nature of the existence of Africans, their marginalisation and alienation whether in their own continent or in the diaspora. Pan-Africanism seeks to respond to historical efforts to undermine and disempower Africa from pursuing its fullest potential. Africa has been exploited and a culture of dependency on external assistance unfortunately still prevails on the continent. If people become too reliant on getting their support, nourishment and safety from outside sources, then they do not find the power within themselves to rely on their own capacities. Pan-

Africanism calls upon Africans to draw from their own strength and capacities and become self-reliant.

Pan-Africanism is a recognition that Africans have been divided among themselves. They are constantly in competition among themselves, deprived of the true ownership of their own resources and inundated by paternalistic external actors with ideas about what is 'good'. The modern-day paternalism of the international system is more sophisticated and dresses itself up as a kind and gentle helping hand with benign and benevolent intentions. In reality it seeks to maintain a 'master-servant' relationship and does not really want to see the genuine empowerment and independence of thought in Africa. The net effect of this is to disempower Africans from deciding for themselves the best way to deal with the problems and issues they are facing. Pan-Africanism is a recognition that the only way out of this existential, social, political crisis is by promoting greater solidarity amongst Africans. If ideas are not designed by Africans, then rarely can they be in the interests of Africans.

The self-exclusion of global powers from the jurisdiction of the Rome Statute

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 operationalise an international criminal justice regime which would hold accountable individuals who commit gross atrocities and violations against human rights. Specifically, the Court was to have jurisdiction over war crimes and crimes against humanity and genocide; and the intention was that its jurisdiction over the crime of aggression would

not 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 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 21 abstained and seven voted against. From its inception, the US administration resisted the emergence of the Court, with Washington signing the Rome Statute only under the Clinton administration, but then unsigned it under the Bush administration.[24] The failure of powerful countries, including Russia and China, proactively to 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 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 great power interests.

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 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, the United Kingdom and the United States – that 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 criticised the Court for doing its work. However, one might even 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 36 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 on the 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' on bringing preliminary investigations to the point of issuing summons and initiating prosecutions of non-African cases suggests to analysts and politicians on the African continent 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 also have to engage in highly convoluted and incoherent arguments as to why there are no cases from outside of Africa.

There are those who have argued that the problem that the AU

has particularly with the UN Security Council's use of its powers of referral, which has been utilised against two heads of state in Libya and Sudan, can only be resolved through the AU's engagement with the UNSC. There are others that argue that the AU's problem with Article 16 cannot be addressed by the UNSC but rather the matter should be addressed to the Assembly of State Parties and their annual meetings in The Hague.

Africa and the ICC

The ICC's prosecutorial interventions are currently focusing exclusively on African cases (the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Sudan (Darfur), Uganda (Northern), Libya, Côte d'Ivoire and Kenya). Through a combination of self-initiated interventions by Prosecutor Luis Moreno-Ocampo, as well as two UN Security Council (UNSC) referrals, and the submission by individual governments of cases to the Court, this Afro-centric focus of prosecutorial interventions has created a distorted perception within the African continent about the underlying intention behind the establishment of the Court. It is important to note that the cases in CAR, DRC and Uganda were self-referrals by the governments of these countries. The reality is that African countries voluntarily signed up to be subject to the jurisdiction of the ICC, so some have questioned why they subsequently question the Court for doing its work. To a neutral observer it is impossible to get the perception that the ICC was established to prosecute cases from Africa. Proponents of the ICC have to engage in highly convoluted and incoherent arguments as to why there are no cases from outside of Africa.

By examining each African case individually one might be able to come up with a rational explanation why all the current cases of the ICC are in Africa. One might even argue that, to a neutral observer, if one critically analyses the facts, it is impossible to get the perception that the ICC was established with the sole purpose of prosecuting cases from Africa. At the same time, one can also conclude that there

is a combination of domestic and international political interests behind the submission of, for the time being only African, cases and UNSC referrals to the ICC. Irrespective of which 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 pre-trial chambers of the Court. The selective justice in the current ICC's prosecutions is seen as an injustice towards the African continent. War crimes are being committed across the world and therefore it appears to African governments that the ICC is only keen to pursue cases in their continent where the states are comparatively weaker when compared to the diplomatic, economic and financial might of the US, 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 actions of this international criminal court whose primary function is to pursue justice for victims of gross violations. Proponents of the ICC also have to engage in highly convoluted and incoherent arguments as to why there are no cases from outside of Africa.

The moral integrity of the ICC has therefore been called into question by a number of commentators and observers in Africa, with the accusation being that cases are not being pursued on the basis of the universal demands of justice, but according to the political expediency of pursuing cases that will not cause it and its main financial supporters any concerns. Against this charge the ICC system and the office of the prosecutor have failed to make a strong case, which ultimately can only be reinforced by actions to demonstrate that this Court is for all and not for the select and marginalised few. This is the perception that the ICC has to address across the African continent. In the absence of such a dialogue reinforced by concrete action to demonstrate otherwise, the efficacy of the Court will continue to decline across the African continent.

The notion that African governments are unwilling to prosecute their own and that African leaders are not prepared to subject themselves to prosecution has also been challenged. This position seems

to be contradicted by the reality of the 2015 prosecution of the former president of Chad Hissene Habre, in Senegal. The Special Tribunal for Sierra Leone sentenced former president of Liberia Charles Taylor to jail for his nefarious role in the civil war in Sierra Leone.

African civil society and the ICC

African civil society does not have a common view with regards to the role of the ICC on the continent. There are several schools of thought among civil society and the wider public. There are those who view the ICC as a necessary palliative to the gross impunity which has wreaked havoc on the lives of African citizens. There is the critical view among some civil society actors that the ICC is not a panacea that will cure Africa of all its ills and rid it of its criminal elite. The pro-ICC civil society camp has the view that the Court confronts and subverts attempts by African leaders and governments to circumvent accountability for past atrocities. It argues that the domestic legal systems are unable or incapable of dealing with the most serious crimes of international concern, and therefore the Rome Statute's jurisdiction has to be operationalised. The sceptics question whether justice meted out in The Hague will ultimately bring about any genuine change on the ground, if there is no political will to do so. Those critical of the ICC sceptics argue that even though African legal systems may not be able to live up to some illusionary 'international standard of the administration of justice', there is no reason to sub-contract the judicial process to a remote and aloof Court in The Hague. They further argue that the ICC's exclusive focus on African cases during its first ten years of operation is tantamount to judicial imperialism and a neo-colonial encroachment into national jurisdictions.

On 26 January 2011, approximately 30 civil society organisations from about 20 African countries wrote collectively to African members of the ICC Assembly of State Parties urging them to support the Court. Even though these civil society initiatives are receiving scant attention from the AU and the majority of African states, they can contribute

towards encouraging a more constructive dialogue between the Union and the Court. Ultimately, the matter will be resolved at the level of governments due to the state-centric nature of international relations.

Structure of the book

This book is divided into three parts: Part One focuses on conceptual and theoretical issues; Part Two engages with case studies of ICC country situations; and Part Three provides further analysis and makes normative proposals.

Following the first introductory chapter, the second chapter in Part One of the book outlines a theory of 21st-century imperialism. Chapter three assesses the politicisation of international criminal justice. This book further argues that within the international sphere the politicisation of international criminal justice amounts to a form of judicial imperialism. Even though the ICC system prefers to assert the fact that it only intervenes on the basis of legal criteria, the Court is in fact a tool for coercion, control, manipulation and dominion in the hands of both global hegemonic actors and national politicians. Global hegemonic actors and national players have politicised the court in order to pursue the own self-interests of targeting their enemies and protecting their cronies.

Part Two of the book assesses the cases of Sudan and Kenya to illustrate how the ICC system has become a compliant political tool in the hands of the powerful, notably the Permanent Five members of the UN Security Council. Part Two consist of three chapters, including chapter 4 which assesses how judicial imperialism manifested in the ICC intervention in Sudan and how the African Union rallied its constituent members to resist the Court's activities in Africa. Chapter 5 explores the issue of prosecutorial selectivity and how the Kenyatta regime managed to utilise the vehicle of pan-Africanism to militate against the neo-colonial instrumentalisation of the ICC by the West. Chapter 6 will examine how the politicisation and instrumentalisation of the ICC replicates itself at the national level, by assessing the machinations

of politicians in the Ugandan and Côte d'Ivorian situations.

The final part of the book will undertake an analysis of strategies to 're-legitimatise' the ICC system, and international criminal justice more broadly. Specifically, chapter 7 suggests that a genuine commitment to concurrent jurisdiction is necessary in order to enable different accountability mechanisms, at the international, regional, national and communal level, to function in support and in tandem with each other. Specifically, this chapter assess the emergence of the African Court of Justice and Human Rights, but suggests that from being committed to pursuing victim-driven justice, the Court replicates the politicisation at a regional and pan-African level. The book suggests that the utility of tradition-based justice systems should be considered a core pillar of the system of concurrent jurisdiction, rather than as a less satisfactory variant of justice that does not live up to an illusory 'international standard' of global criminal justice. Chapter 8 concludes by offering a radical vision of how this global constitutional order can be brought into existence by redefining global governance. The conclusion to the book draws together some of the key themes emerging from the preceding chapters.

Conclusion

If we have created a system in which the international rule of law applies to some states and not to others, then we are no longer in the realm of justice, but one of politics. The issue of adopting a legal lens and a political lens is an important one. For as long as we continue to use one of these lens to the exclusion of the other, then the prospects for resolving the relationship between the AU and the ICC will prove to be difficult. These salient issues need to be examined in a more nuanced way; this book seeks to contribute towards this process in the subsequent chapters.

PART 1:
Conceptual and Theoretical Issues

Chapter 2

A Theory of 21st-century Imperialism

Introduction

This book unravels the dynamics of 21st-century imperialism and its co-optation and instrumentalisation of international law. This chapter will explore the dynamics of 21st-century imperialism and illustrate how it differs in some respects from its antecedents in the 19th and 20th centuries, while retaining the consistent goal of perpetuating dominion, control and subjugation.

Twenty-first century imperialism differs from its predecessors in that it does not rely on the physical conquest of its subjects. Rather in a subtle way it draws its subjects into a dynamic where, despite the appearance of physical freedom, they are in fact colluding and administering their own conquest by others. In effect, the subjects of 21st-century imperialism are willing executors of the imperial project in the way that they permit external actors to impose and determine – through coercion and payments – the trajectory of their own political, economic and social development. This chapter will lay the foundation for subsequent chapters to interrogate how international criminal

justice in its current incarnation and manifestation is being utilised as a vehicle for 21st-century imperialism in Africa.

A historical trajectory of the idea of imperialism

Classical theories of imperialism focused on the territorial expansionism of the European powers between the 15th and 19th centuries. This European expansionism was motivated by the voracious need to 'discover' new markets and raw materials for European capital to invest and maximise the accumulation of profit.[1] As evident in the transatlantic slave trade, the buying and selling of human beings was simply another business opportunity, which regrettably remains the case in the 21st-century practice of human trafficking.[2]

Hobson defines imperialism as 'the combined and separate action of capital ... to secure preferential access to foreign markets and foreign areas of development by colonies, protectorates, spheres of preferential trade and other methods'.[3] Lenin argued that imperialism was a logical outcome of the driving forces of the capitalist system, notably the competitive drive to exploit new markets.[4] Lenin further argued that a key feature of imperialism was the rivalry between great powers to impose their hegemony in the political, legal, economic and social spheres. Subsequently, Fanon observed that 'for centuries the capitalists have behaved in the under-developed world like nothing more than war criminals. Deportations, massacres, forced labour and slavery have been the main methods used by capitalism to increase its wealth, its gold or diamond reserves, and to establish its power'.[5] Fanon further notes that 'Europe has stuffed herself inordinately with the gold and raw materials of the colonial countries: Latin America, China and Africa'.[6]

This European expansionism required the political and social conquest of the colonised peoples. In practice, this meant that a colonial dictatorship was established in which the political control of the society was administered by the imperial power. By extension the judicial system of judges and lawyers was subservient to the colonial

political control, in effect it was a system of judicial imperialism. The subordination of the judicial system to political power is an important point, which will be further explored later in the book. Imperialism was also driven by the need to push the uncivilised, barbaric, backward and ungoverned masses into the realm of civilisation. Consequently, colonised societies were also subject to the imposition of social and cultural norms and mores, through a process that relegated indigenous culture to the status of barbarism and savagery.

The unifying theme of these perspectives is the notion of imperialism as a means to control, manipulate and exercise dominion by one political and socio-economic order over another. This will become relevant when we consider how the utilisation of the international justice system is deployed as a tool to control, manipulate and exercise dominion by powerful countries over weaker countries.

The delusion of decolonisation

With the ushering in of 20th-century decolonisation, imperialist powers were, through a confluence of events, compelled to give up their former empires. However, an interesting phenomenon soon became evident. The former colonised territories were already grafted onto the economies of their former colonial powers and by extension to the international financial system which they did not create. The illusion of political autonomy in the newly independent states concealed the reality of financial subservience to their former colonial masters, with all the attendant consequences and morbid symptoms that also remained evident in the social and cultural sphere.

The end of formalised colonialism regrettably left the reality of colonial relations intact. As a by-product of the process of decolonisation, the colonial mindset remained intact and entrenched in both the psyche of the coloniser and the colonised. The inter-generational transmission of the sentiments of the coloniser and the colonised into the psyche of their descendants persists to this day.

The emergence of the liberal international order was imbued by

the mindset of the coloniser because it was constructed by American and European statesmen and women who believed in their calling to civilise the world, as a variant of what the arch-imperialist Cecil John Rhodes assigned as 'heaven's breed'. At the founding of the United Nations, there were only 51 independent countries, including three African countries notably Ethiopia, Liberia and apartheid South Africa which was at the time reproducing the logic of white supremacy through its laws, politics and social segregation. What appears to be a benign system is not what it appears to be in reality. Rather what exists is a consummate construction of a misleading global framework, which creates harm and enslaves its victims without the majority being aware.

The neo-colonial moment

Neo-colonialism maintained countries from Asia, Africa and Latin America in a relationship of subjugation and subordination to the strictures of the global system, which was being imposed upon them by the West, and during the Cold War period by the Eastern Soviet bloc. The old imperative of imperialism persisted as new systems of subjugation emerged. The core-periphery relationship of dependency was maintained and perpetuated by the global system.[7] This was evident in the geopolitical system including the institutions for international justice, finance and trade. Fanon observed that the emerging leadership of decolonised nations holds the view that 'its mission has nothing to do with transforming the nation; it consists, prosaically, of being the transmission line between the nation and a capitalism, rampant though camouflaged, which today puts on the masque of neo-colonialism'.[8] The impotence of the 'colonised' in this emerging neo-colonial moment was defined by their inability to set the rules for this system. Consequently, they continued to experience economic subjugation.

Critics of neo-colonialism

There is an emerging perception that theories of neo-colonialsm have limited validity because they under-play or ignore the agency, power and politics of the so-called victims to mould their own reality. The argument goes that so-called subjects of neo-colonialism possess the agency to extract themselves from these forms of subjugation. However, this ignores the corrosive effects of global predatory forces on the withering away of an existing agency among the so-called subjects of neo-colonialism.

The appeal of post-imperialism

A school of thought argues that the discourse around imperialism is all in the mind. Some victims begin to believe in this position and their minds become mentally ensnared into the illusionary narrative that they have a long way to go to 'develop' and that they need to look up to the paradise on the hill that is represented by Western civilisation, predicated on the liberal international order.

Post-imperialism argues that the agency, power and politics of the so-called victims provides them with the means to extract themselves from a master-slave relationship. It absolves the existing system of subjugation, subordination and manipulation. Consequently, it protects and maintains the status quo and replicates the conditions of exploitation. It permits the continuing reproduction of imperial relations and new forms of subjugation.

Imperialism in the 21st century

The 21st century is witnessing new forms of subjugation and mechanisms of exclusion. Most commentators viewed the end of the Cold War, through the detente between the US-led Western power block and the former Soviet-led eastern formation of states, as a victory for the West. Western powers viewed this moment through a triumphalism prism and they believed that this was the opening to further export

and entrench their version of society on the rest of the world. Far from advancing the cause of human freedom and dignity through equality, this Western resurgence created new forms of subjugation, albeit much more subtle and almost invisible to the uncritical eye, that David Fidler has described as 'a kinder, gentler system of capitulations'.[9]

The global nation as empire

A global nation follows an imperial logic in that it seeks to maintain its status of pre-eminence by any means necessary but predominantly through its network of client states. The US is the current global nation, with China seeking to dislodge it at the appropriate time from this mantel. China has utilised a soft-power approach to getting itself in position to take over the ultimate prize. Rather than project overt military might, it has chosen to go the route of spreading its economic influence across the world. Consequently, in the economic sphere it is already an economic global nation. All that it has to do now is to wait for the current empire to implode, and it will quietly pick up the pieces and position itself as the premier global nation.

Economic imperialism in the 21st century

The intrusive role of the current liberal order in the economies of countries is also a form of subjugation. Specifically, the majority of the societies around the world essentially became subject to the strictures of economic policy essentially dictated by the International Monetary Fund (IMF) and the World Bank, which are controlled by countries of the erstwhile Western power bloc. In July 2015, the IMF confessed that it exacerbated the Greek financial crisis through its emphasis on austerity, despite the protestations of the local politicians. Despite the fact that Greece is currently still a member of the European Union, and technically within the Western power bloc, there will be no consequences for the lives destroyed by the extent of the IMF's

excesses. The disciplining and controlling nature of the asymmetrical global system of international finance serves to weaken the domestic socio-economic wellbeing of nation-states.

Subjects as willing executioners of the imperial project

21st-century imperialism differs from its predecessors in that it does not rely on the physical conquest of its subjects.[10] Rather in a subtle way it draws its subjects into a dynamic where, despite the appearance of physical freedom, they are in fact colluding and administering their own conquest by others. The subjects of 21st-century imperialism are willing executors of the imperial project in the way that they permit external actors to impose and determine – through coercion and payments – the trajectory of their own political, economic and social development. In effect, 21st-century subjects are guilty and complicit in signing on the dotted line to facilitate their own subjugation. This collusion can only exist due to a failure to decolonise the mind-set of the colonial agent. This is manifest for example, in the former colonies in Asia, Latin America and Africa, which are all experiencing deep internal structural weaknesses, and local leaders take advantage of these problems to entrench and consolidate their hegemonic power over the majority, while subordinating the interests of their countries to the will of the imperial global system of subjugation.

As Fanon observed, the national leadership of countries emerging from colonialism strives 'to be part of the racket'.[11] They are indoctrinated into uncritically thinking about international law and they study, learn and internalise the conceptual frameworks relating to the legal order, which cast non-Western people as uncivilised, notably in their drive to avoid being subject to the rule of law. In fact, Western actors, such as the US, UK and France, and members of the NATO alliance are among the leading offenders when it comes to human rights violations. These willing executioners of their own imperial subjugation are like the uncritical serfs who supplicate themselves to the feudal lords.

The emergence of a Eurocentric international human rights law

framework provides an effective system of intrusion. As Anghie notes, 'it legitimised the intrusion of international law in the internal affairs of a state: it could be used to justify further intervention by the West in the Third Word'.[12] International law cannot intrude however, unless the state actors permit it to do so. Consequently, national politicians are engaged in collusion with global power to perpetuate the exploitation of their local domestic economies.

Corrupt leaders become willing executioners of this global system, even though they wax lyrical and proselytise against the very same system of which they are colluding agents. They bow down to their 21st-century imperial masters, with a mixture of confusion and a misplaced sense of self. They are permitted to stay in power as long as they do not threaten the hegemony of the West in their domestic economies. Unjust rule in Africa benefits the political and economic rule of great powers and 21st-century imperialism. For example, one can witness the paradox and irony of the US government, which has not ratified the Rome Statute, sending 100 military operatives to assist Uganda to arrest the Lords Resistance Army (LRA) leader Joseph Kony, who was indicted by the ICC. The converse of African countries arresting US personnel and facilitating their transfer to the ICC is unfathomable in the colonised mind-set.

Across Africa, its leaders talk about building a continental peace and security architecture, but they decline to finance it with portions of their national defence budgets. Then when a crisis emerges they further prostrate and supplicate themselves to their erstwhile imperial masters in Washington, Paris and London to come and save them from themselves.

This phenomenon is also not confined to the realm of military and security operations. Some of the most vocal proponents of the international criminal justice system are African lawyers, legal scholars and jurists. Paradoxically, they tend to generally have acquired their knowledge from systems of knowledge, even those based in Africa, that were infused with Western notions of the law. They would like the international criminal justice system to save them from their own

corrupt leaders and therefore they become willing executioners of an unjust international criminal justice system. Sending a petition to a higher order to come and save them from themselves is the height of being a disempowered imperial subject. This manifests a naively optimistic attitude of the same Western powers that they show deference to, despite their engagement in an untold array of violations of international criminal law. Consequently, these willing lackeys of an unjust system engage in self-deluding denial as they are systematically violated, which is an affront on their human dignity. In effect, this form of supplication makes them ill prepared to identify the existing system of subjugation for what it is. They fail to realise that an international court will not liberate them from the excesses of their leaders; this can only be achieved by a root and branch transformation of the attitudes within society to the rule of law and internalisation of the democratic practices.

As willing executioners of the imperial project, for African countries to subject themselves to an international legal order through the self-referral process, which has been exploited to target political opponents, but does not demand the same exigencies from the other part of the world, is allowing themselves to be neutralised of any agency. It is also a crude form of sub-contracting what should be domestic legal processes to an international institution whose credibility and legitimacy has been destroyed by its compliant and subservient relationship with the UN Security Council.

Imperialism and the practice of international law

Writing in 1968, Verzijl argued that 'there is one truth that is not open to denial or even to doubt, namely that the actual body of international law as it stands today [...] is the product of the conscious activity of the European mind.'[13] Antony Anghie observes that 'the traditional understanding of international law regards colonialism – and, indeed, non-European societies and their practices more generally – as peripheral to the discipline proper because international law was a

creation of Europe'.[14] For example, the Treaty of Westphalia, of 1648, emerged from European political and legal traditions, which now currently frame how the world engages with notions of sovereignty. The conquest of colonial land was achieved by designating the target territories as non-sovereign based on the 'legal' order of the time. Consequently, the 'Scramble for Africa', initiated through the 1885 Berlin Conference, could be consummated on a 'legal' basis, which gave imperialism the veneer of judicial respectability. As Anghie notes, the 'sovereignty doctrine expels the non-European world from its realm, and then proceeds to legitimise the imperialism that resulted in the incorporation of the non-European world into the system of international law'.[15] Subsequently, Europe succeeds in stamping its imprimatur on the colonised when in the aftermath of decolonisation, 'the non-European state' emerges 'as a sovereign and equal member of the global community.'[16]

The legal order as an instrument for dominion

The 19th-century English jurist, John Austin, 'argued that law and order were only explicable in a system governed by an overarching sovereign that could create and enforce the law.'[17] He further argued that 'international law could not be regarded as law properly so called since the international system lacked such a sovereign.'[18] Anghie argues that 'international law has always been animated by the civilising mission, the project of governing and transforming non-European peoples.'[19] Anghie further suggests that 'colonialism, then, far from being peripheral to the discipline of international law, is central to its formation.'[20] He explains this assertion by arguing that 'it was only because of colonialism that international law became universal; and the dynamic of difference, the civilising mission, that produced this result, continues into the present.'[21]

The Europeanised system of international law was projected onto the global stage as the framework of regulation that applied universally to all societies. Failure of non-Western states to adhere to certain

standards of Europeanised international law exposed them to the designation as uncivilised and subject to conquest.[22]

Fanon observed that 'the UN in its present state is only a reserve assembly, set up by the Great, to continue between two armed conflicts the 'peaceful struggle' for the division of the world'.[23] The members of the UN Security Council, including the United States, China and Russia, are not subject to the jurisdiction of the Rome Statute, but they can dictate the selective referral of country situations to the ICC. Consequently, they can and do instrumentalise the UN Security Council referral process to target and control their perceived enemies or opponents. Fanon argued that 'in reality the UN is the legal card used by the imperialist interests when the card of brute force has failed.'[24] Fanon further argues that the international legal order can be, and has been utilised, as a means 'of crushing the will to independence of people, of cultivating anarchy, banditry and wretchedness'.[25] Earlier in this chapter, the notion of imperialism as a means of control, manipulation and exercise of dominion by one political and socio-economic order over another was discussed. The suggestion being proposed is that international criminal justice in its current incarnation and manifestation is being utilised as a vehicle for 21st-century imperialism in Africa. Judicial imperialism by extension is the utilisation of the international justice system as an instrument to control, manipulate and exercise dominion by powerful countries over weaker countries.

There are self-evident imbalances in the global system in terms of the failure of the powerful to be subject, or to subject themselves, to justice and prosecution for their war crimes and crimes against humanity. Consequently, this creates a two-tier system of international criminal justice – one for the small and weak and another for the powerful countries. It creates the category of a second-class of global citizens, of those who are subject to the law and those who are above the law.

This situation is made more insidious when it becomes evident that the powerful are the primary agents for the formenting of instability

that precipitates and instigates the violence that consumes regions of the world, which in turn produce the war crimes that need to be prosecuted by the international criminal justice system, which the powerful manipulate to begin with!

The reality of judicial imperialism

Anghie argues that:

> Imperialism is experienced in the Third World, I would suggest, in a much more everyday way through for example, international economic regimes, supported and promoted by international law and institutions that systematically disempower and subordinate the people of the Third World.[26]

The duplicitous nature of the ICC interventions

Article 7 of the Rome Statute specifically asserts that a 'crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, including: murder; extermination; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health'.[27] Furthermore, Article 8 of the Rome Statute states that war crimes include: 'wilful killing; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.[28] By any objective measure there are a number of crimes being committed around the world that will not be referred by the UN Security Council to the ICC, because of the veto power that the Permanent Five members have

over such action. This creates a great power exceptionalism, in which the powerful are not subject to the same rules as the less powerful.

In 2003, the United States of America coordinated, planned and led an invasion of Iraq, ostensibly to overthrow the country's brutal dictator Saddam Hussein. However, in doing so it violated Articles 7 and 8 of the Rome Statute, and subsequently violated international criminal law and committed crimes against humanity and war crimes. Fanon observed that 'hesitation in murder has never characterised imperialism'.[29]

Yet the international criminal justice system has not, and will not for quite some time, be able to bring prosecution to bear on the leaders of the US who ordered and executed the invasion of Iraq. This is simply due to the fact that the US has a veto power in the UN Security Council to prevent any potential referral of its invasion to the ICC. In addition, the US is not a signatory of the Rome Statute and is subsequently not subject to its jurisdiction, so as the situation stands the prosecutor of the ICC would not be in a position to initiate any criminal prosecution relating to the US invasion of Iraq. In effect, both the UNSC and ICC system are powerless and impotent in the face of a powerful country that wants to do as it pleases and violates the provisions of the Rome Statute. On this basis, it is evident for all of those who are willing to see, that imperial power trumps over international criminal justice. If the international criminal justice system is unable to restrain the excesses of the powerful states, then it cannot be imbued with any legitimacy. The international criminal justice system, including the UNSC referral provision in the Rome Statute, is exposed for its hypocrisy and double standards. Given the global context in which powerful countries are active participants – as belligerents, regime supporters and arms suppliers – in the majority of conflicts that are taking place across the world, the prosecution of war criminals should always be extended to include individual leaders from these powerful countries who participate in propping up oppressive regimes.

Courtenay Griffiths, Queen's Consel, has observed that 'one of my

major concerns about the way the ICC is currently focusing on Africa is that in every Western country with a sizeable black population you find that the use of stop and search powers, the rate of arrests and the rate of imprisonment is disproportionately skewed to black people'.[30] Griffiths further points out that 'what we are doing now on a global scale is replicating the association between blackness and criminality. Just as an outsider looking at the ICC now, where everybody is African, the immediate impression you get is that Africa is where war crimes occur.'[31] In analysing the ICC, Brendan O'Neill concurs with this view and argues that 'at a time when there is conflict in the Middle East, Asia and Latin America, and when the armies of many Western nations are getting up to all sorts of bad things around the globe, to have a war crimes court which only investigates blacks really is as perverse as it would be to have a court in Britain that investigated black burglaries and ignored white ones.'[32] O'Neill argues that 'it is remarkable that in an era when liberal observers see racism everywhere, in every thoughtless aside or crude joke, they fail to see it in an institution which focuses exclusively on the criminal antics of dark-skinned people from the 'Dark Continent'.'[33] O'Neill further observes that 'liberal sensitivity towards issues of racism completely evaporates when it comes to the ICC, which they will defend tooth and nail, despite the fact that it is quite clearly, by any objective measurement, racist in the sense that it treats one race of people differently to all others.'[34]

Griffiths argues that 'the ICC was set up to try those lesser breeds without the law – the Africans. This is the same civilising mission from the late 19th century and I find it, as a black man, totally objectionable'.[35] To bring into stark contrast in the way the international criminal justice system is duplicitous and compliant to global power, Griffiths questions:

> What is the difference between a 15-year-old boy in Freetown, during the Freetown invasion, hacking someone's arm off – I'm not condoning it – what is the difference between that and a US soldier sitting in a bunker in Nevada controlling a drone over Pakistan.

> Dropping a bomb on a house knowing that he is not just killing a target, but that he is going to wipe out women, children and everything else at the same time? What is the difference between the two and yet that PlayStation style of murder isn't viewed in the same light by the public. Why not? [US president Barack] Obama has been using these drones consistently, knowing full well that they can't be used with the accuracy they allege. Knowing full well that he is murdering people – and remember, he is the one who has to give the say-so. That man has blood on his hands. I don't think often-times people are ready enough to accuse him of that. Obama is a war criminal – that's my view.[36]

O'Neill provokes further on this theme when he argues that 'the fact that many white do-gooders in the West support such a missionary institution rather gives the lie to their claims to be concerned about equality and justice, and exposes the colonial snob lurking beneath their PC veneer.'[37]

The net effect of the US-led invasion of Iraq was the dismantling of the norms of international law, specifically the prohibition of the use of force, which is enshrined in the UN Charter and re-articulated in the Rome Statute as the crime of aggression. This breach of international law was subsequently replicated by Russia when it invaded and annexed the Crimea from Ukraine and when Saudi Arabia invaded and bombed Yemen. This reveals that imperial ambitions are not harboured by the US alone, but also by Russia and China, and regionally by Saudi Arabia. Knox has argued that 'the prime reason driving the US away from the Security Council is not its disdain for multilateralism but rather the threat of other imperialists states'.[38] As Knox argues, 'even the most "normal" and "uncontroversial" multilateral interventions remain racialised and imperialist'.[39] As Anghie observes, 'these efforts to create a new international law appropriate for the allegedly unprecendented times in which we live have involved returning

to a primordial and formative structure of international law, the civilising mission'.[40]

This breach has in effect laid bare the hypocrisy of those who purport to support the emerging system of international criminal justice embodied by the ICC. In effect, efforts to create and consolidate international criminal justice have been undermined by the countries whose responsibility it is to uphold global order. Consequently, as Anghie argues 'this has resulted in the formulation of a new form of imperialism that asserts itself in the name of 'national security', as self-defence.'[41] He goes on to add that 'what is required, then, is an understanding of how imperial relations and structures of thought continue to operate in an ostensibly neutral setting. This would reveal how imperialism has always been part of the international system.'[42]

The intermediaries of judicial imperialism

The paradox is that there are lawyers, jurists and legal scholars in Africa who openly invite and embrace judicial imperialism, deluded by the notion that the law is apolitical and caught up in the desire to preserve the legal neutrality. They become intermediaries of judicial imperialism who endorse and sponsor the activities of a global system of dominion, under the guise of the international rule of law. They believe that they require outside intervention in order to overcome the conditions that they endure within their post-colonial states.[43] However, by uncritically summoning the ICC, as a *deus ex machina*, to salvage them from the savagery of their fellow brothers and sisters, they fail to see the barbarity of an international criminal justice system that is unable, and disabled, from addressing the unfettered destruction of innocent human lives and the pillaging of societies. They export their agency to The Hague even though local politicians also instrumentalise the ICC to pursue their domestic self-interests. The net effect of this is not to render an impartial justice to the victims who have suffered violations, but to frustrate the agency of domestic actors from finding other pathways to resolving their disputes and forging a new society premised on human

freedom, equality and dignity. These issues will be further elaborated later in the book.

Conclusion

Far from attaining human freedom through the administration of international criminal justice, the global South finds itself facing a new form of subjugation from the triumphant Western power bloc. This chapter has traced the historical evolution of the utilisation of international law as an imperial instrument for coercion, control and dominion. It has further assessed the manifestations of 21st-century imperialism. The chapter argued that what distinguishes 21st-century imperialism from its historical antecedents is the phenomenon of its subjects and targets becoming willing executioners of the project of imperial dominion. The chapter argued that based on how the ICC is instrumentalised by the most powerful countries in the world – notably the Permanent Five members of the UN Security Council – it has become an appendage to 21st-century imperialism. The war crimes of the powerful go unaddressed, which creates a two-tier system of international criminal justice, one for the small and less powerful nations, and none for the powerful countries. In effect, the ICC is instrumentalised as an instrument for judicial imperialism. Subsequent chapters in this book will assess how judicial imperialism on this basis is a threat to the freedom of the whole of humanity, not only the country situations currently under the purview of the ICC.

Chapter 3

The Politicisation of International Criminal Tribunals

Introduction

This chapter will assess the politicisation of international criminal tribunals (ICTs), which has been a recurring feature of international relations. Governmental actors often task international criminal tribunals with a broad range of tasks, some of which come into tension with each other such as the pursuit of justice and the promotion of reconciliation. More specifically, mandating ICTs to pursue justice, which can polarise societies and lead to allegations of victor's justice, is in contradiction to the task of promoting reconciliation which requires fostering transformed relationships and building inclusive societies. We can delineate at least three generations of ICTs including: the first generation of international criminal tribunals in Nuremberg and Tokyo; the second generation of international criminal tribunals in the form of the International Criminal Tribunal of the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and the third generation of international criminal tribunals

in the form of the ICC. This chapter will suggest that international criminal law is firmly embedded in political processes, and that it is disingenuous for prosecutors and judges to pretend otherwise. This has far-reaching implications in terms of how international criminal justice is practised around the world. The potential ramifications of the politicisation of international criminal tribunals will be discussed in subsequent chapters.

The politicisation of international criminal tribunals

By introducing international criminal law into global politics, the intention was to embed an accountability framework that could respond to the abuses of political power notably in the aftermath of war. In fact, the opposite occurred with global politics corroding and corrupting international criminal tribunals. This has precipitated the realisation that far from being immune to politics, international criminal tribunals are deeply implicated in the politics of transition. International criminal tribunals are subject to the forces of geopolitics, which bring them into existence. Consequently, ICTs are vulnerable, and almost inevitably become corrupted by the political environment in which they are operating. The majority of international criminal tribunals are established to adjudicate the violations perpetrated in situations of war, violent conflict or authoritarianisms. These situations are extremely fraught with political machinations as the actors on all sides seek to utilise whatever means they can to press for their advantage.

In an ideal world, international criminal tribunals would function on the basis of the principles of autonomy and deliver impartial justice. Regrettably, such an ideal world does not yet exist. Because international criminal justice is implanted in a highly politicised context, namely a post-conflict or post-authoritarian environment, it inevitably becomes swept away by the political undercurrents that prevail in a given situation.[1] To suggest that international criminal justice can somehow be insulated from the political machinations of those that it seeks to

discipline is the height of naivety. Van der Merwe observes that 'the fallacy of the distinction between law and politics is especially evident in the international legal order'.[2] Bachmann, who observed the trial of Slobodan Milosevic between 2001 and 2004 at the ICTY, has argued that 'the main reason for the current crisis of international criminal justice however, stems from the widely ignored fact that, international criminal justice is – and has to be – political'.[3]

Political realism, a variant of international relations theory, emphasises the primacy of the self-interests of nation-states in describing the way the world system works. Political realists view international law with scepticism, and as a 'dangerous moralism' and an idealistic attempt to constrain the behaviour of states in what is in effect an anarchical world society.[4] Van der Merwe notes that 'the notion that international criminal law is conditioned by international politics does not sit well with lawyers ... such a political influence is impossible to overlook, let alone, refute entirely'.[5] Van der Merwe observes that 'international criminal courts are politically negotiated and supported (or not).'[6]

Prosecutors in effect require the political buy-in of the referent states of any international criminal tribunal. This places international criminal tribunals in a precarious situation in terms of their viability and existence. Bachmann further argues that 'international criminal tribunals have a strong role in securing transition to democracy, if they admit, that in political transition, doing non-political justice is impossible'.[7] In effect, international criminal justice is firmly embedded and implicated in the politics of transition. The challenge is one of how to get the political transition right. International criminal law does not exist in a separate and independent nebulous realm of impartial justice, even though there are those that believe that it does, or wish that it could be accepted universally on this basis.

Coercive compliance and the limits of international criminal tribunals

International criminal tribunals cannot enforce the coercive compliance of their rulings. Consequently, they are beholden literally

to the authorities in order to make their administration of international criminal law possible. As Van der Merwe notes 'international criminal courts have no policing and enforcement powers of their own and are heavily reliant on the financial support they receive from states'.[8] Van der Merwe further notes 'that international criminal justice would be largely toothless without a large measure of political backing'.[9]

The hegemonic instrumentalisation of international law

Van der Merwe discusses the 'hegemonic policies towards international law' that oscillate between: the instrumentalisation of international law; and the withdrawal from, or non-compliance with, international law. For Van der Merwe '*instrumentalisation* is viewed as the more *odious form of hegemonic behaviour* and denotes the active pursuit by state of the development and use of international law as a means to stabilise *dominance*, to improve a dominant position or as a means of *regulation and pacification'*.[10] Here we see the resonance with the discussions in Chapter 2, and the notion of the emergence of European international law as a means to regulate and pacify colonial territories. At the heart of European imperialism was the instrumentalisation of international law, firstly as a means to invalidate the legal status of colonial peoples and secondly, to justify the colonial conquest of the 'un-occupied' territory, or *terra nullius.*

Hirsh argues that 'a strong state, particularly a hegemonic state, may be in a position to wield an overwhelming control over the content and functioning of international law'.[11] The element of control over the content of international law highlights the role that powerful countries can play even at the stage of framing the elements and provisions of a statute, which subsequently defines the parameters within which the so-called law will be practised. This equally means that other notions of justice, such as perhaps the re-distribution of illegally obtained economic gains to the victims, may not be given the priority or primacy they deserve in the development of a particular international statute. Hirsh further argues that a powerful hegemonic

state 'has an interest in bolstering an international legal framework that it can influence both directly, through pressure, and indirectly, through using it to project its own world views and values'.[12] Van der Merwe suggests that to an extent international criminal law can be viewed as 'a liberal-legalist tool in *the struggle for political dominance in the international legal order*'.[13] If we accept this proposition, then efforts to re-legitimise international criminal justice cannot be achieved in conditions that enable or permit the self-interested political whims of nation-states to prevail, namely the anarchical nature of international society. To re-legitimise and redeem international criminal law, the global political order has to be re-designed to effectively constrain the behaviour of states. This is especially necessary where powerful hegemonic actors are concerned, as it is the only way to ensure that they uphold the principle of legality and a respect for the rules, which define their duties and rights as nation-states.

Powerful hegemonic actors can also withdraw from the jurisdiction of international law. Van der Merwe argues that through processes of 'hegemonic omission' or a 'hegemonic failure to act ... dominant states may easily choose to *violate international law*, evade their international legal obligations or *undermine international legal efforts*'.[14] The violation of international law is commonplace in the current global system, as evidenced in the aggressive invasion of sovereign states, such as the US-led invasion of Iraq in 2003, the Russian invasion of Ukraine and annexation of Crimea in 2014, the ongoing occupation of Tibet by China, and the Saudi Arabian invasion of Yemen in 2015. These actions effectively render the international law enshrined in the UN Charter a paper tiger, notably given its provisions on sovereignty and territorial integrity. Through these acts of hegemonic violation, the UN Charter appears not to be worth the paper that it is written on.

Selective prosecutions and the violation of the fundamental principles of justice

In addition, national actors more often than not have international

and geo-political patrons, who might be implicated in the conflict or complicit in supporting some of the acts of violation that perpetrators are alleged to have committed. For example, when ICTs only adjudicate the perpetrators of one side in a given conflict then they violate the fundamental principles of justice. Implanting an international criminal tribunal into a situation that is politically contested, and hoping that it will deliver impartial justice is wishful thinking. International actors can also choose a policy of non-cooperation, particularly 'when an international criminal tribunal might undermine other state interests or priorities'.[15] As Lebow and Kelly observe 'many regard international law and associated norms as distractions – or even inimical to state interests – unless they provide a rhetorical cover for policies actually intended to maximise power and influence'.[16]

The absence of a global authority

The absence of a global authority that can enforce compliance of international criminal law means that its implementation is left to the political whims of the constituent nation-states of the world. This is an unsustainable situation in terms of the prospects for the implementation of international law. The danger is that we are beginning to witness the regression towards a situation in which the powerful do as they please, with the spectre of the 'might makes right' rearing its ugly head once more. This is evident in the carte blanche approach to global politics, which is being utilised by the US government and its client European powers in their conduct of international relations with other parts of the world. This has precipitated a copycat approach from Russia, through the invasion of Ukraine, and China, in the occupation of Tibet, for example. Even middle powers have got into the act with Saudi Arabia invading Yemen, without a UN Security Council resolution, as countries now utilise false pretences to justify invading their neighbours. This new authoritarianism is a clear and present danger to the gains that have been made through the establishment of the international system.

The only way to salvage the world from an encroaching global

authoritarianism, fuelled by the rise of the securocrats, is paradoxically to dismantle the existing system and replace it with a more democratic global constitutional order. The challenges of achieving this in practice are significant but not insurmountable.

The invention of international criminal tribunals

The following analysis of international criminal tribunals will not be exhaustive, but rather it will focus on the politics that impacted upon their work.

The Nuremberg Tribunal

The International Military Tribunal (IMT), also known as the Nuremberg Tribunal was criticised as a significant instance of 'victor's justice' in the sense that it was a 'conviction-oriented framework imposed by the four great powers that established the court'.[17] The Nuremberg Tribunal prosecuted and judged the elite of the German Nazi regime. It was one-sided in the sense that it only judged Germans, similarly the Tokyo Tribunal only judged Japanese perpetrators. The criminal acts of the Nazi were so palpably evil that this issue does not generate much analytical criticism.

At the time, destruction of Hiroshima and Nagasaki by atomic bombs dropped by the US government was not considered a war crime or a crime against humanity, because the Americans were on the side of the victors, according to the dominant narrative of time. Yet, if we accept that not all Japanese were willing participants in the Second World War, then undoubtedly some innocent civilians were killed during the Hiroshima and Nagasaki attacks. Similarly, the carpet-bombing of Germany by the Allied powers would equally have killed those few Germans who disagreed with the politics of the murderous Nazi regime. History has revealed that there were indeed some Germans who were opposed to the Nazi regime and even participated in actively saving Jews from prosecution, such as Oscar Schindler for example. The

potentially fraught politics relating to the prosecution of Allied powers, created the conditions in which the matter did not even arise.

Initially, the German people generally accepted the version of justice meted out by the Nuremberg Tribunal. This was the case when the guilt could be assigned to the leaders of the Nazi regime. As Bachmann observes 'the Nuremberg trial had presented an easy psychological escape – all blame and guilt could be shifted to the culprits on the bench'.[18] However, the tide begun to turn on the perceptions of nature of Nuremberg trials, when the Allied powers focused on the crimes of the middle- and lower-ranking Nazi regime officials. A period of time after the trials had been concluded, Bachmann notes that 'Nuremberg became associated with victor's justice and an anti-German bias, and the culprits in the bench became national heroes, alleged victims of unfair justice and were regarded as innocent'.[19] In effect, the perceived legitimacy of the Nuremberg Tribunal shifted precipitously when the guilt was generalised to the wider community.

In effect, the International Military Tribunals had the power to conduct their affairs unimpeded, due to the fact that they were operating in countries, post-war Germany and Japan, which were effectively occupied by the Allied powers. In the case of the Tokyo Tribunal, the US government provided the funds and staffed the Court, including occupying the role of chief prosecutor, which would render the primary condition of impartiality circumspect. Following the Tokyo trial, Justice Radhabinod Pal issued a dissenting opinion in which he argued that international law, based on what he had observed, is in effect 'a project for stabilizing and securing existing power distributions within international society'.[20] Pal argued that the atrocities committed by the Allied Powers, including the use by the US of atomic bombs in Hiroshima and Nagasaki, were not scrutinised and did not therefore deliver on a basic requirement of impartial justice. Consequently, according to Pal, the Tokyo Tribunal was in effect an exercise in false legality designed purposefully to retaliate against the Japanese, and that constituted the instrumentalisation of the Tribunal to deliver a version of 'victor's justice'.

The International Criminal Tribunal for the Former Yugoslavia (ICTY)

UNSC charged ICTY and ICTR with additional tasks including the stabilisation and maintenance of peace and reconciliation in society. Following the implosion of Yugoslavia, at the outset the ICTY was committed to upholding the transparency of its interventions. The selection of evidence and the targeting of perpetrators were influenced by the dominant political perceptions at the time. The dominant narrative in the west, which was regurgitated by the uncritical media, pitted the Serb 'aggressors' against the Bosnian Muslim 'victims'. The anti-Muslim genocidal acts committed in Srebenica, in 1995, further entrenched this perception. Yet one of 'the largest ethnic cleansing campaign during the whole war – that of the Croatian Serb borderland and the crimes in Bosnia committed against Serbs'[21] were not held up as situations that required the interventions of the ICTY. In effect, the dominant political perceptions at the time influenced the perceived impartiality and legitimacy of the ICTY, as far as adjudicating in favour of all victims irrespective of whether they were Albanian, Bosnian Muslim, Croat or Serb.

The ICTY was effectively dependent on the active compliance of the state notably when it came to the apprehension of suspects. The ICTY chief prosecutor Carla Del Ponte did not comment on the ethnic nature of her indictment strategy, preferring instead to emphasise that she was only prosecuting 'perpetrators'. During Del Ponte's term, she focused on a perpetrator selection strategy, which had 'more to do with politics than with justice'.[22] Del Ponte focused on 'low and middle ranking perpetrators connected to the Srebenica massacre' and she would leverage their situation to illicit 'evidence against high ranking perpetrators including Slobodan Milosevic, Ratko Mladić and Radovan Karadzić'.[23] The consequence of this was the great number of Serbs who were arrested and prosecuted when compared to Croats and Bosnian Muslims. On this basis, subsequent criticisms have focused on the politics relating to the selection of perpetrators, which undoubtedly tainted the ICTY with the brush of illegitimacy for some analysts.

According to Bachmann, 'the ICTY became a court that judged mainly Bosnian Serbs'.[24] From a victim's perspective the ICTY emerges as a politically biased court in the sense that while it delivered some 'justice' for victims in Bosnia and Kosovo by punishing the Serb perpetrators, 'it totally failed more than 200,000 Serb expellees from Krajina, and almost all Serb victims from Bosnia and Kosovo'.[25] Bachmann notes that 'as politics threaten to undermine the ICTY's legitimacy and paralyse its organs, the refusal of prosecutors and judges to justify their decisions not only legally, but politically, fires back at the institution'.[26]

Bachmann controversially suggests that the assessment of the ICTY balance sheet, 'looks better, if one conceives it 'not as a legal instrument for doing justice, but as a political vehicle for triggering domestic change, bringing about reform and enhancing democratisation'.[27] In effect, the ICTY was not so much involved in doing 'justice' but rather in compelling national actors to accept societal transformation, which is decidedly a political project.

The International Criminal Tribunal for Rwanda (ICTR): The failure of justice and the non-prosecution of RPF officials

In 2009, Kenneth Roth, the executive director of Human Rights Watch (HRW) sent a letter to the prosecutor of the ICTR Hassan Jallow, and argued that 'it would be a failure of justice – not merely victor's justice – if you do not vigorously investigate and prosecute senior RPF officials because they are currently senior officials or military leaders in Rwanda'.[28] Roth was concerned with the perceived neutrality and the inevitable politicisation of the ICTR when he argued that the failure to prosecute all sides of the conflict would 'taint perceptions of the Tribunal's impartiality and undermine its legitimacy for years to come'.[29]

HRW's concern was that the actions of Jallow would convey the message that even though the ICTR was established by a supposedly 'neutral' actor in the Rwanda conflict, namely the UN Security Council,

it could still subsequently become politicised through the actions, or in this case, the inaction of the prosecutor. This will confirm that the politicisation of international criminal tribunals, from Nuremberg to Yugoslavia and Rwanda, is a persistent reality that cannot be wished away. The concern for Human Rights Watch was that the International Criminal Court, which was already operational in 2009, would become subject to similar political forces and perpetuate the failure of justice in the case that it adjudicated going forward.[30]

The politicisation of the International Criminal Court

From the outset, there were concerns about the prospects for the political interference in the ICC's interventions. The treaty-based origins of the ICC sought to specifically address the pitfalls of political interference and future allegations of one-side justice, which plagued the Nuremberg, Tokyo, Yugoslav and Rwanda tribunals.

In the lead up to the adoption of the Rome Statute, the broad range of stakeholders were concerned about upholding the independence and impartiality of the ICC. As Schabas observes 'it was argued that Security Council involvement be rejected because of the alleged impermissibility of any form of political control over the selection of situations'.[31]

The triggering mechanism as an anti-dote to the political interference in prosecutions

Initially, measures were taken to prevent the politicisation of the ICC notably through Article 15, which empowers the ICC chief prosecutor to initiate investigations, as well as Article 16 which calls for the deferral of investigations and prosecutions by the UN Security Council. Article 16 was contentious and remains a subject of vociferous debate in the negotiations leading up to the adoption of the Rome Statute. The United Kingdom broke rank with the other P5 members of the UN Security Council in endorsing the content of Article 16.[32]

Schabas has observed that during Moreno-Ocampo's term, 'the Prosecutor of the ICC has exercised broad prosecutorial discretion in the selection of situations and cases to be heard by the Court'.[33] However, Schabas notes that 'it is difficult to explain the exercise of this discretion by reference to the criteria purportedly used by the Prosecutor of "gravity" and "interests of justice" under Articles 17 and 53 of the ICC Statute, respectively'.[34] The arbitrary nature of the prosecutor's approach generated the perception of his selectivity and bias to some cases more than others. The nature of this bias is not overtly self-evident even though Schabas suggests that 'it appears more the norm that the Prosecutor of the ICC acts in accordance to *the wishes of the State parties'*.[35] In effect, the actions of the prosecutor are manipulated by state parties, which bring into question the veracity of the application of legal criteria in all cases. If state actors can instrumentalise and politicise the ICC, then the moral integrity of the Court as a mechanism for delivering impartial justice comes into question. This bias has generated the enduring perception that the phenomenon of selective justice was in operation during Moreno-Ocampo's reign as the prosecutor of the ICC.

US and ICC and the unipolar moment

As Lebow and Kelly note, 'after the Berlin Wall came down ... the United States wielded unprecedented power measured in terms of military capability'.[36] Wohlforth has argued that 'the United States is the global security manager ... and an indispensable nation in all matters of importance'[37] given the fact that 'the international system is built around American power'.[38] There have been criticisms of US unilateralism from even some of its allies in the West including the French government, which has pretentions to imperial power in some of its former colonies notably in Africa. Speaking with reference to the US, the former French foreign minister, Hubert Vedrine, demanded that 'we cannot accept a politically unipolar world, nor a culturally uniform world, nor the unilateralism of a single hyper-power'.[39] As

Lebow and Kelly observe, the dominance of the US in the post-Cold War world has been considered by a number of analysts as 'transitory and even dangerous'.[40] This is in part due to the fact that it will spur on competition and a drive for power, which is more likely to destabilise the geopolitics of the world rather than stabilise it. Furthermore, the hubris of being a global hegemon can lead to enabling US governments to proscribe conditions to others or to undermine the international legal order, which they contributed to establishing. Pfaff argues that 'the isolated position of the United States as the sole superpower is tending to go to the national head', this is because 'Congress has acquired a habit of legislating to the world, with the executive branch expected to see that those laws are carried out'.[41] One of these pieces of legislation directly undermines the ICC system and reveals the fact that in the eyes of the US government, the Rome Statute is a paper tiger, which does not apply to it as a superpower.

The US government's Hague Invasion Act and its subversion of the legitimacy of the ICC

As we saw earlier in this chapter, through a hegemonic failure to act dominant states may easily choose to *violate international law*, evade their international legal obligations or *undermine international legal efforts*. Despite the US government's initial signing of the Rome Statute during the Clinton administration, it duly 'unsigned' the Statute during the Bush administration.[42] The US government views the ICC system as a threat to its national security and military operations. Not satisfied with simply 'unsigning' the Rome Statute the US government went a step further and passed legislation that authorises an invasion of the Netherlands, and more specifically The Hague, to 'liberate' any American political, diplomatic or military personnel that may find themselves faced with prosecution on the ICC docket. Specifically, the American Service Members' Protection Act (ASPA), dubbed the US Hague Invasion Act, was enacted on 2 August 2002 as United States federal law which aims 'to protect United State military personnel and other

elected and appointed officials of the United States against criminal prosecution by an international criminal court to which the United States is not party'.[43] This legislation was introduced by US Senator Jesse Helms, a Republican from North Carolina, and US Representative Tom DeLay, a Republican from Texas, and was signed into law by US President George Bush. Specifically, the legislation authorises the US president to use 'all means necessary and appropriate to bring about the release of any US or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court'.[44] The fact that the International Criminal Court is based in the capital city of the Netherlands, The Hague, has resulted in the legislation being dubbed the US Hague Invasion Act. The phrase 'all means necessary' is a catch-all phrase, also utilised in the context of UN Security Council resolutions, to denote the potential for military action and deadly force. The prospective collateral damage of such an incursion, which will potentially involve the loss of life of Dutch citizens, pushes the limits of credulity about the extent that a hegemon is prepared to go to remain above the international rule of law. The US Hague Invasion Act prohibits any branch of the US government from assisting the ICC or transferring classified intelligence and law enforcement information to the Court. Furthermore, the Hague Invasion Act prohibits any ICC officials from conducting investigations in the territory of the US. The Act also prohibits any military assistance to state parties to the Rome Statute, unless they have signed agreements not agreeing to hand over US personnel to the ICC.

This piece of legislation is a stunning manifestation of the sheer audacity of a hegemonic power to proclaim and threaten to enforce its exemption from international criminal law through violent means. In his introduction of the legislation, US Senator Helms argued that 'Americans should not have to face the persecution of the International Criminal Court – which ought to be called the *International Kangaroo Court*'.[45] Helms further argued that 'instead of helping the United States go after real war criminals and terrorists, the International Criminal Court has the unbridled power to intimidate our military people and

other citizens with bogus *politicised prosecutions*'.[46] Helms is, of course, accurate that the ICC will inevitably pursue 'politicised prosecutions', but he is erroneous to suggest that the US should remain above the international rule of criminal law. Historically, hegemonic powers, like the US, have been implicated in instigating, funding and supporting the projection of violence around the world in collusion with local despots – which has led to mass atrocities and violations of the provisions of the Rome Statute.

In 2014, US Senator Dianne Feinstein released the Central Intelligence Agency (CIA) 'Torture Report' which documented how in the context of the post-9/11 world and the so-called 'war on terror' American intelligence and military operatives engaged in the wanton and lascivious torture of 'suspects'. The CIA Torture Report, which was based on a Feinstein-led US Senate Intelligence Committee convened over a period of five and a half years, revealed how detained suspects 'were water-boarded, wedged into coffin-shaped "confinement boxes" and force-fed through their rectums in lawless anonymous "black sites" around the world'.[47] Furthermore, 'one prisoner died of hypothermia after being forced to sit on a bare concrete floor without trousers', and in another incident a prisoner 'spent most of two days chained by his wrists to an overhead bar in a nappy'. The infantalisation of this particular prisoner is an apt metaphor for the way the US views and treats other countries not aligned with its interests. The paradox is that from 2001 onwards, the CIA's brutal so-called 'enhanced interrogation techniques' did not produce intelligence that disrupted terror plots or aid its hunt for Osama bin Laden' who was only captured and killed a decade later on 2 May 2011 in Pakistan, which endured a violation of its sovereignty, since it had not granted the US authority to make covert military incursions into its territory. The fact that 54 independent nation-states assisted the US in conducting extra-ordinary rendition through their territory suggests that the officials who permitted these actions violated the provisions of the Rome Statute.[48] More specifically, the officials of these 54 countries are in violation of Article 7(1)(e) which stipulates that the 'imprisonment or other severe deprivation

of physical liberty in violation of fundamental rules of international law' and Article 7(1)(i) which proscribes the 'enforced disappearance of persons' is a crime against humanity. However, this proposition, and the responsible officials of these 54 countries, will not be tested through by a UNSC referral to the ICC, given the reality of the US dominance in the Security Council and the prohibitions of the US Hague Invasion Act. This proposition will never be tested at the ICC because of the reality of the geo-politicisation of the ICC. This is a matter that should shock the conscience of international lawyers, jurists and legal scholars about the system they proudly hold up as the beacon of human civilisation.

This is perhaps the most significant violation of international criminal law that has been specifically acknowledged by the violating nation. The US government has indicated through its inaction that it will not pursue any prosecution of the alleged perpetrators of torture through its own national courts. Subsequently, the ICC should in theory be a court of last resort for the victims. Article 7(1)(f) of the Rome Statute stipulates that 'torture' falls under the category of a crime against humanity. Consequently, it is possible to envisage the prosecution of the US politicians, CIA and military operatives, at all levels of the government, who participated in the torture of other human beings. However, the fact that the US is a non-signatory (or relapsed signatory) of the Rome Statute, and the fact that the US will veto a UN Security Council referral of any US-related torture cases to the ICC, means that prospects for any form of justice being rendered to the victims will not be happening any time soon. This bold US self-declaration of the violation of international criminal law, in the form of the CIA Torture Report, reveals how the platitudes about upholding norms and principles of global justice are a sham when it comes to the specific case of the world's most powerful country.

The fact that the US government can self-exempt itself from the provisions of the Rome Statute, without the international system being able to do anything about it, renders hollow the injunctions of those who lament that other countries are not obeying and

upholding the provisions of the Rome Statute. Samantha Power, the US Ambassador to the UN Security Council, stated in remarks relating to sanctioning Syria for the atrocities committed following the 2011 violent conflict, that:

> many Americans recognize, that while we are right to seek to work through the Security Council, it is clear that Syria is one of those occasions – like Kosovo – when the Council is so paralyzed that countries have to act outside it if they are to prevent the flouting of international laws and norms.[49]

Power's empty rhetoric about the importance of upholding international laws and norms, despite her government's well-documented complicity in perpetuating and supporting countries that perpetuate violations of human rights, is symptomatic of the structural crisis of international criminal justice. The global hegemon that has, through the US Hague Invasion Act placed itself above the jurisdiction of the ICC, and the world's leading violator of international criminal law has the temerity to regularly issue edicts to other countries about upholding the principles and norms of global justice. If anyone doubts the reality of the politicisation of international criminal justice, the US Hague Invasion Act provides ample confirmation beyond all reasonable doubt. The US Hague Invasion Act reveals the shaky edifice upon which the so-called norms of international criminal law are premised. It renders hollow the arguments of the lawyers, jurists and analysts who continue to proselytise that international law is devoid of politics. If anything, politics is at the core of international criminal law.

The bilateral immunity agreements

Not satisfied with the capability to invade The Hague to remove its personnel from the ICC, the US government has gone a step further and begun a global campaign to prevent countries from transferring

American personnel to the Court on their own volition. The US has put pressure on over 100 countries to sign what are referred to as Bilateral Immunity Agreements (BIA), which were concocted through an interpretation of the Rome Statute. Specifically, Article 98 states that:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[50]

The Bush administration launched a global campaign to compel countries to sign BIAs to further insulate American personnel who might potentially be arrested for violations of the provisions of the Rome Statute. The US government has compelled small- and medium-power states to sign Bilateral Immunity Agreements, through which US citizens indicted by the ICC would be handed over to the US judiciary rather than to the ICC chief prosecutor. In effect, BIAs are a political loophole to avoid the jurisdiction of the Rome Statute, which seriously undermines the Court's mandate to function as an 'international' judicial institution, particularly given the large number of countries who have signed these agreements. The demands of US political expediency in effect trump the interests of international justice.

International criminal law was further subverted and subjugated to the power and will of the world's hegemon and created a two-tier system of selective justice. This reveals an unabashed politicisation of the ICC given the overt statement that the US and its personnel were above international criminal law. This asymmetry of global power and the ability to, on the one hand, avoid any prosecution of its personnel from powerful states, while at the same time, deploying the same system

of law through a UNSC referral to prosecute individuals from less powerful countries, makes a mockery of the notion of international criminal justice. If anything, it represents a failure of international criminal justice.

In relation to other aspects of international relations, as Lebow and Kelly observe, US administrations 'have ignored disagreeable decisions of the World Trade Organization and employed unilateral sanctions in trade disputes in violation of the liberal creed that Washington urges on the rest of the world'.[51] Through its actions and given its self-proscribed role as the world's leading nation, US governments have set the tone in terms of how other powerful and less powerful countries engage with the ICC. There is a strong sentiment that if the most powerful country is above the law, when it relates to the ICC and international criminal justice in broad terms, then the global legal regime has little or no legitimacy. Legitimacy in this sense is gauged by the extent to which the international criminal justice system has not achieved voluntary compliance among other states.

The inactivity of prosecution and its contribution to selective justice

The deliberate slow pace of bringing to fruition a number of preliminary investigations can be attributed to the difficulty of gathering sufficient evidence and ensuring the availability of reliable witnesses to ensure a guilty verdict. However, the snail's pace evident in a number of cases raises serious questions about the manner in which countries can exert political pressure on the ICC system from behind the scenes. A judicial system, like the ICC, that is unwilling or unable to proceed from preliminary investigations to prosecution, is in effect playing a long-term game of deferring justice for innocent victims.

The geo-political repercussions of the ICC investigation in Palestine

The war crimes allegedly committed by Israel in Gaza have been the subject of intense debate in the sphere of international justice. On

2 January 2015, the Government of Palestine acceded to the Rome Statute under Article 12(3). On 16 January 2015, Fatou Bensouda, the ICC chief prosecutor, announced that she would open a preliminary investigation into the alleged war crimes committed 'in the occupied Palestinian territory, including East Jerusalem'.[52] Since as far back as 2009 when Palestine lodged a declaration to accede to the Rome Statute, and has since made several attempts to draw the ICC into its conflict with Israel, but was constantly blocked by the assertion that it was not a sovereign entity recognised by the UN, and consequently it could not accede to the Rome Statute. However, on 29 November 2012, the UN General Assembly adopted Resolution 67/19, which granted Palestine a 'non-member observer State' status in the UN. Bensouda was subsequently able to utilise this recognition to conclude that 'on the basis of its previous extensive analysis of and consultations on the issues, that, while the change in status did not retroactively validate the previously invalid 2009 declaration lodged without the necessary standing, Palestine would be able to accept the jurisdiction of the Court from 29 November 2012 onward'.[53] Consequently, this paved the way for Palestine to accede to the Rome Statute. The ramifications of this announcement have revealed just how prevalent political manoeuvring is a central feature of international criminal law. Mark Kersten observed that Palestine's decision to join the ICC 'instigated a furious backlash from Israeli government officials ... the Netanyahu government is afraid of the ICC ... because they know that they committed atrocity crimes in Gaza' and consequently there might be a prima facie case against Israel.[54] In January 2015, Israel withheld US dollars '127 million in tax revenue it collects for the Palestinian Authority in response to its move ... to join the ICC, further escalating tensions with a step that could have serious repercussions for both sides'.[55] The Chief Palestinian negotiator, Saeb Erekat, argued that 'it's our tax money. It's our people's money'.[56] Avigdor Lieberman, the Israeli foreign minister, commenting on the ICC's move to start preliminary investigations in Palestine stated that:

> We will demand of our friends in Canada, in Australia and in Germany simply to stop funding it. The body represents no one. It is a political body. There are quite a few countries ... that also think there is no justification for this body's existence.[57]

On 29 January 2015, 'more than seventy US Senators urged President Obama to consider cutting off aid to Palestine as punishment for its ICC gambit'.[58] The US government has argued that the Israeli-Palestinian conflict can only effectively be resolved through political negotiations, but paradoxically this is the argument that African countries have been making about the importance of not utilising the ICC as a tool to address violent conflict situations. The Canadian government joined the bandwagon and engaged in criticising the ICC for its decision, indicating that there would be 'consequences' for the ICC.[59] Paradoxically, when Kenya requested a deferral to the UNSC, the argument parroted by the powerful members of the Council was that justice for victims had to be pursued at all costs. Given the ICC system's replication of the act of deferral, the hypocrisy of the dominant actors within the UNSC is all too evident. This political targeting of the ICC could lead to a precipitous decline in its funding. More importantly, the politicisation of international criminal justice in the Palestinian case will have profound implications for consolidating peace in the troubled region, which is an issue that the Preamble of the ICC states that it is committed to.

The deferral or prolonging of preliminary investigations for any reasons other than a legal one reveals that the ICC is in effect exercising its own version of 'political' discretion. While this may be a prudent strategy in some cases, the failure of the ICC system, notably the prosecutor, to explain these political actions in legal terms further exposes the virulent nature of the politicisation of international criminal tribunals. Regrettably, the ICC system, including the prosecutor and presidency, have gone out of their way to reiterate that the Court is solely and exclusively a judicial institution and that it does not involve

itself in politics. Clearly, this is a self-defeating stance when it is all too evident that the contrary is closer to reality in terms of the situations that the ICC has been involved in.

The contentious crime of aggression

Article 5(2) of the Rome Statute stipulates that the ICC 'shall exercise jurisdiction over the crime of aggression'. Yet this is one of the most contentious crimes in the Rome Statute, because it could apply to a number of ongoing violations of international criminal law. The Kampala Review Conference of the Rome Statute, convened 31 May to 11 June 2010, further elaborated on the definition of the crime of aggression. The postponement of the further articulation of the crime of aggression is the political equivalent of kicking the can down the road, as the issue will not dissipate. The more relevant point is that this crime will be broadly applied to the ongoing machinations of powerful countries including: the US in Iraq, Syria and Yemen; UK in Iraq; Russia in Ukraine, and Chechnya; and China in Tibet.

Successive US administrations, and their allies, have escalated the use of drones to achieve their military objectives in Yemen, Afghanistan, Pakistan, Iraq, Syria and Somalia, more often than not with the wilful killing of innocent civilians, now referred to in Orwellian speak as 'collateral damage'. The wilful killing of innocent civilians is a war crime under Article 8(2) of the Rome Statute, yet the US government through its veto will prevent any UN Security Council session from referring drone-inflicted atrocities to the ICC. Justice for the victims in Yemen, Afghanistan, Pakistan, Iraq, Syria and Somalia cannot be pursued given the asymmetrical power of the US government and its ability to prevent the ICC from intervening. Through its imperial power, the US avoids the processes of accountability that it is more than willing to impose on other less powerful countries. Consequently, the legitimacy of international criminal justice regime as it exists today is severely undermined, and it can only be redeemed through the transformation of the global system that sustains it.

The double standard and the UK's involvement in the Iraq invasion

Article 8(1) of the Rome Statute stipulates that 'the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.'[60] The Rome Statute goes on to elaborate on the broad range of war crimes including: wilful killing; torture or inhuman treatment; wilfully causing great suffering, or serious injury to body or health; unlawful deportation or transfer or unlawful confinement and taking hostages'.[61] In February 2006, the ICC prosecutor, Moreno-Ocampo, defended his decision not to proceed with the prosecution of United Kingdom military personnel in Iraq following the 2003 US-led invasion of the country. Moreno-Ocampo argued that the alleged violations committed by UK military personnel did not 'meet the required threshold of the Statute' and 'according to available information, it did not appear that any of the criteria of Article 8(1) were satisfied'.[62] The explanation provided by Moreno-Ocampo defies credulity given the fact that British troops were operating in a war situation, in which the UK was part of an invading coalition of forces led by the US. An invasion is prima facie bound to lead to 'wilful killing' and at the very least would cause 'great suffering', unless those analysing the aggression are wearing rose tinted glasses. The likelihood that UK military operations would not fall under the criteria stipulated in Articles 8(1) and 8(2), suggests that Moreno-Ocampo was putting forward an excuse, rather than a reason, for not pursuing the investigation of the UK's actions in Iraq. Schabas states as much when he 'it is common knowledge that the human suffering in Iraq resulting from war crimes related to the invasion by the United Kingdom exceeds fifteen or twenty victims!'[63] When assessed in the context of the fact that the UK is one of the P5 members of the UN Security Council, the prosecutor's actions are vulnerable to the charge of double standards, when compared and contrasted with other war situations. This inconsistency is not unique to the Iraq situation but replicates itself elsewhere around the world. Schabas concludes that 'when questioned about such inconsistency, most observers merely shrug their shoulders. The double standard is a

fact of life about which we may grumble but do little else'.[64]

The double standards being applied by the ICC system become more stark in the argument that 'an objective application of the gravity criteria proposed in materials from the Office of the Prosecutor leads inexorably to five contiguous states in Central Africa',[65] namely the DRC, Uganda, Central African Republic, Kenya and Sudan. Schabas suggests that Moreno-Ocampo's application of the gravity criteria, in what is clearly an arbitrary manner, resulting in prosecution process exclusively in Africa cannot be 'simple coincidence' and that there is 'some sort of policy determination that is involved'.[66] Schabas goes on to caution that,

> nor are these observations meant to attack the good faith of those involved in these determinations who have *undoubtedly convinced themselves* that they have found a *legalistic formula* enabling them *to do the impossible*, namely *to make what is inexorably a political decision* but without making it look political.[67]

Schabas concedes that 'this is not to suggest that the Prosecutor receives instructions from some clandestine committee of political advisors and foreign intelligence agencies, only that he is compelled to select situations where objective, judicial criteria alone do not suffice'.[68] Schabas proposes that the ICC prosecutor's selection of cases 'seems to be as much related to the fact that *the Court's priorities correspond to the strategic interests of the United States*, and most certainly do not threaten them'.[69] Schabas notes that 'in reality, what we have at the ICC is a political determination but with less transparency, not more'.[70] Schabas suggests that 'the discretion of the Prosecutor in selecting situations under Article 15, and in agreeing to proceed with selections that have already been referred by the Security Council or by State Parties, pursuant to Article 13(b) and 14 respectively, has an *inherently political dimension*'.[71] He further notes that 'even when the situation has been selected, political choices are also made in terms of which parties to a

conflict are to be targeted for prosecution'.[72] Schabas notes that 'the Prosecutor does, in fact, make political choices'.[73] Schabas argues that in the case of Moreno-Ocampo, 'the Prosecutor is not selected for his political skills or judgment, nor does his personal experience and training suggest this is his strong suit'.[74] The fact that the prosecutor is thrown into a political cauldron without the diplomatic nous or strategic antennae to navigate the minefield, suggests that he, or she as in the case of Bensouda, is vulnerable to behind-the-scenes coercion and manipulation by powerful actors. This raises the issue of the transparency of the ICC prosecutor, and system at large, as well as the accountability of processes that are billed as judicial and are inherently political in nature. Schabas proposes 'that it is the lack of political direction to the Prosecutor that has contributed significantly to making the work of the Court so complicated'.[75]

Upholding the veneer of international legality

A perplexing question is why powerful countries bother to uphold the veneer of legality? Firstly, they cannot assert their will to the exclusion of other imperial actors so they have to coexist in what they treat as a pseudo-legal framework that is subject to extensive manipulation by the powerful. Secondly, they seek to convince middle-power and weaker countries that they exist in a framework of international legality, whereas in fact the opposite is increasingly true – powerful countries act with impunity and in violation of the provisions that are enshrined in the UN Charter. Evidence of this has been discussed extensively elsewhere, but to name a few cases this includes the 2003 invasion of Iraq, the Chinese occupation of Tibet, the Russian invasion of Ukraine and annexation of Crimea, albeit through the provision of a veneer of legality in a so-called referendum. Saudi Arabia's invasion of Yemen has been downgraded to a UNSC conversation, rather than a robust Council resolution demanding that the international system act against what is in effect the invasion of another country in direct violation of the legal provisions of the UN Charter. Yet, the UNSC could not issue

a resolution or even a simple presidential statement.

The hypocrisy of international legality trivialises the legal consequences of states participating in the Rome Statute treaty and powerful countries make a mockery of the 'international' element of the ICC regime. Other powerful countries such as China and Russia, which harbour aspirations towards imperial dominance, are biding their time until such a time that the declining dominance of the US will provide an opening for them to assert their power without constraints.

The persistence of politics in international criminal justice

The reality is that politics is a persistent feature of international criminal justice because it is subordinated to the interests of state actors, both internationally and domestically. As Bachmann argues, 'the problem is exactly this – the ICTY (just like the ICTR and the ICC today) embarked on a political mission from the very beginning, denying at the same time any involvement in politics'.[76] Politics will always threaten the legitimacy of international criminal tribunals. Consequently, rather than denying that politics is a feature of international criminal justice, lawyers, jurists and legal scholars need to acknowledge that their work is politicised, even beyond their ability to insulate it from external machinations. Bachmann proposes that 'international criminal tribunals in particular are political and must be political, and their political agenda should be as transparent as their legal one'.[77]

Contestation for global power and the perils for international law

The persistence of the contestation for global power will subject international law to its continuing subjugation to the might of the dominant players. As Schabas observes, 'the ICC is not entirely free of *external political control* in the selection of situations'.[78] The selectivity and lack of independence of the ICC will continue to undermine the principle of legality and the universal rule of international criminal law.

The former US Assistant Secretary of State for Africa, Jendayi

Fraser, writing in the *Wall Street Journal*, argued that the ICC represents the West's 'new parternalism' towards Africa.[79] Fraser points out the grievances expressed across the continent of the ICC's selective behaviour and suggests that 'African leaders are the targets because ambitious jurists consider them to be 'low-hanging fruit'.[80] Any efforts to ensure a morally legitimate and legally impartial international criminal justice system requires that constraints be imposed upon the arbitrary and random nature of global power. The establishment of a global democratic order, as will be discussed in chapter 8, can achieve this.

The redemption of the international criminal justice system

The ICC brought us full circle back to the limitations that beset the Nuremberg Tribunal. Schabas observed that the ICC 'would be no different in substance from its predecessors, to the extent that the selection of situations would lie with a political body'.[81] In a repetition of the structural inequity that defined the Nuremberg Tribunal, one component of the selection of ICC situations would not only reside with the political body, namely the United Nations, but that it would be subject to the coercive manipulation and control of the P5 members of the Security Council. As Schabas laments 'it would be Nuremberg all over again, except a *permanent* and not a temporary version' because, 'the 'great powers' would decide the targets of prosecutions, secure that their own special interests would be protected by the veto'.[82]

The redemption of the international criminal justice system will require the radical transformation of the global system. This may include dismantling of the United Nations Security Council. The fact that the UNSC is failing to maintain international peace and security, as it is mandated to do by the UN Charter, means that it has outlived its useful functions. Most state actors are unable to conceive how to go about the process of dismantling the UN Security Council without leaving a vacuum in the maintenance of global peace.

Conclusion

This chapter has explored the phenomenon of the politicisation of international criminal tribunals. The politicisation of international criminal tribunals represents a failure of justice and the triumph of politics. International criminal tribunals are subject to the forces of geo-politics, which bring them into existence. Consequently, ICTs are vulnerable and, almost inevitably, become corrupted by the political environment in which they are operating. Implanting an international criminal tribunal into a situation that is politically contested, and hoping that it will deliver impartial justice is wishful thinking. Based on the evidence demonstrated by processes of the Nuremberg and Tokyo Tribunals as well as the ICTY and ICTR, as well as other special tribunals, it is necessary to avoid the myth that international criminal justice is devoid of any political considerations.

Bachmann proposes that 'international criminal tribunals in particular are political and must be political, and their political agenda should be as transparent as their legal one'.[83] International criminal tribunals are not so much involved in doing 'justice' but rather in compelling national actors to accept societal transformation, which is decidedly a political project. The question is how can we conceive the instrumentalisation of international criminal tribunals, in reverse as to advance the cause of political transformation.

While international criminal tribunals have a reform-inducing function, they can also be instrumentalised and co-opted for political agendas as we will see in the discussions in the subsequent chapters. The legitimacy of international criminal tribunals should ideally be derived from the fairness, impartiality and inclusiveness of their interventions. The objective and issue at hand is how to move towards the universal rule of international criminal law.

PART 2:
Case Studies

Chapter 4

Might Makes Right: Sudan, UNSC and the ICC

Introduction

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 International Criminal Court, 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 International Criminal Court. 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 chapter will argue that both President Omar Al Bashir, of Sudan, and subsequently President Uhuru Kenyatta, of Kenya, managed to politicise the ICC interventions in their country.

Furthermore, Al Bashir and Kenyatta were able to pan-Africanise 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 chapter will suggest that even though both organisations share a mandate to address impunity, the stand-off between the ICC and the AU suggests that they are in fact engaged in practising a variation of 'judicial politics' and 'political justice'. The chapter concludes that this process of politicisation of the Court's interventions in Sudan and Kenya ultimately subsumed the ICC into a political stand-off against the AU, with the United Nations Security Council as an unresponsive but implicated secondary actor. The chapter will also conclude that since neither the ICC nor the AU have managed to find a way out of this impasse, some innovative strategies need to be adopted to ensure that both organisations fulfil their mandate to address impunity on the African continent. The chapter will then offer insights into a prospective way forward for confronting impunity and holding leaders accountable, while ensuring the promotion of peace and reconciliation on the African continent. The work draws from a range of disciplines including international law, international relations and political studies, and seeks to provide a unique contribution to the discourse relating to the ICC and its relationship with Africa.

Africa and the establishment of the International Criminal Court

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 operationalise an international criminal justice regime that would hold individuals who commit gross atrocities and violations against human rights accountable. Specifically, the Court has jurisdiction over war crimes and 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 that would confront impunity and 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 21 abstained and seven voted against. As discussed above, the US administration first signed the Rome Statute, then unsigned it, thus absolving it being subject to the jurisdiction of the Court.[1] 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 60 ratifications to come into force, which were obtained in April 2002, paving the way for the launch of the International Criminal Court 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 power interests.

Interventions of the International Criminal Court 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, Luis 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 has become a willing accomplice to the machinations of domestic politicians. This has discredited the ICC in the eyes of the political opponents who were summoned by the Court and their supporters. This means that the ICC by association with the ruling regime effectively becomes instrumentalised 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 moral integrity of the ICC system

The moral integrity of the ICC system, including the UNSC referral mechanism, therefore, has 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 the universal demands of justice, but according to the political expediency of choosing cases that will not cause the Court and its main financial supporters any concerns.

Context of the Darfur conflict in Sudan

The situation in Darfur defies simplistic analysis. The root causes of the conflict extends back at least to the 17th century when Arab incursions led to the establishment of a sultanate amongst the indigenous Fur, Masalit and Zaghawa people of the region. A history of coexistence among the pastoralists and the agrarian societies was put under pressure by drought, during the period between the 1980s and late 1990s. The social and economic marginalisation of Darfurians by the ruling regime in Khartoum laid the foundations for the rebellion, which was launched in February 2003. The government retaliated with a combination of its own military offensive as well as the use of a proxy fighting force, known today as the infamous Janjawid. Dafur has become an unwilling and unlikely victim of Sudan's history and culture of violence, notably the nearly 40-year-old North/South conflict, with a break in between 1972 Addis Ababa peace agreement and the launch of the South Sudanese People's Army/Movement (SPLM/A) armed resistance in July 1983.

To date, the war has displaced at least two million people into more than 100 camps in Darfur, and in neighbouring Chad. Despite a peace deal signed with one of the three main rebel movements in May 2003, further fighting has made 50 000 new individuals homeless. Sudanese President Omar Al-Bashir, who took power in a military coup in 1989, said he 'recognised' that refugees had minimal trust in his government.

The conflict in Darfur

In February 2003 the Darfur region on the border of eastern Chad and western Sudan was afflicted by violent conflict between the Sudanese government and a pro-government militia referred to as the Janjawid, and two rebel movements, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).[2] The conflict resulted in widespread atrocities committed against civilians and uprooted people from their homes generating displaced populations. The neighbouring country Chad was at one point hosting close

to 110,000 refugees within its borders. On 8 April 2004 a ceasefire brokered with the assistance of the African Union was due to come into effect for a period of 45 days in order to enable humanitarian aid to reach the affected populations.[3] Throughout, the Chadian mediation team that initiated talks on a political solution to the conflict in N'djamena, has been working closely with the African Union. The AU was subsequently charged with establishing and financing a ceasefire verification commission. The ability of the AU to achieve and fulfil its mission in this situation would always depend on its capacity to mobilise the political will of its member states.

The political aim of the AU in Darfur is 'to assist the parties in conflict to reach a political settlement and consequently to contribute to a stable peaceful and united Sudan.' The political engagement by the AU with the Sudanese parties in conflict was conducted under the rubric of the Inter-Sudanese Talks, mediated by a team from the AU Commission. Since the talks commenced in 2004, considerable progress has been made and the parties have signed the following four documents:

- the Humanitarian Ceasefire Agreement in N'djamena, Chad, on 8 April 2004;
- the Protocol on the Security Situation in Darfur on 9 November 2004;
- the Protocol on the Improvement of the Humanitarian Situation in Darfur of November 2004; and,
- the Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur of November 2004.

In addition to this, the AU has deployed on an incremental basis a peace support operation of African troops, which started with 80 military observers in April 2004. Despite the limited resources and manpower being contributed to the African Union Mission in Sudan (AMIS) initiative, the AU remains fully engaged with this peacemaking operation. Ambassador Baba Gana Kingibe, the former head of

AMIS had the mandate to monitor events to deter, but not prevent, violent raids on innocent civilians and to ensure the delivery of humanitarian assistance.

The resistance movements argued that government had to remove its troops from Darfur as well as disarm the Janjawid militia who was allegedly financed and supported by the government. The Sudanese government though argued that the militias were not under their control and anyone carrying arms in Darfur was an 'outlaw', so it would not be possible for them to fulfil such a demand. In another instance, the Sudanese foreign minister Mustafa Osman Isma'il pointed out that 'those who want us to interrupt the actions of the [Janjawid] militias now must understand that this is not possible ... they forget that there is a rebellion going on and [the SLA and JEM rebels] carry arms and threaten the tribes.' This was a roundabout way of justifying the existence of the Janjawid and of describing the situation in Darfur as a civil war between two groups, both concerned with their security. In a separate assessment, however, the UN Human Rights Commission's Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir concluded that 'there was overwhelming evidence that extrajudicial killings of civilians in Darfur have been carried out, with some exceptions, in a coordinated manner by the armed forces of the Government and Government-backed militia' the Janjawid, who have been blamed for being the main perpetrators of the atrocities in the region.[4]

The foreign minister of Chad, Yamssoum Nagoum, who had been involved in previous efforts to mediate between the two parties, argued that 'there can be no military solution' to the situation in Darfur and that there was a need for concession and compromise. At this stage the talks were inconclusive. Throughout July 2004, there were independent reports from humanitarian assistance workers that armed militias were continuing to attack civilians in Darfur. This included the burning and looting of villages. In a communiqué released by the Peace and Security Council, the AU called 'on all partners to continue to support peace efforts, including the financial and logistical assistance to sustain the

AU-led mission deployed in Darfur and to enhance its effectiveness'.[5] In protest to the inaction of the government of Sudan the leaders of the SLA and JEM did not attend the meeting on Darfur that was convened in Addis Ababa on 15 July. This led the AU to issue the statement that it 'stresses the need for a speedy resumption of dialogue and calls on the parties to be represented at the highest level at the next round of political talks, with a clear mandate, and to negotiate in good faith with the view to achieving a lasting solution to the Darfur conflict'.[6] An observer group of UN staff including the UN Secretary-General Kofi Annan conducted a three-day visit to Sudan and Chad. Annan took the opportunity to canvas the views of internally displaced persons and refugees who had fled from the ongoing conflict. Also accompanying the entourage were Sudanese officials and representatives of various countries. They visited villages in Darfur where displaced villagers were returning. The UN mission's role was to monitor whether the Sudanese government was meeting the commitments that it had made in previous agreements to disarm the Janjawid and restore security to the region. This was following up on a signed statement issued by the UN and the Sudanese government on 3 July 2004 on how to address the humanitarian catastrophe that was unfolding in Darfur. The UN Security Council subsequently held consultation meetings on drafting a resolution aimed at improving the situation in Darfur.

The peace talks were subsequently moved to Abuja, Nigeria, on 23 August 2004, where President Obasanjo, in his capacity as chairman of the AU, hosted renewed peace talks between the Sudanese government and the two armed resistance movements in Darfur. By 30 August 2004, the AU Armed Protection Force were indicating that attacks by Sudanese government troops on Darfur civilians were ongoing and urged Khartoum to put a stop to the violence. The UN had set the deadline of 30 August 2004 for the Khartoum regime to prove that it had made an effort to disarm the Janjawid militia and protect civilians or face possible sanctions. However, the deadline came and passed with no concrete action from the UN. The arithmetic for obtaining the necessary votes in the UN Security Council to sanction

the Sudanese government was not sufficient. In addition, given the oil and petroleum interests of such countries like China in Sudan, the UN Security Council would prove to be an ineffectual instrument for trying to bring about compliance and state responsibility for this humanitarian catastrophe unfolding in Africa. The issue of the violation of the ceasefire continues to plague efforts to resolve the matter. The usual challenges of establishing a ceasefire verification commission meant that the deployment of ceasefire monitors on the ground was delayed at a significant human cost. The AU remained committed to finding a way beyond the impasse and maintained communication channels between the Government of Sudan and the armed resistance movements open. The political and bureaucratic hurdles to achieving the necessary goals do not really place the AU in a good light. But it did show that the AU despite its meagre resources is trying to contribute actively to the peacebuilding challenges that the continent is faced with.

Sudan and the United Nations

The government of Sudan has been quite adept at manoeuvring against the establishment of a UN peacekeeping force. Earlier on in 2004 it had indicated that the UN could be provided with humanitarian access and that potentially a peacekeeping force would be accepted. Subsequently, the Khartoum regime has rejected the presence of a UN force in Darfur. President Omar Al-Bashir stated categorically that the presence of a UN force would be tantamount to the ***re-colonisation of Sudan***. Currently, government troops are being amassed in Darfur almost in defiance of any forced intervention.

The dimensions of the Darfur conflict

Therefore, we can say there are at least three overlapping and interlocking dimensions to the situation. Firstly, there is the national dimension, in which the Khartoum regime sees the Darfur situation as a purely internal affair. It argues that the long-held principles of non-intervention in the affairs of states and of territorial integrity should

not be discarded. Secondly, the regional or continental perspective under the leadership of the AU seeks to find a political solution while undertaking peace operations to alleviate the suffering of the Darfurians. The AU's monitoring missions leave much to be desired and a more robust peacekeeping force is required to effectively dissuade the silent genocide that is taking place there. However, the AU's peacemaking initiative in Abuja, Nigeria, under the tutelage of former secretary-general of the Organisation of African Unity (OAU), Dr Salim Ahmed Salim, led to the signing of the Darfur Peace Agreement (DPA) in May 2006. The fact that only the Minni Minnawi faction of the SLA signed the agreement means that the DPA was by no means a comprehensive peace agreement in the mould of the South Sudan agreement. Which then also indicates that the conflict is not over, there is no durable ceasefire. The armed resistance groups have even begun to fight each other, and the situation has deteriorated into a military, political and diplomatic conundrum.

The international dimension has so far been spear headed by the UN, since a former envoy to the North/South dispute became embroiled in the conflict in Darfur. The UN resolution authorising the establishment of a peacekeeping force has not yet been implemented. Key players among the international community have their own interests in seeing a resolution on the Darfur issue. NATO is assisting with the provision of logistical – particularly airlifting – support in Darfur. In October 2006, senior US and British envoys travelled to the capital, Khartoum, to urge the ruling coalition government to let the peacekeepers in.

In the US, Darfur has become a *cause celebre*, with a number of celebrities throwing their hats into the ring, and picking up the fight for the people of Darfur. We are effectively witnessing the 'celebrification' of an international conflict. This background information provides a prism through which one can understand the multi-faceted dimensions of the Darfur crisis and the internationalisation of the crisis, which set the scene for the United Nations Security Council decision which emerged at a later stage.

In addition, the so-called 'Al-Qaeda' has allegedly issued a statement on Darfur stating that if UN troops enter Darfur, which they see as a Muslim territory, they represent the forces of global imperialism and should be repelled with all means. It is useful to recall that Osama Bin Laden spent some time in Sudan prior to relocating in Afghanistan. So effectively, in the eyes of these actors Darfur has become to be projected through the prism of the post-911 world, and the so-called 'war against terror'. Whether we agree or disagree with this prism and with this campaign, it is a fact that it will begin to affect efforts to achieve peace in Darfur.

In Darfur, the AU has found itself with a test case that it was ill equipped institutionally and under-resourced to successfully resolve. The politicisation of the situation in Darfur means that there are now no easy answers. Certainly, it is right and proper for the AU to be in Darfur, or for some form of international peace operation to be staged there. Regrettably, while the AU's peacemaking efforts are to be applauded, its peace monitoring operation is floundering and enabling government forces, the Janjawid, and the armed resistance groups to continue fighting amongst themselves and continue the carnage and destruction of the lives and property of Darfurians.

Sudan and the UN Security Council

On 31 August 2006, the UN passed a Security Council resolution 1706 (2006), which called for the deployment of a UN peace operation in Sudan from 1 October 2006. It also stated that the UN Mission in Sudan (UNMIS) would take over responsibility for implementing the Darfur Peace Agreement from AMIS, upon the expiry of its mandate at the very latest by 31 December 2006. Sudan was willing to accept a large increase in the number of foreign peacekeepers in Darfur with a stronger mandate to protect civilians, as long as they remained under African Union control. Speaking to the *Guardian* newspapers President Al-Bashir stated that the force could have logistical help from European and Arab countries, but warned that any UN attempt to impose foreign

troops could lead to 'such troops becoming a target of attacks and part of the conflict, not the solution'. Al-Bashir was adamant that any non-African help for the AU be confined to equipment and logistics. When Al-Bashir was interrogated on whether the AU could double its troops to 20 000, the president said: 'We have no objection to the AU increasing its troops, strengthening its mandate, or receiving logistical support from the EU, the UN, or the Arab League for that matter, but this must of course be done in consultation with the government of national unity.'[7] The concern was that any form of intervention that included a strong Western contingent would be considered as a form of recolonisation of Sudan. This insight is important for the subsequent tension that arose between Sudan, the UN Security Council and the ICC.

In addition to the fighting, there has been a pattern of organised attacks on civilians and villages, including killings, rapes and abductions. A particular conflict strategy seemed to be predicated on the forced displacement, through the destruction of homes and the livelihood, of farming populations in the region. Estimates indicate that 60 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 to refer the Darfur situation to the International Criminal Court.

The ICC's intervention in Sudan

Three cases have been initiated with regard to Darfur in the International Criminal Court: *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'); The Prosecutor v. Omar Al Bashir;* and *The Prosecutor v. Bahar Idriss Abu Garda.* The ICC Pre-Trial Chamber has issued three arrest warrants for Harun, Kushayb and Al Bashir for crimes against humanity and war crimes. Meeting shortly after the ICC's decision, the African Union

Peace and Security Council (PSC) issued a communiqué, PSC/PR/COMM.(CLXXV), on 5 March 2009 which lamented that this decision came at a critical juncture in the ongoing process to promote lasting peace in Sudan.[8] Additionally, through its communiqué of 5 March 2010, the PSC requested the UN Security Council to exercise its powers under Article 16 of the Rome Statute to defer indictment and arrest of Al-Bashir. The PSC subsequently expressed its regret over the UN Security Council's failure to exercise its powers of deferral and effectively postpone any ICC action. Consequently, on 3 July 2009 at the Thirteenth Annual Summit of the Assembly of Heads of State and Government held in Sirte, Libya, the AU decided not to cooperate with the ICC in facilitating the arrest of Al-Bashir. However, this was not a unanimous position and some countries expressed their reservations, with Botswana publicly stating its disagreement with this decision and South Africa subsequently indicating that its legal obligations as a State Party to the Rome Statute did not permit it to subscribe to the AU's decision.

The African Union is in effect advancing an argument for sequencing with respect to Al-Bashir's case. There are undoubtedly political reasons for such a request 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 the president of Sudan in April 2010, could not only be construed as a face-saving exercise but one that seeks to prevent the ICC from having such a remit in the administration of international justice on the continent. However, the AU also consistently made the point that Sudan found itself at a critical juncture of its peacemaking process in Darfur and is also engaged with a peacebuilding process in the south, and in both instances Al-Bashir was the key interlocutor with the armed militia and political parties in the south. This argument from the perspective of the African Union clearly cannot be wished away or ignored. Sudan has not yet even begun to initiate a reconciliation process, even though

the AU High Level Panel on Darfur (AUPD), also known as the Mbeki Panel, has recommended the establishment of a restorative justice process, including the creation of a Truth, Justice and Reconciliation Commission and the use of hybrid courts to prosecute individuals who have committed atrocities in its report entitled, 'Darfur: The quest for peace, justice and reconciliation'.

The situation in Darfur does not offer any easy answers to the question of sequencing the intervention of retributive and restorative justice, but rather problematises the issue further. Whereas the prosecutorial fundamentalists would prefer to see Al-Bashir in the ICC docks, there is less clarity – and perhaps concern – on their part as to how this would impact upon peacemaking in Darfur, currently being conducted by mediators in Doha, Qatar. The fact that Al-Bashir has now been re-elected as the president of Sudan also raises a conundrum for those engaged in peacebuilding and efforts to promote national reconciliation. The prosecutor of the ICC has so far received non-compliance from the government of Sudan with regards to his arrest warrant, and even other African countries have declined to arrest Al-Bashir and others cited in the warrants. 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 the international community in seeing through its request.[9]

The politics of the ICC intervention: The UN Security Council referral

The prosecutor of the ICC has so far received non-compliance from the government of Sudan with regards to his arrest warrant, and even other African countries have declined to arrest Al Bashir when he has travelled there including Djibouti, Kenya, 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.

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, then the ICC is currently implicated in impacting upon the dynamics of peacebuilding in the countries in which prosecutions are pending or ongoing. Therefore, the ICC has the potential to disrupt in-country peacebuilding initiatives if its interventions are not appropriately sequenced.

On 29 and 30 January 2012, the Eighteenth 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 and 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 ICC against President Bashir of the Sudan'.[10] The AU further requested its member states to ensure that their requests to defer the situations in Sudan, as well as Kenya, are considered by the UN Security Council.

According to a number of African governments, a court that does not apply the law universally does not justify the label of a court. This is particularly important if the jurisdiction of the Court does not apply to some 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? Certainly, not the ICC and not the UN. 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 also be demanded 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.[11] In the absence of an over-arching system of global political administration or government, international criminal justice will always be subject to the political whims of individual nation-states.

The AU has argued that the Rome Statute cannot override the immunity of state officials whose countries are not members of the Assembly of State Parties. The AU intends to seek an advisory opinion from the International Court of Justice on the immunities of state officials within the rubric of international law.

Pan-African support for Al-Bashir

South Africa also has reiterated its commitment to upholding its legal obligations as a State Party to the Rome Statute, yet following the Al-Bashir escapade in Johannesburg in 2015, it is evident that the pan-African agenda has prevailed over the ICC's. The prospects for the accreditation of the International Criminal Court to the AU headquarters in Addis Ababa, become even more remote. In 2008, President Paul Kagame of Rwanda articulated his concerns by stating that,

> Rwanda cannot be party to the ICC for one simple reason ... with ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries.[12]

Van der Merwe observes that 'there is the perception that these courts are politically tainted and constitutive of a new form of imperialism through which dominant states control weaker ones and impose their values'.[13]

Al-Bashir's escapade: South Africa and non-compliance with the ICC

In June 2015, Al-Bashir participated in the AU Assembly of Heads of State and Government meeting in Johannesburg, South Africa. The South African government knew full well that he was still under indictment with a pending arrest warrant issued by the ICC. During the meeting, a South African NGO called Southern Africa Litigation Centre submitted an application to a Johannesburg High Court for Al-Bashir to be arrested. The High Court judges duly issued a ruling barring Al-Bashir from leaving South Africa. Yet through processes not yet unknown, Al-Bashir was able to leave South Africa and travel back to Khartoum. This has subsequently plunged South Africa into a constitutional crisis, with a legal process that seeks to challenge the constitutionality of the South African government's failure to comply with the Court's ruling. The legal process was still on going at the time of going to press.

The important issue that emerges from this debacle is the fact that the South African government, headed by Jacob Zuma, in tacitly enabling Al-Bashir to flee the country has firmly nailed their colours to the AU mast and opted for pan-African solidarity rather than enabling the ICC on the continent. Legal analysts will undoubtedly debate this issue for years to come, with interpretations and counter-interpretations of the law. However, the politics of the issue offer a more sanguine indication of where the relationship between the AU and ICC is heading – to even more turbulent waters.

Diverging African opinions on the ICC

As indicated above, at the Eighteenth Ordinary Session of the Assembly of AU Heads of State and Government African leaders reiterated their non-cooperation policy towards the ICC. Following this summit, some African countries expressed their reservations about the Union's position on the ICC. Botswana publicly disagreed with the AU's decision not to cooperate with the ICC, stating its international obligations under the Rome Statute. South Africa also reiterated its commitment

to upholding its legal obligations as a State Party to the Rome Statute. However, while Botswana was emphatic and unwavering in its support for the ICC's actions, South Africa played a more nuanced diplomatic game due to its key role within the African Union.

In January 2012, South Africa succeeded in achieving the appointment of Nkosazana Dlamini-Zuma, its former foreign minister, as the chairperson of the African Union Commission, which ushered in an era of more hands-on and assertive role within the Union. In the July 2012 AU Summit in Addis Ababa, Dlamini-Zuma was victorious with 37 member states voting her in as the new chairperson. South Africa adopted a cautious approach towards dealing directly with or raising the profile of the ICC's prosecutions given its stated position to uphold its international commitment to the Rome Statute. South Africa was therefore perennially caught between a rock and a hard place when it came to the AU–ICC relationship. After the appointment of Dlamini-Zuma as the chairperson of the AU Commission, and her initial pronouncements on this issue, indications were that she would be more likely side with the AU rather than pursue the ICC's agendas on its behalf across the continent. This ultimately does not augur well for the ICC, given South Africa's important regional role.

It should be noted that there were diverging opinions about the ICC within the AU. Botswana 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 and in some cases beholden to the influence of their former colonial power France, adopted a lukewarm stance when it came 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 then position as chief prosecutor, which she still retains to this day, there was at that point in time a Sene–Gambian axis at the helm of the ICC system, which could have been leveraged AU to its advantage – in theory. However, this did not led to the thawing of relations between the ICC and AU.

The second chief prosecutor and the prospects for the AU–ICC relationship

In December 2011, the Assembly of State Parties appointed Fatou Bensouda, former attorney-general and the minister of justice of the Gambia, as the consensus choice for the office of the ICC prosecutor. Ms 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 was emphatic that he did not 'play politics', but it was all too obvious that he was more enthusiastic in initiating prosecutions for only African cases and not even undertaking preliminary investigations into alleged war crimes in Sri Lanka, and Chechnya, due to the politically sensitive nature of such actions. The OTP 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 about them. 'Permanent preliminary investigations' are essentially a technical way of avoiding launching prosecutions indefinitely. Ocampo's selection of four individuals as the people most responsible for instigating and perpetuating the most serious crimes of international concern during Kenya's post-electoral violence in 2007 and 2008 is now a central feature of the campaigning for presidential elections in 2013. Political opponents in Kenya have now completely politicised the ICC indictments of Uhuru Kenyatta, the deputy prime minster; William Ruto, a former cabinet minister; Francis Muthaura, the chief secretary to the ministerial cabinet and head of the civil service; and Joshua Arap Sang, a radio personality.

The image of the ICC in Kenya among certain sectors of the Kenyan population was that it was a useful tool for political opportunists to dispose of their opponents prior to the presidential election. This was a volatile situation, which needed to be carefully managed. Given the fact that the statute of limitations provisions within the Rome Statute are indefinite, Bensouda could have used her prerogative to extract the

ICC from this incendiary political situation in Kenya and only pursue the prosecutions after the heated controversy around the role of the Court in excluding candidates has simmered. Even though the ICC had stipulated that the Kenya prosecutorial proceedings would only begin in April 2013, this only marginally reduced the saliency of the Court's role in the presidential poll that took place in that year.

This discrepancy in Ocampo's behaviour and attitude towards non-African war crime situations was not lost on African leaders. This in fact fuelled allegations that the ICC prosecutor was implementing a thinly veiled pro-western agenda of judicial imperialism, even though he was emphatic in denying this. In the final analysis, critical scholars like Adam Branch have argued that there is no valid reason why Ocampo could not have instigated prosecutions in other non-African countries during his tenure.[14] Consequently, the ICC's bias towards Africa under Ocampo was palpable and morally odious. As a consequence, Ocampo's version of the ICC is now viewed with suspicion by some actors in Africa as confirming the function of the Court as an instrument for judicial imperialism. This perception has not been transformed or altered since, therefore it is necessary to interrogate the politicisation of international criminal justice in Africa.

The appointment of Bensouda as the prosecutor was a move calculated to appease the African members of the State Parties. By appointing an African and former Minister of Justice of the Gambia, the Assembly of State Parties was communicating the fact that it does not view the Court as advancing an anti-African imperial agenda. An African at the helm of the prosecutorial arm of the Court would supposedly dispel any suspicions that the ICC is a neo-colonial instrument that projects judicial imperialism to discipline the untamed and still barbaric African landscape.

Bensouda however had a mammoth task ahead of her, since the trust that had been broken between the AU and the ICC, under Ocampo, still needed to be mended. Bensouda needed to initiate dialogue with the African Union leadership. Specifically, Bensouda had to distance herself from the confrontational stance that developed during the highly

politicised Ocampo regime between the ICC and the AU. Bensouda also needed to communicate directly to African constituencies, governments and civil society and utilise them to continue to convey the message behind the objective and mandate of the Court.

On Darfur, Bensouda's hands were effectively tied by the standoff between the AU and the UN Security Council. The UNSC has to date declined to issue a formal communication to the AU on its request for the Bashir indictment to be deferred. Some members of the UNSC have informally stated that the AU should in effect take a 'hint' and consider the Council's 'silence' as a form of communication. Such dismissive attitudes do not augur well for a mutually acceptable resolution of the impasse between the AU and the UNSC, which in effect also drags in the ICC and makes it appear complicit in not responding to the African Union's request. The deteriorating situation between the AU and ICC is evident in the fact that Bensouda and the wider ICC system were unable to sustain a problem-solving dialogue with the African Union. In addition, the ICC system has not at the time of going to print succeeded in fully operationalising an ICC office in Addis Ababa, the headquarters of the AU, which could serve as an urgently required liaison office and means for the Court to regularly engage the Union as an interlocutor in its own backyard. As of going to print in 2019, this is a goal that the ICC has singularly failed to achieve due to its failure to formally acknowledge the political nature of its judicial interventions.

The limits of judicial imperialism

The current persistence of judicial imperialism is not a sustainable framework going forward. One consequence of this, of course, is the continued practice of impunity by the global power elite as far as the international rule of law is concerned. The existence of an imperial system of power, embodied in the P5 of the UNSC, that systematically abuses and violates international law, will lead to its further de-legitimisation and breakdown of international order, with perhaps the resurgence of a global authoritarianism, albeit under the guise of

the superficial adherence to an international system. Lebow and Kelly further note that 'empires based on force alone will not endure', since, 'raw force can impose its will at any given moment, but few hegemons have the military and economic capability to repress their subjects indefinitely'.[15] The persistent violation of international law will also generate a global culture of lawlessness and encourage nation-states to take matters into their own hands, such as the P5 of the UNSC (except China), war in Syria from 2011 onwards, the 2014 Saudi Arabian invasion of Yemen and the Russian annexation of the Crimea region of Ukraine.

Conclusion

The Sudan intervention revealed the selective instrumentalisation of the ICC, through a UN Security Council referral, which has since not been utilised to address the myriad of other conflict situations around the world. This form of selective justice reveals that the ICC is a useful instrument in the hands of powerful states who want to target regimes that they do not approve of, which means in effect that the ICC is an instrument for judicial imperialism. The ICC's Sudan intervention has also generated a fissure between the African Union and the Court, which deteriorated even into the regime of the second prosecutor of the ICC, Fatou Bensounda. More specifically, in its latest policy pronouncements the AU framed the ICC interventions in Africa as a form of neo-colonialism. This raises the spectre of judicial imperialism and raises several questions about the legitimacy of the brand of justice that the ICC is dispensing, and on whose behalf it is dispensing this justice. This and other issues will be further addressed in subsequent chapters.

Chapter 5

Kenya and the ICC: Prosecutorial Selectivity, Neo-imperialism and Pan-Africanism

Introduction

This chapter will assess the evolution of crisis in Kenya and the events that precipitated the post-electoral violence of 2007 and 2008. It will then assess Kenya's efforts to deal with the past violations with a specific emphasis on the ICC interventions. Specifically, the country was politically divided as far as the implementation of the so-called Kriegler and Waki recommendations. Some politicians viewed the implementation of the Waki report as vital to the consolidation of peace through justice as well as crucial to laying the foundation for healing and reconciliation in Kenya. Other politicians calculated that undermining the implementation of the Waki report would work to their advantage and marginalise their opponents. This dithering set the scene for the politicisation of the ICC's interventions in Kenya. Consequently, the chapter will assess the politics relating to the ICC's

interventions, and the claims of neo-colonialism which have been levelled at the Court. In particular, the chapter will assess the criticisms that the Kenyan government has directed at the ICC as an instrument for neo-colonial control in the country. The chapter will then assess how Kenya managed to build upon the Sudan situation in its efforts to further escalate and pan-Africanise the issue of the ICC's interventions in Africa. The chapter will assess how President Kenyatta managed to have his charges dropped through political decision to travel to The Hague directly. The chapter will conclude by assessing the prospects for the ICC's relationship with Kenya.

Context of the Kenyan crisis

In order to effectively analyse the post-electoral crisis in Kenya, the events that were witnessed in December 2007 and early 2008 have to be situated within a historical context. It would be limiting to analyse the post-electoral violence in 2007 as an aberration that spontaneously emerged. It would be more accurate to consider the events in 2007 as the logical consequence of the continuous political ethnic manipulation that had been taking place prior to the introduction of multi-party politics in 1992. More specifically, Kenya has had a history of electoral violence. There have been systematic campaigns of violence almost every year since multi-partyism was introduced in 1991. Both the 1992 and 1997 electoral polls were beset by violent ethnic clashes. Between 1991 and 1993, the regime of Daniel Arap Moi actively agitated against the Kikuyu in the Rift Valley, as a means to weaken the opposition vote and consolidate the incumbent governments' vote in the province. Following a replay of this violence in the 1997 elections, the Kenya government commissioned the Akiwumi and Kiliku judicial inquiries. These inquiries recorded and revealed the financing, incitement and confiscation of land in the run-up to, during and after the elections. The 2002 poll was in fact the exception to this history of electoral violence, when a peaceful transition from the incumbent President Moi to the then President Kibaki was effectuated with relatively fewer

incidents of violence. The 2007 crisis was unique in its scale and degree of organisation and financing. Despite the findings of the Akiwumi and Kiliku judicial inquiries, no political or business leader has been prosecuted for ethnic cleansing. The Kenya Human Rights Commission has through a process of documentation sought to confront the national amnesia for past abuses and the lack of accountability for atrocities that in principle should be punishable by law.

The root cause of Kenya's history of violence is linked to the twin problems of economic impoverishment and ethnic chauvinism. The tragedy of Kenya's situation is that the seeds of dissension that manifested after the elections in the form of spiralling violence were sown in the very fabric of the postcolonial nation-state, when the country inherited its current constitution, system of government and its electoral system from the former British colonial administration.[1] Throughout its colonial and postcolonial history Kenya has been a plagued by the scourge of ethnic manipulation. Essentially, the problem in Kenya stems from the persistent and increasing 'ethnicisation' of the political sphere. Linked to this process of ethnic manipulation is the instrumentalisation of political power to gain, secure and entrench economic advantage. Kenyan politics through the reign of its three postcolonial presidents – Jomo Kenyatta, Daniel Arap Moi and Mwai Kibaki – has degenerated into a realm of ethnic contestation. Progressively, over the 45 years of the country's independence, an increasingly powerful presidency rendered the quest for political power a zero-sum game. Kenyatta, Moi and Kibaki managed to maintain a stranglehold on government, to the advantage of the groups favoured by the incumbent president of the time, ruthlessly manipulated ethnic power blocks. This was to the detriment of the ethnic groups that were not able to obtain the patronage of the ruling president and party.

It is not suprising that neither Kenyatta, Moi nor Kibaki saw the long-term political expediency or appreciated the necessity to change and transform the way in which political power is centralised in what is in effect an imperial and exceptionally powerful presidency. A modified Westminister electoral and governance model was adopted and

perpetuated an acceptably high degree of competition and a winner-takes-all framework of interaction which entrenched the politics of exclusion. The modified Westminister model serves the interests of larger ethnic groups or coalitions of ethnic groups. Smaller ethnic groups therefore became consumed with ensuring two principles: 'protection from majoritarian tyranny and the apportionment of political power to ensure minority participation'.[2] The Westminister model has the effect of consigning smaller ethnic groups in Kenya to the status of being a 'permanent minority'.[3] As a consequence, the stakes in terms of controlling the presidency in Kenya are inappropriately and perversely high. Since independence in 1963, three of Kenya's postcolonial presidents have come from only two ethnic groups, the Kikuyu and Kalenjin. The first Kenyatta and the third Kibaki were from the Kikuyu ethnic group and the second Moi was from the Kalenjin ethnic group. It therefore goes without saying that the remaining 40 ethnic groups, out of Kenya's total of 42 ethnic groups, have a just basis upon which to feel indignant and impatient to take over the mantel of presidential power.

The ethnicisation of the Kenyan state

The fundamental problem with the system of government and elections in Kenya is that even if a minority of ethnic groups succeed in capturing state power it will not alter the essential sense of exclusion that other groups will undoubtedly feel. In his book *The Wretched of the Earth* published in 1961 the pan-Africanist thinker Frantz Fanon warned that postcolonial African states held within their design all the seeds of a divisive and ultimately violent future for African people and societies. Fanon was observing the process of decolonisation as it unfolded in the early 1960s and noted that the political parties, which had taken over control from the colonial powers, were in fact strongholds for ethnic group power. Fanon observed that the typical political party 'which of its own will proclaim that it is a national party, and which claims to speak in the name of the totality of the people, secretly,

sometimes even openly organises an *authentic ethnical dictatorship*'.[4] He argued that after such political parties captured state power they would seek to maintain and extend their power and dominion over other groups within states, or enter into alliances with a few select ethnic groups to consolidate their position. Fanon goes on to note that 'this tribalizing of the central authority, it is certain, encourages regionalist ideas and separatism. All the decentralizing tendencies spring up again and triumph, *and the nation falls to pieces, broken in bits*'.[5] Fanon was prophetic in his analysis written in 1961. What he describes, and more, has come to pass in various regions of Africa notably in Somalia, the Democratic Republic of Congo, Côte d'Ivoire, Sudan and more recently in Kenya. The fact that Fanon wrote this 47 years ago even before Kenya was independent is a testimony to his prophetic understanding of the challenge of governing the postcolonial African nation-state without altering how power is configured. Historically, the process of decolonisation left behind an arbitrary logic of statehood, which has sown the seeds of the current instability and 'ungovernability' of several African states. Most of the existing boundaries were drawn by colonial administrations without regard for, or knowledge of, pre-existing indigenous or cultural social political groupings. This arbitrary division of community created, and continues to sustain, the potential for tension and it also contributes toward the cycles of violence, which plague a number of African countries.

It is evident that through the 'ethnicisation' of the Kenyan state, political elites were able to appropriate state power to advance their private accumulation.[6] Asymmetrical economic development is a contributing factor to the exacerbation of ethnic chauvinism, particularly when ethnic coalitions utilise and instrumentalise the apparatus and machinery of the state to advance capital accumulation. Today, Kenyans are experiencing a country that Fanon predicted and described 47 years ago. The degree of ethnic animosity has been fuelled by years of misrule, economic mismanagement, and corruption. Effectively, the politics of polarisation in Kenya today have become manifest through the tragic confluence of this legacy, the deep-seated

sense of being aggrieved politically among some ethnic groups, a restless and anxious populace, and the inability of the Electoral Commission of Kenya (ECK) to fulfil its mandate effectively.

The convening of elections have raised questions about the role of elites in promoting ethnic mobilisation in their drive for state power and the problems that face electoral politics across the continent. Stephen Ndegwa suggests that 'ethnic identity in Africa is a relatively recent phenomenon whose salience is largely a product of colonial rule and post-colonial dynamics in which elites have continued to reify ethnic identity for political mobilisation'.[7] In effect, ethnicity is socially constructed and it is highly susceptible to manipulation in the formation of imagined or invented communities by ethnic entrepreneurs.[8]

The 2007 and 2008 post-electoral violence

The post-electoral violence in Kenya was one of the most violent and destructive periods in the country's history. 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). The election results were announced on 30 December and Mwai Kibaki was hastily sworn in as the president of the country amid protests from the opposition leader, Raila Odinga, of the Orange Democratic Movement (ODM). The chairman of the Electoral Commission of Kenya (ECK), Samuel Kivuitu, confessed later that he was not certain who had won the presidential election. There were therefore grounds for ODM to contest the results of elections but PNU also continued claiming that it had won the election legitimately. The tension created by this contested result further fuelled the violent protests that afflicted the country in the early months of 2008. Specifically, the political disagreement over the outcome of the poll led to the outbreak of sporadic and widespread violence across Kenya, which affected communities in the low-income areas of Nairobi, as well as in key urban and rural centres including Mombasa, Kisumu,

Eldoret and sections of the Rift Valley, Nyanza, Western and Coastal provinces. Over a six–seven-week period, an estimated 1 200 people were killed in the violent clashes that ensued and approximately 350 000 people were internally displaced and forced to flee their homes as a direct result of the violence. The failure to address the underlying issues relating to ethnic polarisation was evident in the tensions that were generated in the aftermath of the nullification of the 2017 presidential elections in Kenya, which pitted the Jubilee political formation against the National Super Alliance (NASA) formation, largely along ethnic voting blocks.

The Kenya National Accord and Reconciliation Agreement

In early January 2008, the then chairman of the African Union Assembly of Heads of State and Government, President John Kuffor of Ghana, flew to Kenya to assess the situation and see what could be done to bridge the divide between the parties. The first sign of hope that a way forward could be found emerged when the PNU and the ODM agreed to a dialogue and mediation process convened by the African Union through an eminent panel led by Kofi Annan, the former UN secretary-general, and supported by Benjamin Mkapa, former president of Tanzania, and Graca Machel, a former leader within the Mozambique freedom movement. Faced with the violence that was threatening to engulf the country there was clearly a need to transcend the political standoff and the unhealthy brinksmanship that persisted between the opposition and government. Several hardliners within both the PNU and the ODM were against the mediation process because they believed that their side had legitimately won the polls. However, in practical terms there was no way to transcend this situation, unless the parties involved in this crisis were prepared to resort to force. An escalation of tension would have undermined the immediate prospects for restoring peace and tranquillity in Kenya.

On 28 February 2008, a peace agreement was signed between the PNU and ODM establishing a grand coalition between the

two parties. The Annan-led mediation process led to the signing of an Agreement on the Principles of Partnership of the Coalition Government and a National Accord and Reconciliation Agreement as part of a wider set of agreements. Specifically, the Agreement on the Coalition Government noted that 'neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process'.[9] The Agreement committed the parties to enacting the National Accord and Reconciliation Act 2008, which makes provisions for 'a Prime Minister of the Government of Kenya, with authority to coordinate and supervise the execution of the functions and affairs of the Government'.[10] The Tenth Kenyan Parliament subsequently passed the National Accord and Reconciliation Bill 2008, which entrenched the Agreement into the Kenyan Constitution. The Bill became law and subsequently President Kibaki and Prime Minister Odinga jointly led the Grand Coalition Government of Kenya. In addition, the Agreement created two Deputy Prime Ministerial posts, as part of a 42-member cabinet that sought to establish a balance of Ministers from the coalition parties. The Agreement stipulated that 'the composition of the coalition Government shall at all times reflect the parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance'.[11] In effect, 'Post-Accord Kenya' would attempt to establish a qualitatively very different government, in terms of the distribution of political power, from those that preceded the electoral crisis of 2007 and 2008.

The post-electoral violence commissions of inquiry

The Annan-mediated National Accord and Reconciliation Agreement, of 28 February 2008, stipulated the need to convene commissions of inquiry to assess the electoral process and also to investigate the post-electoral violence. These were duly convened as the Independent Review Commission (IREC), headed by the retired South African Justice Johann Kriegler, and the Commission of Inquiry

into Post-Election Violence, under the chairmanship of the Kenyan Justice Philip Waki. The Kenyan Commission of Inquiry into Post-Election Violence (CIPEV – the Waki Commission) was mandated to investigate the facts and circumstances surrounding the violence. Together with the Independent Review of Elections Commission (IREC), the Waki Commission has highlighted the key issues that enabled a flawed election and generated the violence during the 2007 polls in Kenya.

The Kriegler Commission Report

Johann Kriegler led a seven-member Independent Review Commission into the Kenyan elections.[12] Specifically, the Kriegler Commission was mandated to examine all aspects of the controversial 2007 presidential poll through consultations with officials of the ECK, election observers, politicians, and citizens. The mandate of the Kriegler Commission included reviewing 'the organisation and conduct of the 2007 elections, extending from civic and voter education and registration through polling, logistics, security, vote-counting and tabulation to results-processing and dispute resolution'.[13] In addition, the Commission was tasked with assessing 'the structure and composition of the ECK in order to assess its independence, capacity and functioning' and to 'recommend electoral and other reforms to improve future electoral processes'.[14] The ensuing recommendations would therefore play a vital role in re-establishing the confidence of the Kenyan people in the electoral system. The Kriegler Commission Report's contribution to transitional justice would subsequently be measured by the extent to which the implementation of its recommendations would enable the establishment of an electoral legal framework that could avert the crisis witnessed in 2007, in the next scheduled elections of 2013.

The Kriegler Commission Report concluded that the Kenyan voter register was 'materially defective' in a way that effectively impairs 'the integrity of the election results'.[15] Crucially, it also noted that the 'numerous implausibly high turnout figures reported in the strongholds

of both main political parties evidence extensive perversion of polling, probably ballot-stuffing, organised impersonation of absent voters, vote buying and/or bribery'.[16] A disturbing feature of the controversial elections was the fact 'that in many instances (in the strongholds of both main political parties) effectively only the majority party was represented during polling and counting'.[17] This damning indictment of both the PNU and ODM voting strongholds illustrates that both the incumbent government and the opposition coalition committed voting irregularities, a factor that becomes relevant when we consider the prosecutorial interventions that subsequently transpired under the rubric of the ICC. The Kriegler Commission Report further noted that 'a likely facilitator and catalyst for ballot-stuffing … was the indulgence granted by the ECK shortly before the elections for 'black books' (in which the names of voters had been entered at the time of registration) to be used in certain circumstances and for double registrants to be allowed to vote, contrary to previous regulation'.[18] The report in effect accused the current Electoral Commission of Kenya of incompetence, laxity and a dereliction of duty in the conduct of the 2007 poll. This in effect made its continuing existence untenable. Indeed, the report also noted that at the time 'the manner of appointment of commissioners and the structure, composition and management system of the ECK are materially defective, resulting in such a serious loss of independence, capacity and functional efficiency as to warrant replacing or at least radically transforming it'.[19]

In terms of the integrity of the results, the Kriegler report notes that 'although there is room for honest disagreement as to whether there was rigging of the presidential results announced by the ECK, the answer is irrelevant, as (i) the process was undetectably perverted at the polling stage, and (ii) the recorded and reported results are so inaccurate as to render any reasonably accurate, reliable and convincing conclusion impossible'.[20] Ultimately, the Kriegler Commission concluded that 'the conduct of the 2007 elections was so materially defective that it is impossible – for IREC or anyone else – to establish true or reliable results for the presidential and parliamentary elections'.[21] The Kriegler report

recommended reconstituting the electoral legal framework to ensure fair and transparent political competition. Specifically, it recommended 'that all laws relating to the operational management of elections should be consolidated under one statute'. In addition, it recommended 'that a separate law be enacted to facilitate the establishment of a special Electoral Dispute Resolution Court to handle appeal matters from the initial states of dispute resolution by the ECK'.[22] It further notes that the 'culture of electoral lawlessness' which has become entrenched in Kenya over many years and could not 'be reversed without a concerted, non-partisan commitment to electoral integrity on the part of political leaders, which commitment will need to be sustained and monitored over time'.[23]

The Waki Commission Report

The National Accord and Reconciliation Agreement articulated the mandate of the Commission of Inquiry into Post-Election Violence (CIPEV) to 'investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in the handling of it, and to make recommendations concerning these and other matters'.[24] CIPEV, also known as the Waki Commission, begun its work on 23 May 2007 and investigated 'the facts and circumstances related to the acts of violence following the 2007 presidential elections' as well as 'the actions or omission of state security agencies during the course of the violence'.[25] However, the most important task undertaken by the Waki Commission was to make 'recommendations concerning measures to be taken to prevent, control, and eradicate similar violence in the future; bring to justice those responsible for criminal acts; eradicate impunity and promote national reconciliation'.[26] Therefore, the Waki Commission recommendations were to play a vital role in determining the institutionalisation of transitional justice in Kenya.

The Waki report noted that following the election-related clashes of 1992 and 1997 'the main perpetrators of systemic violence have never been prosecuted' prior to that date.[27] The Waki report also noted

that 'the violence surrounding elections has been ethnically directed, this has increased distrust among different groups and vastly eroded any sense of national identity. Hence, ethnicity has now taken on a dangerous and negative connotation.'[28] The report further noted that at that time Kenya was at a critical juncture, and that in recording the conditions at the issue of the report, 'violence is endemic, out of control, and is used routinely to resolve political difference'. This was in effect an early warning of the potential escalation of politically motivated violence in the future. Specifically, the Waki report noted that 'because of the ethnic nature of the post-election violence, ethnic fears and hatred have been elevated in importance and could turn violent again even more easily than has happened in the past'.[29] The report warned that 'the individuals and institutions who have benefited in the short term from the chaos and violence need to give up the methods they have used or Kenya could become a failed state'.[30]

The Waki report also noted that state security agencies 'failed institutionally to anticipate, prepare for, and contain the violence'. In some instances, 'individual members of the state security agencies were also guilty of acts of violence, and gross violations of the human rights of citizens'.[31] It also raised doubt about the integrity of the judicial system to remedy the violence and the electoral irregularities that plagued the country after the elections. In particular, the Waki report stated that the role of the judiciary was not sufficiently understood by the public at large and has therefore 'acquired the notoriety of losing the confidence and trust of those it must serve because of the perception that it is not independent as an institution'.[32] The report suggested 'that is why, for example, the leadership and members of the ODM refused to submit to the jurisdiction of the courts to resolve the dispute that arose after the 2007 general elections in relation to the Presidential results'.[33] In terms of its operational efficiency, the Waki report noted that the judiciary 'has also been accused of delays in the administration of justice and for non-transparency in its functions'.[34] To remedy this fact the Waki report recommended that 'nothing short of comprehensive constitutional reforms will restore the desired confidence and trust in the judiciary'.

The Amnesty debate and the Waki recommendations

Kenyan politicians and the society engaged in wide-ranging discussions about the controversial issue of whether the perpetrators of violence following the presidential poll on 27 December 2007 should have been prosecuted in accordance with the law or granted amnesty. The Waki report defined amnesty as 'the act of an authority (eg. Parliament or government) by which the State restores those who may have been guilty of an offence against it to the position of innocent persons'. Specifically, the report stated that amnesty 'includes more than a pardon, in as much as it obliterates all legal remembrance of the offence'.[35] The application of amnesty raised issues of justice. The then Kenyan minister of justice, Martha Karua, argued that perpetrators had to be prosecuted in order to uphold the rule of law. Karua was also a key actor within the Party of National Unity (PNU), which also happens to be the former President Kibaki's party and a partner of the then Grand Coalition Government. In contrast, a key advocate of the call for amnesty was the then Kenyan minister of agriculture, William Ruto. Ruto was a member of the Orange Democratic Movement (ODM) camp, which is led by the former Prime Minister Odinga and also a partner in the Coalition.

The authorities in connection with the post-election violence had arrested a significant number of individuals. In the Rift Valley Province, several hundreds of youths were held in police custody, on suspicion of participation in the violent acts that followed the elections. The Kenyan police in the Province released information on the numbers of those who had been arrested and charged. The police also indicated the number of those who are awaiting trail and those who had been convicted.

The amnesty debate was complicated because it has been difficult to ascertain whether some of the violence was orchestrated by political elites in order to pursue and achieve their self-interests. The notion that the violence was entirely spontaneous continues to be challenged, with evidence emerging that some of the militia were systematically armed and manipulated by as yet unidentified actors and agents. The situation at

the time was delicate and precarious because Kenya's stability depended on ensuring that the populace continued to engage in national healing and reconciliation and that the politicians continued to maintain their support for the political compromise that was at the heart of the then Grand Coalition Government.

The issue of amnesty had been proposed as a means to ensure that the forgiveness of all perpetrators was applicable to those in the political ranks who may have instigated, as well as citizens who may have deliberately participated in perpetuating violence. The idea at the time was to ensure that the amnesty was as inclusive as possible. However, in order for amnesty to work, the issue of impunity had to be addressed. In other words, the perpetrators or instigators would have had to confess their planning or execution roles in order to receive amnesty and a time frame had to be placed on those who come forward to reveal their roles in perpetuating the violence. There was of course the danger that this issue of amnesty could become a political weapon for the opposing elements within the Grand Coalition to seek their advantage whilst undermining that of their opponents.

The challenges of implementing the Kriegler and Waki recommendations

The issues that dominated the debates relating to the implementation of both the Kriegler and Waki commissions related to the conduct of the elections and administration of justice to the alleged organisers and perpetrators of violence. In effect, what was at stake was whether Kenya would adopt a process of transitional justice that would enable it to reform its electoral system, address the atrocities that were perpetuated and lay the foundation for the consolidation of peace in the country.

The implementation of the Kriegler and Waki commissions' recommendations presented a conundrum for the politicians and society in Kenya. Failure to make an effort to implement these recommendations constituted the persistence of inaction and impunity in the face of the violent acts that followed the elections. The peril was that inaction would lay the foundations for future violence and

instability in Kenya. Whereas the resolute implementation of the Waki Commission's recommendations could have potentially required the bringing to justice of political leaders, some of whom are serving in the then Grand Coalition Government of Kenya. For the Kenyan Grand Coalition Government, this conundrum was captured by the fact that it would have been a case of 'political-damnation-if-you-do', and 'political-damnation-if-you-do-not' implement the Kriegler and Waki Commission recommendations.

The Waki Report insisted that 'it is imperative to guard against further encouragement of the culture of impunity by granting blanket amnesty to all and sundry in the post-election mayhem'.[36] However, a number of senior political figures were implicated in the organising and instigating of violence. Therefore, it became politically difficult to implement any sanctions. Astutely, the undisclosed list of names of individuals suspected of war crimes was held by Kofi Annan, in his capacity as the head of international mediations effort to resolve the crisis in Kenya. If it became necessary, this list would be forwarded to the ICC. This created a conundrum for Kenya's politicians and security agencies because it was not clear who was implicated in this undisclosed list. If the ICC list were to be released it was entirely possible that a number of politicians could be identified as allegedly having played a role in instigating the post-electoral violence. As a consequence, the political camps were divided between those who supported the implementation of the Waki Report and those who were inclined to ignore it and wish that the issues it raised will fade from the consciousness of the populace. Hypocritically, some politicians were calling for the implementation of the Waki Report recommendations because they believed that their opponents would be exposed by the undisclosed list and subsequently sanctioned. This suggests that the calls for its implementation were not necessarily driven purely by a concern to see an effective transitional or international criminal justice process in Kenya, but by domestic politics and the contest between hegemonic political formations.

Kenya's efforts to deal with the past

The Kenya Truth, Justice and Reconciliation Commission

The National Accord and Reconciliation Agreement also proposed the establishment of the Kenya Truth, Justice and Reconciliation Commission (TJRC). The Waki Commission was also mandated to 'make such suggestions to the Truth, Justice, and Reconciliation Commission' as it deemed necessary. The Kenyan Parliament duly passed the TJRC Bill, which could have offered a way out of the political standoff caused by the issue of amnesty, because it addresses the issue of the need for perpetrators to confess their atrocities, and the need to request for amnesty before it can be granted. Therefore, there were specific conditions under which amnesty could be sought and granted. The political standoff created by the amnesty debate needed to be addressed by the then Grand Coalition Government. In particular, the more moderate and pragmatic politicians needed to manage and negotiate the adversarial positions that had been adopted by Karua and Ruto. What was of interest was the number of politicians who would take advantage of this truth, justice and reconciliation mechanism to come to terms with their own complicity in plunging Kenya into post-election crisis.

The Special Tribunal of Kenya

To confront impunity and inaction, the Waki Report called for the establishment of a Special Tribunal of Kenya to try suspected sponsors and organisers of the post-electoral violence. This was to serve as an in-country legal framework for the adjudication and administration of justice for the alleged suspects. However, there had been prevarication among a number of politicians in implementing this recommendation. Some analysts have argued that there was an attempt by spoilers within and outside of the Grand Coalition Government to undermine the implementation of the recommendations of the Waki Commission Report and in particular the Special Tribunal to suit their own agendas.[37]

Astutely, the Waki Commission ensured that the recommendations in its report were accompanied by sunset clauses that would initiate consequences for inaction or intransigence. Specifically, the Waki Report stated 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'.[38] The Waki Report further stated that 'the Special Prosecutor shall be requested to analyse the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons'.[39] By establishing these conditionalities, the Waki Commission effectively indicated that it was prepared to internationalise Kenya's transitional justice process, if the domestic politicians failed to institute a viable process.

This sunset clause had the effect of keeping the process in check but the political manoeuvring continued. Failure to establish the tribunal would initiate another process, which could find Kenyan political and business elites indicted by the ICC in The Hague. In the absence of an effective process of transitional justice and the complete transformation of the constitutional framework to ensure that there is adequate ethnic accommodation, the future sustainability of Kenya would remain in doubt.[40] The issue of how to govern multi-ethnic societies is not unique to Kenya or Africa; it is in effect a global problem.[41] It may be the case that post-colonial African governments should as a matter of principle only operate on the basis of governments of national unity so as to prevent the politics of ethnic exclusion which inexorably leads to the fragmentation of the nation-state.[42]

The Kenyan state has a responsibility to protect its citizens based on a number of international declarations it has signed, as well as its membership of the African Union whose Constitutive Act as well as its Protocol on Democracy, Elections and Governance are explicit on the adherence to the rule of law and upholding of human rights.

Kenya and the International Crimes Bill

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 the establishment of a Special Tribunal of Kenya to begin the process of adjudicating on the cases relating to the organisers and perpetrators of the post-electoral violence in Kenya. However, this process is fraught because some political and business leaders are wary of being prosecuted by the tribunal for the role they played in fomenting violence after the 2007 poll. The political crisis continued to undermine the confidence in institutions of governance in Kenya.

On 16 December 2008, the Kenyan Parliament passed the Constitution of Kenya Amendment Bill. In order to lay the foundations for a stable system of government, the constitutional review process would need to consider the 'ethnicisation' of the Kenyan state, the effects of authoritarian rule in fostering economic impoverishment, and design a framework of governance that addressed the previous logic of designing electoral power on the basis of ethnic groupings. Beyond the issues of redress for past violations, the principle that should have guided the re-constitution of the Kenyan state would need to focus on ensuring ethnic accommodation by ensuring minority participation and mitigating against majoritarian domination. In order to curtail the inevitable drive within the executive to consolidate and centralise power, the legislative and judiciary needed to be constitutionally independent and sufficiently endowed with the power to implement a system of checks and balances to constrain the excess of executive power.

The Constitutional Review Amendment Bill

In February 2009, then minister for justice, Martha Karua, tabled

the Constitution of Kenya (Amendment) Bill 2009 to parliament. A Constitution Amendment Bill, which sought to establish the special tribunal, required a minimum of 148 members of parliament to be present for the bill to be debated. However, the members within the government and parliament were divided with regards to the enactment of the bill.[43] The main issue was whether perpetrators should be tried locally or whether an international legal process should be invoked. There was also an understanding of the Waki Report recommendations which stipulated that the names of the suspects be handed to the International Criminal Court after the 28 February 2009 deadline. However, on 12 February 2009, the Constitution of Kenya Amendment Bill was defeated by 101 to 93 votes. In effect, the members of parliament blocked government attempts to establish a Special Tribunal to adjudicate those who orchestrated the violence that affected the country. This was a blow to efforts aimed at ending the culture of impunity in Kenya, which was one of the objectives of the National Accord and Reconciliation Agreement that was signed almost a year prior to the date of this legislative rejection. Specifically, the National Accord recommended the adoption of 'measures with regard to the bringing to justice of those persons responsible for criminal acts' as well as to 'eradicate impunity and promote national reconciliation in Kenya'. The Hague option was described as the sugar-coated poison pill, which was stipulated by the Waki Report recommendations.

The ICC's interventions

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 in the situation in Kenya. On 15 December 2010, Ocampo identified six individuals who he considered to be 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 MP), 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 summonses 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 Trail 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 politicised within the Kenyan domestic political scene.

'Choices have consequences': Prosecutorial selectivity and the politicisation of the ICC in Kenya's 2013 elections

In parallel to these ICC proceedings, the prosecutorial selectivity and the politicisation 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 utilised 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 who were fomenting civil unrest during the 2007 and 2008 post-election violence, an issue that was documented in the Waki Report, as we saw above. Analysts have suggested that if one was to broaden the net, then Mwai Kibaki, as the former 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, 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 politicisation of international criminal justice processes, with 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.[44] Oblivious to the incendiary nature of such a comment coming from the world's only superpower, Carson unwittingly played into Kenyatta and Ruto's game of politicising their ICC cases. Carson's utterances further fuelled the notion that neo-colonial 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' and neo-colonial card all the way to 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 in particular Kenyatta appearing before the ICC. At the heart of Kenyatta's strategy was to pan-Africanise 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. As we saw in the previous chapter, prior to this the African Union had been embroiled in a standoff with the ICC, fuelled by the UN Security Council referral of Bashir, and therefore Kenyatta found a willing interlocutor among his peers at the African Union.

On 12 October 2013, an Extraordinary Session of the Assembly of Heads of State and Government of the African Union 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 term of office'.[45] In alluding to the need to 'safeguard' the constitutions of African countries and to protect the 'integrity of member states', the AU was raising the spectre of nefarious intentions by the international criminal justice system, and pronouncing on its perception of the existence of a condition akin to judicial imperialism. Furthermore, the AU heads of state called for suspension of the trials of Kenyatta and Ruto until they had 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'.[46] 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'.[47] The AU's pushback against the ICC was the clearest indication that it would not countenance the prevalence of judicial imperialism on the continent, and that it was going to utilise all of the political tools at its disposal to prevent further external encroachment into the African criminal justice landscape.

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 'neo-colonial' interventions on the African continent, just like Al-Bashir had achieved before him. Some analysts have argued that this series of decisions signified the African Union consolidating and entrenching its position with regard to what it perceived as the ICC's judicial imperialism. The notion that an AU member state had to inform and seek the advice of the Union if it wishes to refer a case to the ICC was of course itself an overt politicisation of what should be in theory an impartial international criminal justice process.

The UNSC meeting on a deferral of the Kenyan cases

On 15 November 2013, at the 7060th Meeting of the UN Security Council, a resolution seeking to request the International Criminal Court, under Chapter VII of the UN Charter, to defer the investigation and prosecution of President Kenyatta and Deputy President Ruto for 12 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 the securing of a mandatory nine votes and no veto to pass the resolution. This enabled African member states of the UNSC to criticise the Council for its selective application of its powers over the ICC, notably in situations that were not under the 'patronage' of the P5 members. Specifically, the UNSC vote has produced a barrage of criticism from African members of the UNSC. The Kenyan ambassador to the UNSC, Macharia Kamau,

appeared quite irritated when he stated that 'for Africans, their business in the Council was done but the matter was not closed'.[48] He went on to add 'the Council had removed itself from being part of an amicable solution and had thereby done irreparable damage to the Rome Statute and its future furtherance'.[49] These cryptic remarks could have been viewed simply as the rantings of an irritated diplomat or they could indicate that the African countries would subsequently seek a way to escalate the situation. Operating on the basis of the maxim, 'there is strength in numbers', the Kenyan government managed to take advantage of the AU's standoff with the ICC to address and seek to advance its own agenda.

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 organisation's concern about the failure of the International Criminal Court to undertake prosecutions outside Africa, as well as the impact of international criminal proceedings upon efforts to promote peace and stabilise regions. Muigai argued that immunities for sitting heads

of state already exist in domestic jurisdictions and that it would be anachronistic for them not be recognised and implemented at an international level.

Kenyatta's ICC escapade and the evocation of the spectre of neo-imperialism

Between 8 and 17 December 2014, the Assembly of State Parties (ASP) of the International Criminal Court convened their annual meeting in New York. Among the issues to be discussed was the role of the ICC on the African continent. A few days prior to the meeting, on 5 December 2014, a historic event transpired when Prosecutor Fatou Bensouda chose to throw the towel in and acknowledge that she did not have the evidence to prove the charges levelled against Uhuru Kenyatta, the president of Kenya. Kenyatta was accused by the ICC of 'criminal responsibility' for crimes against humanity including murder, rape and forced removals that took place in Kenyan post-electoral violence in 2008. This event is historic in that it was the first time ICC had dropped its charges against a sitting head of state, even though Kenyatta incurred the charges prior to his ascendancy to presidential power. This would have major ramifications for future cases brought before the Court involving heads of state, notwithstanding the still pending case against Omar Al Bashir, President of Sudan, for crimes in Darfur.

For ICC supporters this was a major setback for the project of international criminal justice and a second violation against the victims who suffered during the post-election violence. In her statement following the withdrawal of the charges, Bensouda described the event as 'a dark day for international criminal justice'. She lamented that due to the seven years dedicated to the pursuit of evidence, the ICC's judicial process was confronted by incidents of witnesses dying and statements being withdrawn, coupled with the Kenyan government's 'non-compliance'. Bensouda, however, left the door open for a re-establishment of the case against Kenyatta at a later date, should new evidence emerge.

Controversially, Bensouda's tone in her statement was more political rather than legalistic, as she strayed into conjuring up the image of 'dark' machinations behind the scenes against the pursuit of justice. In effect, Bensouda was confirming to the court of public opinion that indeed Kenyatta is guilty as charged, which is a political manoeuvre. This degree of conviction is only possible if the prosecutor is in possession of sufficient evidence to prove her case 'beyond a reasonable doubt'. But her decision to withdraw charges suggest that, either she did not have sufficient evidence, or that she did not believe that the evidence would convince the ICC judges during trial. Either way, it was disingenuous to 'adjudicate' against Kenyatta through her public statement, as a way to imply that he is guilty until proven innocent, because this violated the basic legal principles of equality before the law and the requirement for due diligence. If the ICC is to pass muster, the strict criteria of the appeal to the law and evidence, as it claims to aspire to, then it should – as a system – avoid dabbling in political rhetoric, unless it acknowledges that it is not a purely judicial organisation. In the absence of the ICC system recognising that the Court is more often than not a 'political' actor, it will continue to make pronouncements and act in a manner that will expose its duplicitous identity.

In contrast, in his statement responding to the dropping of the charges Kenyatta did not pull any political punches and laid the blame for his ordeal with the ICC on 'the intensity of pressure exerted by improper interests to pollute and undermine the philosophy of international justice'. Kenyatta astutely avoided naming these 'improper interests' but undoubtedly he was pointing a finger at his political opponent, the former prime minister of Kenya, Raila Odinga, who he blamed for his name appearing on the list that launched the ICC prosecutions. Furthermore, Kenyatta was also alluding to Western powers, notably the US government whose assistant secretary of state, Johnny Cochran, warned Kenyans prior to the 2013 presidential elections that 'there would be consequences' for electing Kenyatta and his deputy president William Ruto, who were both already under summons by the ICC.

Kenyatta's gambit of personally appearing before the ICC, in early

October 2014, having delegated his authority to his deputy Ruto, now turns out to have been politically astute, even though the act was depicted at the time as an extraordinary piece of political theatre. This move at the time caught the Kenyan political opposition and wider citizenry by surprise. It shifted the burden of proof to the ICC prosecutor's office, which two months later had buckled under the weight of a lack of evidence, to in effect freeze any further prosecution against Kenyatta whilst he was head of state.

Following his ascendancy to power, the only consequences that Kenyatta endured was to be feted by the White House during the US-Africa Summit, and caricatured by the group photo opportunity with former president Barack Obama. Furthermore, Kenyatta was received in London by the former UK prime minister David Cameron due to Kenya's role as a frontline state in the US-led global war on terror, and its embattled siege by Somali-based Al Shabaab extremists. These events illustrate the duplicitous nature of global politics and confirm the old adage that in politics there are no permanent enemies only permanent interests. More importantly, it reveals that geo-politics continues to trump over international criminal justice, and confirms the persistence of the reality of judicial imperialism as a weapon in the arsenal of the global power elite against those whom they hold a grudge against.

Supporters of the ICC have failed to make the connection that the ICC cannot work in an anarchical society of states, where realpolitik and Machiavellian machinations by governments are the order of the day. In addition, African governments who stood behind Kenyatta have pointed towards the selective nature of the ICC's justice, notably due to the failure of the UN Security Council to refer the Syrian case to the Court, even after a chemical weapon attack took place in Damascus. Attempting to operationalise international criminal justice without transforming the UN Security Council leaves the prevailing global system of law and order open to criticism and increases calls for democratising decision making at the highest levels of the UN system. Kenyatta's ICC escapade only serves to heighten the need for such

urgent transformation, an issue that will be discussed in subsequent chapters of this book

Parallel mandates: ICC, AU and the prospects for confronting impunity

The African Union constantly 'reiterates its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union'.[50] According to officials of the African Union, the body takes exception to being constrained by how other international actors choose to fight impunity on the African continent.[51] The organisations diverge in that the African Union is a political organisation and the ICC is an international judicial organisation. In this divergence lies the key to how the two organisations go about 'addressing impunity and ensuring accountability for past violations, atrocities and harm done'. The African Union, by its very nature, will gravitate first to a political solution and approach to dealing with the past, which places an emphasis on peacemaking 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 might never converge.

Indeed, both the African Union and the International Criminal Court, who have been practising a variant of 'political justice' and 'judicial politics', need to reorient their stances. The African Union would need to move away from its exclusively political posture towards embracing international jurisprudence and the limited interventions by the International Criminal Court. Conversely, the Court needs to move away from its unilateral prosecutorial fundamentalism, and insulate itself from the phenomenon of judicial imperialism instrumentalised through the UNSC, and recognise that there might be a need to arrange its interventions in order to give political reconciliation an opportunity to stabilise a country.

On 30 June 2014, at its annual summit of the Assembly of Heads of State and Government in Malabo, Equatorial Guinea, the African

Union 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 15 AU state parties ratified the Malabo Protocol, it was to 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 a continental jurisdiction is beside the point; the key issue is that the continental body views its relationship with the International Criminal Court, as a result of its perception of the existence of judicial imperialism, as having deteriorated to such a point that it is exploring actively how to make the Court's presence in Africa an irrelevancy in the future. International organisations such as the League of Nations have folded when their members effectively ignored their mandates. Will the International Criminal Court suffer the same fate?

Judicial imperialism and the corruption of international justice

A question of the legitimacy of the international criminal justice system

According to a number of African governments, a court that does not apply the law universally does not justify the label of a court.[52] 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, 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 such cases, the same way they seem to be convinced, and 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. In the absence of an over-arching 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 jeopardising its base of support among the African States' in the specific case of the arrest warrants issued with reference to Darfur.[53] 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) – the China, France, Russia, United Kingdom and United States.[54] Given the historical fact of the politicisation of the actions of the Security Council, not least its failure to act during the April 1994 Rwandan genocide, international observers and other countries have intimated that even this deferral was tainted by political imperatives. This would expose 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, a condition that exposes it to being instrumentalised as a tool for judicial imperialism.

The failure of UNSC to refer Syria to ICC between 2013 and 2014, despite the commission of specific war crimes such as a chemical weapon attack in September 2013 in Damascus, exposes the fact that when it comes to international criminal justice the legal criteria for criminal liability is not sufficient for a case to become 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 proselytise to other nations about the importance of upholding the rule of law. Judicial imperialism therefore also proscribes those who will be referents and recipients of the redress and restoration of their human dignity, based on whether they are deemed to be worthy of geo-political intervention. 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'.[55] This was in the context of an argument in favour of referring the situation in Syria to the ICC. Yet, US congressional records reveal that the US has actively campaigned against the establishment of ICC all along and it still has in its legal statutes The Hague Invasion Act, which authorises US military forces to rescue its personnel from the ICC docket in the Netherlands. The US instrumentalises 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'.[56] 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 to this is the fact that the US unsigned and, therefore has not ratified, the Rome Statute, which reveals the hypocrisy of talking up the merits of international law, while surreptitiously undermining it. International law is only a secondary afterthought, this is in line with the US predisposition to global rules which it has always believed were a ploy utilised by weaker

nations to constrain it actions and full spectrum dominance of the planet. As the international lawyer, Philippe Sands has also argued the US' 'approach to the ICC is symptomatic of a more generalised opposition to international rules and to multilateralism'.[57] The ICC is now an extension of global politicking and a terrain of power contestation, in effect the ICC is and will continue to be instrumentalised as a geo-political actor until the global system of governance is dismantled and remade.

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'.[58] Sengupta argues that in light of the ICC's evident instrumentalisation 'such actions have also politicised the notion of international criminal justice and in turn undermined its credibility'. 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'.[59]

The issue is no longer whether international criminal justice and the ICC is beholden to global power, the issue is now whether the ICC is subservient to global power. The secondary question is whether it is effectively being utilised as a form of legalised coercion of African countries or an instrument of judicial imperialism. 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?'.[60] This is reflective of the attitudes and mindsets of the global power elite and their posture towards Africa.

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 and encroaching corruption of their institution. Such officials need to make the argument internally in defence of the independence of the ICC, but their silence becomes collusion with global powers and they render them agents of judicial imperialism. 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 practising self-evident double standards and hypocrisy in light of the operationalisation of the ICC's politicised 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 politicised milieu in which they operate. ICC officials need to become political actors. Otherwise, they become lackeys and modern servants for the global paymasters and 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 legalised coercion or judicial imperialism.

Conclusion

The ICC intervention in Kenya illustrated how prosecutorial selectivity exposes the politicisation of the ICC and its instrumentalisation by various national actors to achieve their self-interests. All political parties manipulated the fraught politics around the ICC prosecutions during the 2013 Kenyan presidential elections. The inability of ICC Chief Prosecutor Bensouda to recognise this and extract the Court from this volatile political situation reveals either a political naivety or a callous indifference to the potential crisis that she could have precipitated in Kenya. The Kenyatta government managed to pan-Africanise their confrontation with the ICC, and paint it as an instrument of neo-colonial agendas, which eventually played to his advantage in getting the charges against him dropped. The Kenyan case has further antagonised the relationship between the AU and ICC, which requires innovative solutions in terms of it being addressed. Proposals on how to

address this antagonisation between the AU and ICC will be discussed in subsequent chapters.

Chapter 6

National Hegemonic Agendas and the Instrumentalisation of the ICC in Uganda and Côte d'Ivoire

Introduction

Commentators and analysts like to point out with much fanfare and self-righteous justification that a number of cases before the ICC have been referred by the states themselves. The inference is that this somehow legitimises and bestows a degree of credibility on the investigations and prosecutions that emanate from these referrals. Yet nothing could be further from the truth; in fact, virtually all of these processes have had political agendas. The agenda in brief is the intention by national politicians to maintain the hegemonic control over the state and to target their opponents by utilising the ICC to remove them from the national scene. In other words, what these commentators and analysts fail to point out is that the individuals who are referred to by these states are the political and military opponents of the incumbent leader of the particular country or neighbouring country.

This raises the important issue of how the ICC is being instrumentalised by leaders who have dubious legitimacy and contested claims to political power. This turns the ICC into a useful instrument to silence political and military opponents. In effect, by replicating the reality that manifests at an international level, the ICC has also become a useful tool for hegemonic agendas and action at a national level. This chapter will assess how this process of instrumentalisation manifested in Uganda and Côte d'Ivoire.

The fact that the ICC system, including the prosecutor and Pre-Trial Chambers, allows itself to be utilised in this nefarious manner, renders it an accomplice to the political strife within the situation countries in which it operates. By extension, the ICC system also harbours a moral responsibility for any future tension and violent conflict that will emanate in these target countries, which might lead to the death of innocent civilians. The critical problem is that officials of the ICC system, including the prosecutor and the judges of the Pre-Trial Chambers, do not harbour any such moral concerns. If they do, they have not articulated this publicly to alert the wider international public that their actions can in effect prolong violent conflict and postpone efforts to achieve peace.

This chapter will conclude that the hegemonic instrumentalisation of the Court will require the ICC system as a whole to explicitly accept that it can become part of the national political machinations. Ultimately, such a recognition would require the ICC system to ensure that it has effective political analysis of the situations that they intervene in to ensure that they are not adding fuel to the fire, by only selecting one group of perpetrators and privileging others within a given country. Such political analysis is not necessarily the domain of lawyers, even though some lawyers may possess the required analytical skills. This sort of political analysis requires personnel who are ideally from the region where the situation country is located.

The instrumentalisation of the ICC for nefarious political ends, by national hegemonic actors, has further eroded the legitimacy of the Court, notably in Africa, which is the only continent where it

is currently conducting prosecutions. Regrettably, this is once again an example of the international experimentation with the African continent, and the imposition of external approaches to post-conflict justice, which may not resonate with the local populations. Following this chapter the final part of this book will assess strategies that could be deployed to re-legtimise the ICC and ensure that justice is effectively delivered for victims.

Understanding national hegemonic politics

According to Krisch, international law is an instrument to exert power over others and so unequal power impacts on the ability to manipulate the legal order.[1] As we saw in Chapter 3, on the politicisation of international criminal tribunals, hegemonic geopolitics seeks to instrumentalise international law to achieve and maintain dominance, as well as regulate and pacify less powerful actors.[2] Similarily, hegemonic geopolitics can avoid compliance with international law in order to ensure self-protection or to shield cronies and clients from prosecution.

The hegemonic impulse, manifest in the crude exercise of power above all else, is equally reproduced and replicated at a domestic level in national politics. National political actors succumb to the hegemonic impulse when they deploy their regimes to exert undue influence in society. As Lebow and Kelly observe, 'all hegemons periodically succumb to the temptation to exploit their privileged status for selfish ends'.[3] National political actors instrumentalise international criminal courts to advance their self-interests and outmanoeuvre their opponents. This means utilising state referrals to condemn and neutralise their political and military opponents to face so-called 'justice'. National political actors can also utilise non-compliance to protect themselves or their clients and cronies from being subjected to the jurisdiction of international criminal tribunals.

The involvement of international criminal tribunals in the hegemonic agendas of national political actors makes these institutions the willing accomplices in domestic political dynamics, which can in extreme cases

contribute towards tension, crisis and even violent conflict. The paradox is therefore self-evident; international criminal tribunals that are self-professedly committed towards ensuring accountability for victims of violence can inadvertently contribute towards fuelling national tension and even precipitating conflict and thus generating new victims in the future.

This paradox seems to be either misunderstood or deliberately overlooked by the prosecutors who have presided over the more contemporary international criminal tribunals, including the ICTY, ICTR and the ICC. If prosecutors do not understand this paradox, then it is evident that they need to seek and incorporate political and conflict analysis into their case selection processes. If they indeed do understand this paradox then they also have a responsibility to communicate directly to the citizens of ICC situation countries to keep them informed of their decisions. Failure to ensure an effective communication strategy with the local population can lead to misperceptions and misunderstandings, which in the context of post-conflict societies can become highly explosive and destabilising.

As Van der Merwe observes, 'criminal trials, especially those that occur during societal transitions, are vulnerable to political exploitation'.[4] If prosecutors are deliberately overlooking the existence of national hegemonic agendas then they are in effect morally complicit in the political strife and tension that afflicts target societies. To date the two ICC prosecutors, Moreno-Ocampo and Bensouda, have preferred to continue to assert the apolitical nature of their interventions, and their commitment only to the application of legal criteria. As this book has reiterated, this strategy is either self-delusional or deliberately misleading, both of which are a deplorable abdication of responsibility for the wellbeing of deeply divided and highly volatile societies. Lebow and Kelly observe that 'few hegemons have the military and economic capability to repress their subjects indefinitely'.[5] Consequently, when the power of these hegemons wanes and a power vacuum is created, then the conditions are rife for the emergence of a potential future theatre of violence. Hence,

the moral responsibility of ICC prosecutors in colluding with national politicians should be much more clearly understood.

The instrumentalisation of the ICC in Uganda

The crisis in North Uganda

For the last three or more decades, the Lord's Resistance Army (LRA) has been in conflict with the government of Uganda. It is currently led by President Yoweri Museveni who came into power in 1986 through undemocratic processes designed to maintain his hegemonic control over the country. The LRA is a notorious militia which is prone to child abduction to replenish its military ranks. It is estimated that over 60 000 children have been abducted and approximately 2.8 million civilians have become Internally Displaced Persons (IDP) in camps across northern Uganda.

In 2006, a mediation effort between the Ugandan government and the LRA was convened in South Sudan and subsequently dubbed the Juba Peace Talks. The peace talks did not make significant headway and as a result war continues to persist in northern Uganda. This laid the foundation for the ICC intervention in order to address the violations that took place during the war.

A special division known as the International Crimes Division (ICD) was established within the High Court of Uganda and empowered to address the most serious crimes of concern to the international community as a whole. This was in effect the domestication of the provisions of the Rome Statute, which established the ICC, and an institutional structure that would be complementary to The Hague court.

On 6 January 2015, the United States 'military advisors' who are operational in tracking down LRA operatives, following a request from the Ugandan government, proclaimed that they were in custody of a senior LRA Commander, Brigadier Dominic Ongwen, who was

abducted, by the LRA, in 1999 when he was a ten-year-old child. Ongwen was a victim of the LRA militia, but subsequently went on to command its ranks and therefore he stands accused of being a perpetrator of human rights violations.

On 16 January 2015, the Ugandan-based think tank, the Refugee Law Project (RLP), located at Makerere University in Kampala, convened a consultative dialogue in Gulu, that brought together 60 opinion leaders under the topic of 'Ongwen's Justice Dilemma: Perspectives from Northern Uganda'.[6] This dialogue, which was jointly convened with the Northern Uganda Transitional Justice Working Group (NUTJWG), noted that the 'case has implications for international law and the fight against the LRA, as well as the broader prospects for sustainable peace, justice and reconciliation in ... Uganda'.[7]

The ICC intervention in Uganda

In December 2003, pursuant to Article 13(a) of the Rome Statute, the ICC became involved in Uganda after a state referral. In June 2004, the office of the prosecutor launched preliminary investigations. By June 2005, the ICC concluded that there was enough evidence to demonstrate that crimes within the jurisdiction of the Court may have been committed in Uganda. In the situation in Uganda, the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* is currently being heard before Pre-Trial Chamber II. The suspects are charged with significant crimes. Ongwen, for example, is allegedly criminally responsibile for seven counts of war crimes and crimes against humanity including: murder, enslavement, inflicting bodily harm, looting and cruel treatment of civilians.[8] In this case, warrants of arrest have been issued against four of these leading members of the Lord's Resistance Army, which is engaged in a conflict with the government of Uganda. The ICC intervention in Uganda has also generated a degree of controversy given the fact that the local community leaders have voiced a preference for pursuing peace with the LRA, rather than inviting a potential backlash from the movement,

which would further undermine their well-being.[9] In June 2006, peace talks between the Ugandan government and the LRA were launched but soon became subject to controversy and collapsed.

There is one school of thought, which suggests that one of the issues that led to the failure of the Juba Peace Agreement between the LRA and the government of Uganda was the issuing of ICC arrest warrants for the top five LRA commanders. The ICC's investigation and plan for prosecution means that the key interlocutors on the LRA side are subject to arrest. While this could serve the interests of retributive justice for all the atrocities that they have allegedly committed, it would not chart a course for how peacebuilding, healing and reconciliation could be consolidated in the war-affected region of Northern Uganda. In keeping with its criminal jurisdiction mandate, the ICC has not issued any recognition of the ongoing peace process in Uganda, nor is it required to do so. This notwithstanding, the ICC through the authority vested in the prosecutor by Article 53 could have sequenced the quest for punitive justice in Uganda in order to provide a basis for laying the foundations for peacebuilding through restorative justice processes.

The politics of the ICC intervention

When the ICC intervention was conceived in Uganda, it was limited to crimes committed after the date the Court was established. Critics in Uganda have suggested that 'the question of what justice should be done for crimes committed prior to 2002, before the ICC came into force remains unanswered ... this casts doubts on what justice the ICC will deliver to war victims'.[10] This question continues to plague the Ugandan situation. Furthermore, there are suggestions for the ICC to nuance its drive to prosecute these individuals because of the impact that this will have on promoting peace among the community and in the Northern Ugandan region. The key issue relating to the politicisation of the Court and its instrumentalisation by the Ugandan government is that the ICC is in effect engaged in selective prosecution because there are also members of the Ugandan Peoples Defence Forces (UPDF),

who are shielded by the hegemonic agendas of the president of Uganda, Yoweri Museveni, even though they also perpetrated serious crimes of international concern against other Ugandan civilians. The RLP report cites Bishop Ochola, a religious leader, who states that 'the government of Uganda cannot take Ongwen to court since it is also implicated in the same crimes'.[11] Ochola also went on to state that 'Ongwen is a victim of circumstance, so if the world wants to punish him twice, then that is another injustice'.[12]

The impact of the ICC intervention in Uganda

The report noted 'that Ongwen is a victim and will remain so because it was the government that failed its responsibility to protect him, prior to his abduction'[13] while he was on his way to school. This of course cannot detract from his agency as a human being with a conscience and a choice, even on pain of death, not to act in a manner that violates the human rights of other people. The RLP report concluded 'that Ongwen's fate is not a personal dilemma but a dilemma for Uganda and the ICC to grapple with'.[14] The RLP report also proposed that the ICC 're-open the entire investigation in northern Uganda, ensure full accountability for atrocities committed by all parties to the conflict, and accord Ongwen a fair hearing'.[15]

From LRA abductees to soldiers

The situation in Northern Uganda defies simplistic interpretations, because through their abductions the LRA militia who go on to commit violations are both victims and perpetrators. The RLP report proposed that the ICC 'must equally take into account the circumstances of Ongwen's abduction and investigate the failures to protect him'.[16] In particular, Sheikh Musa Kilil, a member of the Acholi Religious Leaders Peace Initiative (ARLPI), who is cited in the RLP report, argued that 'the government, army, police, community, parents, school, all different groups or categories who failed to protect this child

from abduction are liable'.[17] This was a sentiment that was echoed in the RLP meeting, based on the notion that 'the state bears the greatest responsibility' for protecting its citizens, which Uganda failed to do in the case of Ongwen's childhood abduction.

Article 7(1)(c) of the Rome Statute stipulates 'enslavement' as a crime against humanity, and so the abduction of children, which Ongwen suffered, is a violation that falls under the purview of the Rome Statute. Furthermore, Article 7(1)(e) states that the 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law' is equally a crime against humanity. Even though these crimes were committed prior to the Rome Statute coming into force, it does not negate Ongwen's victimhood. Regrettably, this is an issue that international criminal justice is not equipped to address. More specifically, the Ongwen case reveals the paradox of pursuing individual culpability for alleged perpetrators, who themselves may be victims under the provisions of the Rome Statute. As will be discussed later in Chapter 7, on concurrent jurisdiction, this conundrum cannot be addressed exclusively through the administration of international criminal justice. It requires a differentiated accountability framework, which can where necessary apply restorative justice specifically in cases in which perpetrators were once victims.

The Ongwen surrender and transfer to the ICC

Museveni was vocal in calling for African countries to pull out of the ICC, yet shortly thereafter he handed over Ongwen, the former LRA commander, directly to the Court in The Hague. This reveals the crude instrumentalisation of the ICC to confront and neutralise military and political opponents as a means of maintaining his hegemonic control of the Ugandan state. Ongwen's surrender to the Seleka armed militia in the Central African Republic (CAR) was unexpected and raised a number of dilemmas for Museveni's government. Ongwen was subsequently handed over to the US Special Forces who were stationed in the CAR, illustrating the extensive imperial reach of America

across the African continent. There was a concern that attempting to adjudicate his crimes through the International Crimes Division (ICD) of the Ugandan judiciary, would be subject to political manipulation. The RLP report suggested that 'the primary objection to the ICC as a forum of dealing with war crimes in Uganda has been and remains its failure to hold both sides of the conflict accountable'.[18] Consequently, the sentiment is that 'the ICC must re-open its investigations into the Northern Uganda situation if it is fully to appreciate the justice dilemmas raised by Ongwen's case'.[19] In effect, 'all parties to the conflict must be held accountable for justice to be done'.[20]

The appeal of local justice processes

The RLP report noted that some commentators in Uganda 'believe that the ICC should truly complement Uganda's domestic processes by honouring the local justice framework agreed in Juba ... before he faces trial at The Hague'.[21] The idea is that local justice processes will be able to address the persistence of impunity and offer some redress to the survivors of past violations. However, there are observers who believe that these local justice institutions do not achieve the same standard of judicial probity as the established mechanisms of international justice. Nevertheless, some participants in the Gulu dialogue believed that local justice processes should be given precedence in this particular case because 'in the absence of such measures, the ICC will be putting a victim on the stand'.[22] This will be explored further in chapter 7.

The instrumentalisation of the ICC in Côte d'Ivoire

The crisis in Côte d'Ivoire

A former colony of France, Côte d'Ivoire (formerly the Ivory Coast) endured years of misrule and economic mismanagement under the 33-year rule of Felix Houphouët-Boigny, between 1960 and 1993. Houphouët-Boigny, an Ivoirian, served as a minister in several French

governments and was a willing accomplice to the West's agenda of containing the spread of communism in Africa. This included supporting covert destabilisation operations against some of his neighbouring countries, to depose leaders who were considered not to be pro-Western. Following his death Côte d'Ivoire endured a period of instability with military coups and internal tension. In 2002, a full-scale civil war erupted in the country fuelled by ethnic animosity and identity politics. The notion of Ivoirité was introduced as a means of 'othering' groups whose origins were from neighbouring countries, such as Burkina Faso, but who were at the time living in Côte d'Ivoire. In 2004, France engaged directly in fighting, which further destabilised the country. The UN intervened through a number of peacemaking and peacekeeping initiatives. The constant fighting meant that conditions were not appropriate to convene elections. Under the regime of President Laurent Gbagbo, the polls that were designated for 2005 were postponed to 2010, which set up the country for a potentially tense aftermath.

The outcome of the November 2010 election was disputed, with Gbagbo refusing to accept defeat in the polls. This triggered violent events across the country, in which approximately 3 000 people were killed. The allegations were that pro-Gbagbo forces attacked civilian populations in Abidjan, the capital city, as well as in the west of the country, whom they believed were supporters of the opposition candidate Alassane Ouattara. Consequently, the suggestion is that attacks were targeting specific ethnic groups.

The United Nations recognised Alassane Ouattara as the winner of the November 2010 election. The incumbent president Laurent Gbagbo was charged in relation to the widespread violence that gripped the country. Gbagbo, his wife and close associates rejected the electoral outcome, and evaded any consequences until they were arrested in April 2011, by a coalition of forces including French troops and the UN.

Gbagbo and his wife were charged in Côte d'Ivoire 'with economic crimes, including looting, armed robbery and embezzlement'.[23]

Subsequently, Gbagbo was duly transferred to The Hague. Towards the end of 2012, the ICC Pre-Trial Chamber I assessed the charges against former president Laurent Gbagbo and found him fit to stand trial. Gbagbo's trial, together with that of Charles Blé Goudé, a former youth minister in Gbagbo's regime, was scheduled to begin in November 2015. This was a convenient outcome for Ouattara who no longer had to contend with his brand of politics.

The politics of the ICC intervention

In 1998, Côte d'Ivoire signed the Rome Statute, but did not proceed to ratify it or domesticate its provisions in national legislation. In June 2011, Moreno-Ocampo requested authorisation from the Court to initiate preliminary investigations into the violence that afflicted Côte d'Ivoire following the 2010 elections. On 12 December 2013, the Ivorian parliament passed legislation to amend the national constitution and allow the ratification of the Rome Statute. President Alassane Ouattara duly enacted the legislation on 13 December 2013. On 20 December 2013, the parliament adopted additional legislation authorising the government to ratify the Rome Statute.

The rapid sequence and succession of these events suggests that there was a degree of coordination between the presidency and parliament to hasten the ICC's jurisdiction over the country. Comparable processes in other countries illustrate how legislative processes are typically gradual and cautious processes. The fact that Côte d'Ivoire signed the Rome Statute in 1998 and proceeded to place the ratification on the back burner until it became politically expedient to do so, suggests that there are more than rule of law aspects to the rapid ratification process that preceded the 2010 conflict. In effect, the rapid ratification event reveals how Ouattara's desire to dispose of his political opponent Gbagbo led to the instrumentalisation of the ICC system and its processes, in a manner that played into the hands of a leader intent on securing the hegemonic control of the state. The politicisation of the ICC system becomes more poignant when we take into account President Ouattara's repeated proclamations that 'even his supporters who committed

crimes would face justice', yet to date 'only supporters of Mr Gbagbo have been charged'.[24] This has not materialised and consequently the instrumentalisation of the ICC to pursue national hegemonic agendas in Cote d'Ivoire becomes a self-evident reality. Specifically, Outtara's transmission of his political opponent to The Hague and his failure to subject his own personnel to the accountability processes of the ICC, reveals the duplicitous way in which he instrumentalised the ICC to serve his own agenda.

The curious case of Mrs Gbagbo

The ICC issued an arrest warrant for Mrs Simone Gbagbo, the wife of the former president of Côte d'Ivoire. Mrs Gbagbo was charged with four counts of alleged crimes against humanity, as an indirect co-perpetrator, including: a) murder; b) rape and other sexual violence; c) persecution; and d) other inhuman acts, committed between 16 December 2010 and 12 April 2011.[25] The ICC Pre-Trial judges alleged that Mrs Gbagbo was part of an 'inner cirlce' that exercised 'joint control over the crimes' and who 'made a coordinated and essential contribution to the realisation of the plan'.[26]

Initially, Ouattara resisted transferring Simone Gbagbo to the ICC, and even challenged the admissibility of the case to the ICC on 1 October 2013, arguing that 'a case against the same person for the same crime is being prosecuted at the national level'.[27] On 11 December 2014, the Pre-Trial Chamber I, rejected Côte d'Ivoire's challenge to the admissibility of Mrs Gbagbo's case to the ICC, and duly requested the government to transfer her to The Hague 'without delay'. The government of Côte d'Ivoire appealed this decision.

This is a curious case because Mrs Gbagbo was unelected, and not the chief executive who had authority over the government of the state, even though she was influential in her own right. The charge of indirect co-perpetrator could easily apply to a number of Gbagbo's other political lieutenants and military leaders. The charge in effect presupposes that Mrs Gbagbo was influential enough to control her husband's behaviour. The fact that other senior officials of the state

during Gbagbo's regime have not yet been subjected to a similar 'trial by inference' that Mrs Gbagbo has endured, suggested that there might be more at stake. Ultimately, in March 2017, an Ivoirian court acquitted Mrs Gbagbo of her alleged war crimes.[28]

The impact of the ICC intervention in Côte d'Ivoire: The de-legitimation of the ICC

Despite a UN commission of inquiry implicating both pro-Ouattara and pro-Gbagbo forces, the ICC has only pursued individuals who were in the Gbagbo camp, which has fuelled perceptions about how the ICC was instrumentalised to achieve political goals. Elizabeth Evenson, the senior international justice counsel at the international NGO Human Rights Watch has argued that 'the focus so far on pro-Gbagbo forces has deeply polarised opinion within Côte d'Ivoire'.[29] The polarisation of opinion has contributed to the progressive de-legitimation of the ICC and undermined its credibility, not only in Côte d'Ivoire, but also across the rest of Africa and around the world.

Implicating the ICC in Ivorian politics

As the August 2015 Human Rights Watch report on Côte d'Ivoire observed, 'removing Gbagbo from the Ivorian political scene was something that the Ivorian government wanted desperately'.[30] Consequently, on this particular issue Human Rights Watch concludes that 'the Office of the Prosecutor's decision in this regard can be questioned'.[31] Specifically, during a group discussion with civil society representatives convened by Human Rights Watch, one participant lamented that 'the main perception is that the ICC is only working with people in power ... it is looked at as a means of eliminating [political] opponents'.[32] Indeed, the HRW report observes that 'the risk that a one-sided strategy would instead polarise opinion about the court and undermine perceptions of its legitimacy was entirely predictable, given the deep politico-ethnic divisions in the country'.[33]

The escalation of crisis due to the ICC intervention

The danger is that the disgruntled elements within Ivoirian society will eventually feel that their marginalisation and selective victimisation in the hands of national politicians has to be responded to through other means. This raises the very real possibility that the unresolved societal issues, combined with a sense of alienation, buttressed by the perception of being selectively targeted through the ICC's interventions, could precipitate the escalation of crisis in the country. Given Côte d'Ivoire's history of violence, this is not a proposition that should be taken too lightly.

The implications of the instrumentalisation of the ICC on its operations

The Human Rights Watch report argues that 'the ICC's work is *ripe for political manipulation*'.[34] To ensure that the ICC does not become instrumentalised as part of the political machinations of national hegemonic actors, the Court's system needs to undertake some important changes. The one-sided nature of the ICC's prosecutions, combined with Ouattara's reluctance to subject his cronies to the Rome Statute, as well as his targeting of pro-Gbagbo forces, including the curious case of Mrs Gbagbo, has polarised opinion and de-legitimated the ICC in the eyes of a section of the Ivorian population. The victims of the crisis who should be at the centre of the efforts to pursue accountability have in effect been marginalised as pawns in larger national political processes. Van der Merwe notes, 'the greatest risk in such a scenario is injustice to the defendants and distortion of the historical record'.[35]

ICC interventions and the re-escalation of tension in situation countries

Van der Merwe suggests that criminal trials that are manipulated by national hegemonic actors are 'particularly dangerous in a deeply divided society where politically compromised criminal trials might serve only to further embed the social antagonism that may lead to

mass atrocity'.[36] In effect, the pursuit of prosecutorial justice may in fact foment and fuel further violent conflict and the death of innocent civilians who are caught up in the maelstrom of political machinations.

Strategies for mitigating against the instrumentalisation of the ICC

Adopt a paradigm shift: Embrace the fact that the ICC is involved in 'doing' politics

As suggested in Chapter 3, on the politicisation of international criminal tribunals, it is necessary for judicial institutions involved in intervening during political transition to acknowledge that they are deeply implicated in political processes. This would require a paradigm shift from the standard orthodoxy espoused by international criminal lawyers and jurists, who continue to reiterate in a parrot fashion, that they only take into account the legal criteria when selecting cases and prosecuting perpetrators. As noted from Chapter 3, international criminal lawyers and jurists need to state explicitly that they are involved in political processes and that they are not only focusing exclusively on the law.

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 a 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.

Establish an OTP division of political analysis and ensure outreach to situation countries

The Court's chief prosecutor, Fatou Bensouda, needs to establish an Office of the Prosecutor (OTP) Division of Political Analysis headed by a senior political adviser to act as a liaison with political organisations such as the African Union. Given Moreno-Ocampo's and Bensouda's protestations that they do not engage in the politics of their situation countries and only utilise the legal criteria, such a transformation will require reframing the debate entirely and emphasis that international criminal justice is by the nature of what it seeks to pursue embedded in a political process. The exact modalities of such a division need to be further enumerated and developed.

Issue an office of the prosecutor's policy paper on its processes of political analysis

Bensouda should issue a series of OTP policy papers on sequencing the administration of justice to enable the promotion of peacebuilding, particularly in countries that still are affected by war. This will enable governments and civic actors to know where the ICC situates and positions itself with regards to pursuing prosecutions in fragile war-affected countries. Such a policy paper would also indicate that the OTP is cognisant of the impact of its criminal justice interventions on the dynamics of societal peacebuilding. This document in fact should already have been issued, since the issue of how to sequence the administration of justice to enable and enhance peacebuilding remains a vexed question.

Conclusion

This chapter assessed how national hegemonic behaviour by political actors can contribute to the de-legitimation of the ICC system. By analysing the politics around the ICC interventions in Uganda and Côte d'Ivoire, this chapter illustrated that, far from being a benign

judicial entity that operates in isolation from the political sphere, the Court system is deeply implicated in domestic political processes. This has fundamental implications about the claim to impartiality that is implied in the provisions of the Rome Statute, but negated by the actions of national politicians particularly when they collude with the ICC system.

This chapter argued that the national instrumentalisation of the ICC system is in effect a replication of the political manipulation that occurs at the global level, notably through the machinations of the P5 members of the UN Security Council. This factor suggests that the solutions that are necessary to address these structural flaws within the current system cannot be found by appealing back to the very same international order of states. The way forward in the pursuit of justice that is responsive to the needs of victims will require some new thinking and radical transformation which will be discussed in the final two chapters.

PART 3:
Analysis and Normative Proposals

Chapter 7

Concurrent Jurisdiction: Victim-Driven Justice and the Pan-African Contestation of Judicial Imperialism

Introduction

As discussed in Chapter 1, international law emerged from the domestic political, cultural and legal norms of European societies. Subsequently, international law has been projected onto the world stage as a universally applicable system of norms and rules, which should frame and guide the way societies live. If Eurocentric domestic norms can inform international law, the question arises as to whether other non-European societies can also extract, distil and proffer certain norms, which can inform the reconstruction and redefinition of international law. The response is self-evidently in the affirmative. The modern regime of international law is to a large extent a work-in-progress as a normative framework. Its current corpus of law does not foreclose the possibility that other sources of influence can be drawn

upon to reorient this normative framework. The way forward for international law will be to not continue to pretend that its origins were culturally inclusive and to embrace the possibility of new ways of conceptualising and framing international law by drawing from other cultures around the world.

This chapter proposes a notion of concurrent jurisdiction as a framework, which can enable judicial systems to operate at the level at which they are most effective and in a manner that will be most responsive to the needs of victims. This chapter will also be concerned with the prospects for victim-driven approaches to confronting impunity and ensuring accountability for violations of human dignity. It will assess the moves towards enabling the African Court of Justice and Human Rights (ACJHR) to prosecute the most serious crimes of international concern, as stipulated in the Rome Statute. This chapter will assess the politicisation of the African Court as a response to the selective prosecution of Africans by the ICC system. In addition, this chapter will assess the potential role of tradition-based justice, mindful of the embedded nature of gender bias in virtually all human cultures. This chapter will conclude with an assessment of how rather than viewing the emergence of alternative sources and framings of international criminal law as a threat to the ICC or as an attempt by regional actors to evade justice, they should be viewed for their potential to create concurrent jurisdictions to address the violations in situations of conflict. This chapter also proposes the idea of concurrent jurisdiction as a way for international criminal law to complement and coexist within regional, national and communal judicial institutions.

Concurrent jurisdiction: Rethinking the complementarity of judicial institutions

A 2015 Human Rights Watch report on Côte d'Ivoire observed that 'the benefits of justice are difficult to realise unless efforts to hold perpetrators to account are also responsive to the concerns of

affected communities and clearly understood by those communities'.[1] Van der Merwe states that 'cultural relativists ... argue that the ideals of international criminal justice and universal human rights are in reality the liberal legal ideals of dominant and mostly western states, imposed under the guise of universal ideals or international justice'.[2] He further argues 'that the dominant force in international law, liberal legalism drives hegemonic legal culture by subverting minority legal culture through using its ascendancy to solidify its own dominance'.[3] In order to redress the dominance of hegemonic Western legal culture in what is called international law it is necessary to operationalise a system of concurrent jurisdiction in order to ensure that 'efforts to hold perpetrators to account are also responsive to the concerns of the affected communities' as suggested by the Human Rights Watch report.

The operationalisation of a framework of concurrent jurisdiction is premised on an acknowledgement that violations take place at different levels of society and that justice systems designed for one level may not be appropriate for another level. A system of concurrent jurisdiction therefore encourages different courts to pursue judicial redress and accountability at the level within which they are most likely to be effective in administering justice. The attempt to operationalise an appreciation for concurrent jurisdiction is also an attempt to try and make judicial processes more responsive to the victims, by drawing them into the processes of pursuing redress for the violations that they have endured. Consequently, ICC interventions will not necessary be the most appropriate framework to deploy in every situation in which there have been mass atrocities. Through the principle of complementarity, the ICC system acknowledges that it is a court of last resort, yet in some situations such as Libya, the ICC has been the court of first instance. Consequently, complementarity exists in theory but does not always manifest itself in practice. The need to develop a concurrent jurisdiction stems from the need to deepen the interpretations of the notion of complementarity, and to acknowledge the existence and validity of other alternative mechanisms of accountability.

Furthermore, the Rome Statute stipulates a relationship between the ICC and nation-states, but it does not elaborate on the prospects for a relationship between the ICC and regional or continental courts. On this basis, it is worthwhile to explore whether the African Court of Justice and Human Rights can serve as a vehicle for operationalising concurrent jurisdiction with respect to the crimes stipulated in the Rome Statute. As chapter 6 demonstrated, the Ongwen case, in Uganda, reveals the paradox of pursuing individual culpability for alleged perpetrators, who themselves may be victims under the provisions of the Rome Statute. On concurrent jurisdiction, this conundrum cannot be addressed exclusively through the administration of international criminal justice and it would require a differentiated accountability framework, which can genuinely engage with the issue of how to approach victims and perpetrators. The RLP report states that 'there is need to complement the ICC proceedings with domestic processes that provide acknowledgement to the multiple victims of the conflict, provide healing to survivors and the affected community, and take steps to promote national reconciliation and guarantee non-recurrence'.[4] The RLP report argued that the accused LRA commander, Ongwen's 'prosecution at The Hague must not jeopardise the meaningful and robust accountability and reconciliation mechanisms agreed in Juba for post-conflict northern Uganda'.[5] Consequently, tradition-based justice is over dismissed as not living up to some arbitrary 'international standard', however as previous chapters have demonstrated, the current practice of international criminal justice and the persistence of judicial imperialism have delegitimised the ICC's role in Africa. The prospective role of tradition-based justice will be discussed later in this chapter.

The pan-Africanisation of international criminal law

The AU's critique of the politicisation of international criminal justice

The Constitutive Act of the African Union of 2000, empowers the body 'to intervene in a member state pursuant to a decision of the Assembly

in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity ... upon the recommendation of the Peace and Security Council'.[6] Consequently, from the outset the AU's policy documents sought to internalise the organisation's commitment to confront impunity. Along these lines the AU Constitutive Act identifies the need to create an AU Court of Justice and recognises the continued functioning of the African Court on Human and Peoples' Rights. The AU is a political organisation and thus it would ultimately operate along the lines of pan-African solidarity when it came to issues of international criminal justice. Along these lines, the AU has repeatedly reiterated its concern about the instrumentalisation and politicisation of the international criminal justice system. For example, the AU has expressed its objection to the abuse of the principle of universal jurisdiction, particularly in instances in which African statesmen and women are disproportionately subject to international law, when compared to other regions of the world.

The African Court of Justice and Human Rights

The AU has subsequently embarked on the elaboration of its own international criminal law systems. As Van der Merwe observes, 'international criminal courts are politically negotiated and supported (or not)'.[7] This applies directly to the pan-Africanisation of international law. In particular, as a means to offset the judicial imperialism that was being deployed by the West as an instrument for coercion and control, African countries have politically 'birthed' their own version of a regional court to adjudicate international crimes.

On 1 July 2008, member states of the African Union adopted the *Protocol on the Statute of the African Court of Justice and Human Rights*, which in effect 'merged the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into a single Court'.[8] Subsequently, the AU adopted the *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (hereafter Protocol). The Protocol will enter into force upon the

ratification of the Protocol by 15 member states of the African Union, with instruments of ratification being deposited with the chairperson of the AU Commission. The AU also intends to register the entry into force of the Court with the secretariat of the United Nations.

The organs of the Court include the: i) Presidency; ii) Office of the Prosecutor; iii) Registry; and iv) Defence Office. The resonances with the structures of the ICC are self-evident, and also indicative of the intentions to create a parallel institution to adjudicate international crimes. Article 3(1) of the Protocol stipulates that 'the Court is vested with an original and appellate jurisdiction, including *international criminal jurisdiction*'.[9] The establishment of this parallel mandate to that of the ICC provides an opening to consider how a framework of concurrent jurisdiction will in effect be ushered in by the entry into force of the Protocol of the African Court. In addition, the Court has the 'jurisdiction to hear matters or appeals as may be referred to it in any other agreements that the member states or the regional economic communities or other international organisation *recognised* by the African Union'.[10] The word 'recognition' is significant in this instance since it gives the AU the means not to engage with international organisations that it is not prepared to recognise.

The statute of the African Court of Justice and Human Rights

According to the merged Statute of the African Court of Justice and Human Rights, the structures of the institution will include three sections, namely: i) a General Affairs Section; ii) a Human and Peoples' Rights Section; and iii) an International Criminal Law Section.[11] Furthermore, the International Criminal Law Section will have three chambers, including a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber, highlighting again the parallel structures when contrasted to the Rome Statute. According to Article 7, the International Criminal Law Section is 'competent to hear all cases relating to the crimes specified in the Statute'. These include the international crimes stipulated in the Constitutive Act of the African

Union. They are further elaborated in Article 28A, which states that 'the International Criminal Law Section of the Court shall have the power to try persons for the crimes' of: genocide; crimes against humanity; war crimes; the crime of unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking of persons; trafficking of drugs; trafficking of hazardous wastes; illicit exploitation of natural resources; and the crime of aggression.[12] These crimes will not be subject to any statute of limitations. This panoply of crimes introduces some interesting departures from the crimes framed in the Rome Statute, and is reflective of the current challenges that the African continent is confronting. Interestingly, some crimes will apply directly to external non-African actors who engage in these crimes either as planners or willing executioners, notably of the crimes relating to mercenarism, money laundering, trafficking of persons, drugs and hazardous wastes, as well as illicit extraction and aggression. These commissions of these crimes by non-African actors intervening across the continent could theoretically lead to a situation in which Western operatives end up on the docket of the African Court in Arusha, in what would be a reciprocal outcome when contrasted to the ICC's current prosecutorial caseload, which includes only Africans. This is particularly relevant when it relates to the crime of aggression, given the proclivity of Western powers, notably the US and France, to intervene militarily across Africa, as though the colonial era was still an ongoing concern. China has also placed African countries on notice and indicated that it would gradually scale up its military presence on the continent as part of its ongoing agenda to extract the continent's natural resource in collusion with corrupt domestic leaders. Article 28A of the Statute stipulates that the 'crime of aggression means the planning preparation, initiation or execution, by a person ... state or organisation ... of a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union'.[13] More specifically, Article 28M notes that 'regardless of a declaration of war by a state, group of states, organisations of states, or non-state actors or by a foreign entity', the crime of aggression shall include,

'the use of armed forces against the sovereignty, territorial integrity and political independence of any state'. These will include invasions, bombardment, blockades, air, land, or sea attacks or harbouring armed militia. The AU Assembly of Heads of State and Government can also incorporate additional crimes to keep up with the developments of international law.

The concurrent jurisdiction of the African Court

Article 46H of the Statute of the African Court stipulates that the institution will 'be complementary to that of National Courts, and to the Courts of the regional economic communities'.[14] The African Court will be empowered to try a case if an AU member state is 'unwilling to investigate or prosecute in a particular case'.[15] This clearly demarcates the parameters of the Africa Court vis-a-vis other sub-regional and national courts, which is at the core of a system of concurrent jurisdiction. The issue of which court has the preferred competency to oversee the accountability processes for perpetrators can only be addressed through an understanding of the specific context in which the violations took place.

The operationalisation of a framework of concurrent jurisdiction is premised on an acknowledgement that violations take place at different levels of society, and that justice systems designed for one level may not be appropriate for another level. The attempt to operationalise an appreciation for concurrent jurisdiction is also an attempt to try and make judicial processes more responsive to the victims, by drawing them into the processes of pursuing redress for the violations that they have endured.

The *Apriori* politicisation of the African court

In an interesting attempt to address the accusations of the ICC's prosecutorial selectivity in determining cases, which are tinged with political considerations, Article 46A(1) of the Statute of the African

Court states that 'all accused shall be equal before the Court'. In a contradictory manner, Article 46A bis of the Statute outlines the immunities granted by stating that:

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

Through this statement the Statute of the African Court makes a definitive departure from the provisions of the Rome Statute and reveals in sharp relief the essentially political nature of international criminal law. In effect, the Court will not subject African statesmen and states-women to prosecution for acts committed during their term of office. This, in effect, insulates African governments whose operatives might be guilty of committing the stipulated crimes. However, it does not insulate leaders of Western or Eastern governments who might be involved in conducting their nefarious extractive and exploitative agendas on the African continent.

In a sense Article 46A bis in the Malabo Protocol is a direct riposte to the sense of persecution that the instrumentalisation and politicisation of the ICC precipitated among African states. Specifically, the ability of the P5 of the UN Security Council to practice judicial imperialism at the global level revealed the perils of instrumentalising and politicising international criminal tribunals. Interestingly the African Court can now be turned into an instrument to prosecute non-African actors, and their African accomplices, who engage in the list of crimes outlined above. The prosecution of American, French, British, Chinese and Russian operatives who are accused for the crimes stipulated in the Statute is not beyond the realm of possibility, provided that African countries cooperate in transferring them to the Court in Arusha. The fact that the nefarious US Bilateral Immunity Agreements do not apply to the Statute of the African Court means covert operatives who

operate without the express sanction of countries on the continent could in effect find themselves in the Arusha docket.

The self-evident reality that international criminal law is always political cannot be conveyed more forcefully than through the existence of Article 46A bis. Regrettably, this move to provide immunity to African state officials does not live up to the demand of aspiring to and pursuing victim-driven justice. More specifically, to the extent that the African Court has been conceived and operationalised by Africans, it will adjudicate on crimes that are committed against Africans by other Africans. On this basis, even though the African Court is continentally owned, it will probably fall short of achieving victim-driven justice, because it will largely be administered by Africa's legal and juridical elite, to the exclusion of the active and genuine participation of victims from the war-affected regions of the continent.

The emergence of the African Court is more of an attempt to offset and mitigate against the geopolitics of Western judicial imperialism, rather than the manifestation of some newfound respect for the international rule of criminal law among the continent's leaders. The reality of the instrumentalisation of the ICC by Western powers has in effect spawned a regional variant whose primary objective is to contest the hegemonic dominance and misbehaviour of powerful states. Yet in pursuing this objective the African Court has been dismembered of the ability to pursue heads of state and government, which replicates the immunity that the P5 members of the UNSC exercise from any form of ICC intervention. The Statute establishing the African Court, is the continent's own version of the infamous US Bilateral Immunity Agreements, but designated especially for heads of state in the continent.

Tradition-based justice in Africa

Since the African Court is unlikely to deliver for all victims, the quest for victim-driven justice must be directed elsewhere. Transitional justice is now acknowledged as a central feature of efforts to restore peace and stability to societies that were previously suppressed by authoritarian

regimes, impacted by regime change, or affected by conflict. Transitional justice in this context is understood as endeavouring to promote a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims, and start a process of reconciliation and transformation towards a more just and humane society. The field of transitional justice, however, has become inundated with concepts and frameworks developed outside Africa. Consequently, the dominant discourses in transitional justice demonstrate this external bias. There is a need to draw upon Africa's knowledge systems, its traditions and culture of jurisprudence to articulate and document indigenous models of transitional justice. However, such an activity has to be informed by the fact that Africa is not a homogenous entity and within its societies there is a vast array of different approaches to dealing with the issues of peace and justice. This chapter will discuss where we can begin to draw upon indigenous sources to develop African models of transitional justice.

Culture gives distinctiveness to a particular society's way of doing things. This chapter will discuss how there have always been customary rules, social sanctions and ethical precepts to regulate African societies. While each society has its own specific approach to dealing with social problems, some common themes emerge across societies. In the majority of African communities studies have shown that the individual is not considered a separate, autonomous entity but always part of a larger collective of human beings.[16] Family groupings give way to the formation of clan communities and then ethnic nations. These groupings had a responsibility to maintain social harmony. Due to the importance of maintaining harmony, peaceful approaches to resolving disputes were preferable to more confrontational and belligerent strategies (which were also occasionally utilised). This chapter will therefore discuss how most African societies have developed rich cultural traditions of transitional and restorative justice as well as reconciliation for preserving harmony, making and building peace and maintaining this peace by cultivating group solidarity and avoiding aggression and violence.[17]

Understanding the role of justice in African culture

Some African conceptions of the individual, and their role and place in society, can provide an alternative framework for establishing more harmonious political and economic relations at local, national, continental and even global levels.[18] Through commonly found African emphasis on the value of social harmony and non-adversarial dispute resolution, there are lessons that can be learned and applied to contemporary conflict situations. It is necessary to question the notion of a universal conception of justice that can be advanced by a 'world court', like the international criminal court. This universalising tendency is often driven by a 'civilising' and 'modernising' imperative, which self-evidently marginalises the 'other's' conception of justice. It regrettably assumes that there is one way of conceptualising justice, which is erroneous at best and coercive and alienating at worst. Instead, we need to embrace the idea that notions of justice can be locally specific and culturally defined. As highlighted at the beginning of this chapter, the purpose of justice is to achieve redress and ensure accountability for harm done. If cultural forms of justice can achieve this in a way that does not rely exclusively on a prosecutorial imperative, then it is vital to draw lessons from such approaches. As discussed above, African conceptions of justice emphasise communal harmony over the general tendency within Western notions of justice to prioritise individual culpability.

As with most human societies, African communities also tended to be patriarchal in nature, which often led to discrimination on the basis of gender. Patriarchal cultures have influenced legal systems, with the result that governance structures have tended to uphold the unequal status of women. As we proceed into the second decade of the 21st century, it is clear that gender-sensitive strategies for restoring the human dignity of all members of society need to be adopted. This means challenging the social norms that try to enforce the subservience of women to men. The fact that there are these inequalities does not, however, mean that indigenous approaches to peacebuilding have nothing to teach us. Many of these approaches offer progressive value

systems for maintaining social relationships and promoting harmonious coexistence, which can provide insights that can contribute toward building peace in Africa. We shall now assess some examples of these traditional approaches.

Ubuntu approaches to justice and reconciliation

This section outlines the five stages of the peace and reconciliation processes found among ubuntu societies, including: acknowledgement of guilt, showing remorse and repenting, asking for and giving forgiveness, and paying compensation or reparation as a prelude to reconciliation. Potential lessons for peace and reconciliation efforts are highlighted with the premise that the ubuntu approach to the building of human relationships, while rooted in local tradition, can also offer an example to the world.

Desmond Tutu reflects in his book *No Future Without Forgiveness* that he drew upon both his Christian and cultural values when carrying out his duties as the chairman of the South African Truth and Reconciliation Commission.[19] In particular, he highlights that he constantly referred to the notion of ubuntu when he was guiding and advising witnesses, victims and perpetrators during the commission hearings.

Ubuntu is found in diverse forms in many societies in various parts of Africa. More specifically among the Bantu languages of East, Central and Southern Africa the concept of ubuntu is a cultural worldview that tries to capture the essence of what it means to be human. In southern Africa, we find its clearest articulation within the Nguni group of languages.

In terms of its definition, Tutu observes that:

> ubuntu is very difficult to render into a Western language. It speaks to the very essence of being human. When you want to give high praise to someone we say, '*Yu, u nobuntu*'; he or she has ubuntu. This means that they are generous, hospitable, friendly, caring and compassionate. They share

> what they have. It also means that my humanity is caught up, is inextricably bound up, in theirs. We belong in a bundle of life. We say, 'a person is a person through other people' (in Xhosa *Umntu ngumntu ngabanye abantu* and in Zulu *Umuntu ngumuntu ngabanye abantu*…). I am human because I belong, I participate, I share. A person with ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good; for he or she has a proper self-assurance that comes with knowing that he or she belongs in a greater whole and is diminished when others are humiliated, or diminished when others are tortured or oppressed, or treated as if they were less than who they are.[20]

As a 'human being through other human beings', it follows that what we do to others feeds through the interwoven fabric of social, economic and political relationships to eventually impact upon us as well. Even the supporters of apartheid were in a sense, victims of the brutalising system from which they benefited economically and politically: it distorted their view of their relationship with other human beings, which then impacted upon their own sense of security and freedom from fear. As Tutu observes: 'in the process of dehumanising another, in inflicting untold harm and suffering, the perpetrator was inexorably being dehumanised as well'.[21]

This notion of ubuntu sheds light on the importance of peacemaking through the principles of reciprocity, inclusivity and a sense of shared destiny between peoples. It provides a value system for giving and receiving forgiveness. It provides a rationale for sacrificing or letting go of the desire to take revenge for past wrongs. It provides an inspiration and suggests guidelines for societies and their governments on how to establish laws, which will promote reconciliation. In short, it can culturally re-inform our practical efforts to build peace and heal our traumatised communities. It is to be noted that the principles found in ubuntu are not unique; as indicated earlier, they can be found in diverse

forms in other cultures and traditions. Nevertheless, an ongoing reflection and reappraisal of this notion of ubuntu can serve to re-emphasise the essential unity of humanity and gradually promote attitudes and values based on the sharing of resources and on cooperation and collaboration in the resolution of our common problems.[22]

How, then, were the principles of ubuntu traditionally articulated and translated into practical peacemaking processes? Ubuntu societies maintained conflict resolution and reconciliation mechanisms, which also served as institutions for maintaining law and order within society. These mechanisms pre-dated colonialism and continue to exist and function today.[23] Ubuntu societies place a high value on communal life; maintaining positive relations within the society is a collective task in which everyone is involved. A dispute between fellow members of a society is perceived not merely as a matter of curiosity over the affairs of one's neighbour; in a very real sense an emerging conflict belongs to the whole community. According to the notion of ubuntu, each member of the community is linked to each of the disputants, be they victims or perpetrators. If everybody is willing to acknowledge this (that is, to accept the principles of ubuntu), then people may either feel a sense of having been wronged, or a sense of responsibility for the wrong that has been committed. Due to this linkage, a law-breaking individual transforms their group into a law-breaking group. In the same way a disputing individual transforms their group into a disputing group. It therefore follows that if an individual is wronged, they may depend on the group to remedy the wrong, because in a sense the group has also been wronged. We can witness these dynamics of group identity and their impact on conflict situations across the world.

Ubuntu societies developed mechanisms for resolving disputes and promoting reconciliation with a view to healing past wrongs and maintaining social cohesion and harmony. Consensus building was embraced as a cultural pillar in regulating and managing relationships between members of the community.[24] Depending on the nature of the disagreement or dispute, the conflict resolution process could take place at the level of the family, at the village level, between members of

an ethnic group, or even between different ethnic nations situated in the same region.

In the ubuntu societies found in southern Africa, particularly among the Xhosa and the Sotho, disputes would be resolved through an institution known as the *inkundla/lekgotla,* which served as a group mediation and reconciliation forum.[25] This *inkundla/lekgotla* forum was communal in character in the sense that the entire society was involved at various levels in trying to find a solution to a problem, which was viewed as threatening the social cohesion of the community. In principle, the proceedings would be led by a council of elders and the chief or, if the disputes were larger, by the king himself. The process of ascertaining wrongdoing and finding a resolution included family members related to the victims and perpetrators, as well as women and the young. The mechanism therefore allowed members of the public to share their views and to generally make their opinions known. The larger community could thus be involved in the process of conflict resolution. In particular, members of the society had the right to put questions to the victims, perpetrators and witnesses as well as to put suggestions to the council of elders on possible ways forward. The council of elders in its capacity as an intermediary had an investigative function and it also played an advisory role to the chief. By listening to the views of the members of the society, the council of elders could advise on solutions, which would promote reconciliation between the aggrieved parties and thus maintain the overall objective of sustaining the unity and cohesion of the community.

The process involved five key stages:

1. After a fact-finding process where the views of victims, perpetrators and witnesses were heard, the perpetrators – if considered to have done wrong – would be encouraged, both by the council and other community members in the *inkundla/lekgotla* forum, to acknowledge responsibility or guilt.
2. Perpetrators would be encouraged to demonstrate genuine remorse

or to repent.

3. Perpetrators would be encouraged to ask for forgiveness and victims in their turn would be encouraged to show mercy.
4. Where possible and at the suggestion of the council of elders, perpetrators would be required to pay appropriate compensation or make reparations for the wrong done. (This was often more symbolic rather than any repayment in kind, with the primary function being to reinforce the remorse of the perpetrators.) Amnesty could thus be granted, but not with impunity.
5. The final stage would seek to consolidate the whole process by encouraging the parties to commit themselves to reconciliation. This process of reconciliation tended to include the victim and their family members and friends as well as the perpetrator and their family members and friends. Both groups would be encouraged to embrace co-existence and to work towards healing the relationship between them and thus contribute towards restoring harmony within the community, which was vital to ensure the integrity and viability of the society. The act of reconciliation was essential in that it symbolised the willingness of the parties to move beyond the psychological bitterness that had prevailed during the conflict.

This process was not always straightforward, and there would naturally be instances of resistance at various stages of the peacemaking process. This was particularly so with respect to the perpetrators, who tended to prefer that past events were not re-lived and brought out into the open. In the same way, victims would not always find it easy to forgive. In some instances, forgiveness could be withheld, in which case the process could reach an impasse, with consequences for the relations between members of the community. However, forgiveness, when granted, would generate such a degree of goodwill that the people involved, and the society as a whole, could then move forward even from the most difficult situations. The wisdom of this process lies in the recognition that it is not possible to build a healthy community at peace with itself unless past wrongs are acknowledged and brought out

into the open so that the truth of what happened can be determined and social trust renewed through a process of forgiveness and reconciliation. A community in which there is no trust is ultimately not viable and gradually begins to tear itself apart. This process draws upon the ubuntu values and notions of 'I am because we are' and 'a person being a person through other people' when faced with the difficult challenge of acknowledging responsibility and showing remorse, or of granting forgiveness.

As mentioned earlier, this traditional peacemaking process covered offences across the board from family and marriage disputes, theft, damage to property, murder and wars. In the more difficult cases involving murder, ubuntu societies sought to avoid the death penalty because, based on the society's view of itself – as people through other people – the death penalty would only serve to cause injury to society as a whole. Though it would be more difficult to move beyond such cases, the emphasis would still be on restoring the broken relationships caused by the death of a member of the community.

The guiding principle of ubuntu was based on the notion that parties need to be reconciled in order to rebuild and maintain social trust and social cohesion, with a view to preventing a culture of vendetta or retribution from developing and escalating between individuals, families and the society as a whole. We continue to observe how individuals and sections of society in South Africa, epitomised by Mandela and Tutu, have drawn upon some aspects of their cultural values and attitudes to enable the country to move beyond its violent past. The South African Truth and Reconciliation Commission, which had as many critics as it has supporters, also relied on the willingness of victims to recognise the humanity of the perpetrators, and there are documented cases of victims forgiving particular perpetrators. Tutu himself would always advise victims – if they felt themselves able to do so – to forgive. His guiding principle was that without forgiveness there could be no future for the new republic.

Justice and reconciliation among the Acholi of Northern Uganda

In Northern Uganda the government is in conflict with a resistance movement calling itself the Lord's Resistance Army (LRA), which continues to make incursions from neighbouring countries.[26] In this conflict the social provisions, which normally would have been provided for by the state, are also lacking. The majority of the people from this region are from the Acholi ethnic group. Many Acholi have found themselves divided by their different loyalties: many support the rebellion due to grievances that they hold against regimes which have ruled over them, while others remain neutral and yet others support the government due to the rebel incursions and the LRA's practice of abducting children to join the ranks of its soldiers. Social cohesion is fragmented and the persistence of violence and abductions has thoroughly undermined levels of social trust.[27] From this complex matrix of factors brought about by violent conflict there has been an urgent need to identify mechanisms and institutions for conflict resolution which could achieve the medium to long-term goal of rebuilding social trust and reconciliation.

An examination of some of the features of the reconciliation mechanism found among the Acholi may be informative.[28] The Acholi have a conflict resolution and reconciliation mechanism called the *mato oput*, which also served as an institution for maintaining justice, law and order within the society. This mechanism pre-dated the colonial period and is still functioning in some areas. The Acholi place a high value on communal life. Maintaining positive relations within society is a collective task in which everyone is involved. A dispute between fellow members of the community is not perceived as only the concern of one's neighbours, but in a very real sense an emerging conflict belongs to the community itself. Each member of the Acholi community is in varying degrees related to each of the disputants. To the extent that somebody is willing to acknowledge this fundamental unity, then people can either feel some sense of having been wronged or some sense of responsibility for the wrong that has been done. Due to this linkage, a law-breaking individual thus transforms their group into a law-breaking group. In

the same way a disputing individual transforms their group into a disputing group. It therefore follows that if an individual is wronged they may depend upon their group when seeking a remedy to what has transpired, for in a sense the group has been wronged. The Acholi society therefore developed *mato oput* to resolve disputes and promote reconciliation based on the principle of consensus building. Consensus building is embraced by the Acholi as a cultural pillar of their efforts to regulate relationships between members of a community.

The Acholi leadership structures are based on models designed to build consensus. There are councils of elders or community leadership councils made up of both men and women. All members of the society have a say in matters affecting the community. With the passage of time, however, colonialism and the onset of post-colonial regimes have undermined the adherence to this value-system among most of the population. Today there are ongoing efforts to revive this way of thinking as a means to promoting more sustainable peace by using consensus to determine wrongdoing as well as to suggest remedial action.

The peace process in the Acholi context, therefore, involves a high degree of public participation. As noted earlier, under the timeless Acholi worldview a conflict between two members of a community is regarded as a problem which afflicts the entire community. In order to restore harmony and rebuild social trust there must be general satisfaction among the public, in particular the disputants, with both the procedure and the outcome of the dispute resolution effort. The *mato oput* process therefore allows members of the public to make their opinions known. Through a public assembly known as the *kacoke madit*, those supervising the reconciliation process (normally the council of elders, who have an advisory function with respect to the chiefs) listen to the views of the members of the public, who have a right to put questions to the victims, perpetrators and witnesses as well as make suggestions to the council.[29]

Due to the emphasis on inclusion and participation, the peace process can at times be a lengthy affair. The victims, perpetrators or

disputants have to make certain commitments. The process generally proceeds through the following five stages:

1. Perpetrators are encouraged to acknowledge responsibility or guilt for the wrongs done following the presentation of evidence by witnesses and the public and investigation by the council of elders.
2. Perpetrators are encouraged to repent and demonstrate genuine remorse.
3. Perpetrators are encouraged to ask for forgiveness from the victims and victims are encouraged to show mercy and grant forgiveness to the perpetrators.
4. If the previous stage is carried out satisfactorily, perpetrators, where possible and at the suggestion of the council of elders, pay compensation to the victims. (This in many instances is a symbolic gesture that seeks to reinforce the genuine remorse of the perpetrator.)
5. The process concludes with an act of reconciliation between the representatives of the victims and the representatives of the perpetrators. This act of reconciliation is conducted through the ceremony of *mato oput,* which is the drinking of a bitter-tasting herb derived from the *oput* tree. The bitter drink *oput* symbolises the psychological bitterness that prevailed in the minds of the parties during the conflict. The act of drinking it is an indication that an effort will be made to transcend this bitterness in order to restore harmony and rebuild trust.

In Acholi society, the *mato oput* process covers offences across the board, from minor injustices such as theft to more serious issues involving violence between members of a society, the taking of a life, even accidentally, and conflict situations. The Acholis strive to avoid recourse to retributive justice and in particular the death penalty because of how the society views itself and the value that it attaches to each of its members. While the sense of and demand for vengeance may be great among some victims, the perception in the community

is largely that permitting the death penalty for murder would only serve to further multiply the effects of suffering in other parts of society and ultimately undermine any possibility of re-establishing harmonious coexistence.

Depending on the level of the offence the *mato oput* reconciliation act is followed by two other ceremonies. In all dispute situations the community leaders or council of elders of both genders – the male leaders are referred to as *rwodi moo* and the female leaders are known as the *rwodi mon* – give a final verbal blessing to mark the end of the conflict. In the case of a murder or warring situation, the two parties involved in the conflict conduct a ceremony called the 'bending of the spears' in order to symbolise an end to hostilities and the disposal of the instruments of its execution.

It is evident, then, that the guiding principle and values of this approach are based on the notion that the parties must be reconciled in order to rebuild social trust and maintain social cohesion and thus prevent a culture of vendetta or feud from developing and escalating between individuals, families and other members of the society. This is one reason why the *mato oput* act of reconciliation always includes the disputants, victims, perpetrators and their representatives. Public consensus also plays a significant role in the post-conflict situation, particularly when social pressure is utilised to monitor and encourage the various parties to implement peace agreements. Any breach of the act of reconciliation by either side would represent a far worse offence than the original offence because it would set a precedent that could eventually lead to the fragmentation of communal life.

In sum, the Acholi method for resolving disputes provides us with some practical insights into how we can refer to culture in our efforts to establish mechanisms for promoting reconciliation and rebuilding social trust, across Africa as well as other parts of the world. Civil society groups, religious leaders, parliamentarians in the Acholi community of northern Uganda together with Acholis in the diaspora have been advocating the revitalisation and integration of the *mato oput* into current peace initiatives. The process is being utilised in various local

efforts within the region with significant results in the termination of violent conflict and the healing of communities. Many believe that the *mato oput* mechanism has the potential to contribute significantly towards repairing the relationship and healing tensions between the Lord's Resistance Army and the government of Uganda. There are also efforts through a government amnesty bill to bring aspects of the *mato oput* mechanism into the reconciliation and pardon initiatives to reintegrate perpetrators, some of who are still minors, back into society.

As was discussed in chapter 6, efforts to resolve the LRA standoff using traditional approaches were derailed by the International Criminal Court's indictment of LRA leaders, including the militia group's commander, Joseph Kony. The ICC's action triggered a debate in Uganda about the merits and demerits of pursuing international criminal prosecutions as opposed to a traditional reconciliation process. The Ugandan government has been criticised for manipulating both the ICC and Acholi traditional leaders in order to pursue its own political ends. In particular, the Ugandan government is viewed as having opted for ICC prosecutions for LRA leaders in order to advance its own political agenda of suppressing and ultimately eliminating the armed militia group, which was a potential political adversary. As a result, the neutrality of the ICC has been called into question. Further, it is held that Acholi traditional leaders have been pressured by the Ugandan government to silence dissent in their communities and to distance it from the objectives of the LRA. As with any political process there are, of course, still obstacles to policy implementation, which undermines the potential to use these mechanisms in current peace efforts. The fact that politicians can instrumentalise the ICC or co-opt traditional leaders does not in and of itself negate the important insights and practices that can be gleaned from cultural practices. Continued leadership and vision on all sides is required to ensure that judicial and quasi-judicial processes do not in effect become politicised.

The recent inroads made by the Acholi system of reconciliation, as far as its impact on government policy is concerned, suggest that there is an opportunity for this model to promote the legal acceptance

of alternative forms of restorative justice within national constitutions. The interplay or cross-fertilisation of law, politics, morality and social values is indeed possible; beyond that, however, it is also necessary and desirable in the interests of building sustainable peace and democratisation through reconciliation. One key inference that we can draw from the Acholi system of reconciliation and the cultural wisdom handed down by generations of these people is that punitive action within the context of retributive justice may effectively decrease social trust and undermine reconciliation in the medium to long term and that such action is therefore ineffective as a strategy for promoting social cohesion.

The utility and limitations of African models of justice

A key utility of African models of transitional justice is that they emphasise that peace is not just the absence of violence but also the presence of communal harmony and a commitment to coexistence. In this regard, bringing about healing and reconciliation through the promotion of non-violence and consensus building becomes the organising principle of society.[30] African institutions for justice and reconciliation[31] can contribute towards enhancing political participation and decision-making since they:

- are more accessible to all members of a given society;
- cost less to manage than mechanisms for the administration of justice inherited from the colonial era;
- are already embedded in the social norms and political structures of a given society and therefore the rules and procedures are more readily accepted and internalised;
- enable all members of a society to be aware of their responsibilities and rights with regard to the community as a whole.

The two case studies above have illustrated some of these points.

However, efforts to revitalise and adopt indigenous structures

and institutions for justice and reconciliation are constrained by the structures and frameworks of governance, which are prescribed by the international system of states. There needs to be a shift in attitude over the way sub-state actors are accorded recognition in the international arena. Innovations at an international level could create institutionalised mechanisms that respond to local and traditional mechanisms of justice and reconciliation. Ultimately, a degree of complementarity between institutions at local, national and global levels is vital in order to promote public participation in the administration of justice and promotion of reconciliation. In Africa, the constitutional integration and recognition of sub-national or indigenous mechanisms for promoting transitional justice and reconciliation with those of the state is an important first step towards addressing the scourge of conflict which afflicts most of the continent.

Towards concurrent jurisdiction between modern and African models of justice

There is an artificial dichotomy between so-called modern and African models of transitional justice and reconciliation. In most instances, these processes function in parallel. Externally driven modern efforts to resolve conflict situations are often faced with the limitation that the local parties are unwilling, or unable, to relate to these initiatives. In such circumstances the communities themselves deploy the traditional processes, sometimes independently of modern processes. These cultural approaches are not used sufficiently and they tend to be used at the periphery of reconciliation efforts whereas they should be informing mainstream peace-building initiatives. A healthy balance between tradition and modernity when it comes to the strategies deployed to promote justice and reconciliation is necessary for achieving the objectives of peace in Africa.[32] Ultimately, modern approaches need to develop a greater synergy with traditional approaches in order to foster integrated peace-building processes.

How, then, can we begin to revitalise African approaches to justice

and reconciliation? The most important starting point is to understand that Africa is not a homogenous entity. With 55 countries, and at least 3,500 different ethnic groups and a total population of about one billion (notwithstanding the African societies in the diaspora), Africa does not lend itself to a monolithic framework of analysis or generalised prescriptions. Approaches to promoting justice and reconciliation in Africa can only be defined by first understanding some of the world views that are commonplace in Africa. As we saw earlier, some African societies affirm the existence of a universal bond between people that transcends the usual family ties. They then use this existing normative framework to establish traditions and mechanisms for managing disputes between members of society and for administering justice and promoting reconciliation in a way that reduces tendencies which would otherwise foster suspicion and fear and lead to harm and destruction. It is important to note that African approaches to justice and reconciliation can only be understood in their specific and local context. However, these approaches can provide insights into how peacebuilding can be enhanced across the continent. The need to educate for peace has become urgent.

Concurrent jurisdiction and tradition-based justice

Based on the discussion above we can consider how a framework of concurrent jurisdiction can foster an approach through which modern approaches can benefit from complimentary African models of transitional justice and reconciliation. In particular, the training of peace practitioners, government officials and civil society actors, using the principles drawn from African models, can provide an advocacy and lobbying framework to promote the practical use of these approaches in administering post-conflict justice as well as supporting ongoing dispute resolution efforts on the continent. It is also necessary to identify ways in which peacemaking insights drawn from the heritage of African models of restorative justice and reconciliation need to be integrated and mainstreamed into educational curricula at secondary

and tertiary levels. This will provide learners with a unique perspective and worldview, which can only contribute towards fostering a global culture of peace. Peacebuilding needs to be context specific, in the sense that it is relates to the local communities' concepts of peace and justice, as well as being sensitive to social and cultural traditions. In Africa, the colonial methods of dispute management were retained in the post-colonial state and superimposed on African systems of peacemaking, justice and reconciliation.[33] This chapter has discussed how African models of justice and reconciliation address a given situation. If an individual or a group has perpetrated a crime or acted violently, the leadership of a community asks the relatives of the individual or the group to pay reparations to the victims and the entire society participates in redeeming that individual. The perpetrator is exposed to the shame of their family and pressure is put on the individual to behave in a manner that is acceptable to society in the future. The whole exercise is aimed at bringing people back into the embrace of their families and societies once again, which lays the foundation for increasing the levels of peace, tolerance, solidarity and social harmony.

African approaches to transitional justice and reconciliation can offer other important lessons as we continue to work towards global peace. Four key lessons include:

1. the importance of public participation in administering justice and promoting reconciliation;
2. the utility of supporting victims and encouraging perpetrators as they go through the difficult process of making restorative justice;
3. the value of acknowledging guilt and remorse and the granting of forgiveness as a way to achieve reconciliation;
4. the importance of referring constantly to the essential unity and interdependence of humanity and living out the principles which this unity suggests, namely empathy for others, the sharing of our common resources, and working with a spirit of cooperation in our efforts to resolve our common problems.

Reconciliation understood from this perspective is a process in which the opposing parties are involved in co-creating a solution that they can live with. These processes are also empowering in the sense that they give local cultures the space to make use of their own values, which can only serve to restore a sense of confidence and promote greater self-reliance when it comes to solving problems and enabling progressive development.

Conclusion

This chapter assessed how the concurrent jurisdiction of differentiated accountability mechanisms is necessary for pursuit of victim-driven justice. International criminal tribunals, including the African Court of Justice and Human Rights, remain elite-driven accountability processes, which in effect marginalise the victims. This chapter explored at length prospective models of tradition-based justice as a key component of a framework of concurrent jurisdiction, which will include an international, regional, national as well as communal level. The important question that needs to be addressed is how such tradition-based justice systems can be incorporated into a system of concurrent jurisdiction.

Given the historical and imperial origins of European international law, non-African governments and societies as well as international organisations will need to reflect on how they can collaborate more closely with traditional justice and reconciliation processes to promote genuine ownership of the processes of post-conflict justice and peacebuilding.[34] External actors must be willing to learn and not blindly (or patronisingly) transpose or impose knowledge and skills that are not immediately translatable or understandable to their host populations. We should question attempts to impose a universal conception of justice, or assume that so-called 'international law' is devoid of any imperial pretentions as far as disciplining and controlling target countries is concerned. Instead, we should draw lessons from some African conceptions of justice, which emphasise communal harmony over the general tendency within Western notions of justice

to prioritise individual culpability. It is always vital to learn what peacemaking and judicial strategies or responses might be appropriate in different contexts, this is at the heart of a differentiated accountability system based on the notion of concurrent jurisdiction. The question that faces us today in the context of our globalised world is whether we are prepared to draw from the lessons of African models of justice and reconciliation.[35]

Chapter 8

The Re-legitimation of Global Justice: A Proposal for Establishing Global Democracy

Introduction

This chapter argues that the re-legitimation of global justice can only be achieved by establishing a new global democratic architecture. The International Criminal Court was only the first step in what is an incomplete project of radical global democratic transformation. This chapter will assess the criticism voiced against the United Nations, as an institution that has served its purpose and that now needs to be transformed or dismantled. This chapter will then argue that international criminal justice, as a political project; can only acquire legitimacy if its source of authority is a new global democratic architecture. This chapter will argue that continuing efforts to tinker with the UN will not fundamentally alter the politicisation of international criminal justice, but merely replicate the manifestations of judicial imperialism in other myriad forms. Consequently, this chapter will argue that the re-legitimation of global justice will have to be

achieved through the transition to global democracy. On 14 July 2010, Inga-Britt Ahlenius, the outgoing United Nations under secretary-general for the Office of Internal Oversight Services (OIOS) issued a scathing report in which she stated that the UN was 'in a process of decline and reduced relevance'. Ahlenius was even more damning when she concluded that the UN seems 'to be seen less and less as a relevant partner in the resolution of world problems … this is as sad as it is serious'.[1] The continuing relevance of the United Nations is a lament that is often heard within the corridors of the organisation. Yet, the institution remains a forum of last resort when particular global issues threaten to overwhelm the international system, such as the legitimacy of international criminal law. This chapter will assess whether the UN remains a viable institutional model for addressing the challenges of the 21st century, such as international criminal justice. In particular, the chapter will assess the fallacy of UN reform and suggest that radical transformation is what is required given the never-ending nature of current models' institutional revival. The chapter will assess the recent debates on deepening global democracy and propose a radical transformation of the UN into a World Federation of Nations (WFN). The ICC would become one of the judicial arms of the WFN to complement a World Court. The chapter will assess the practical steps that would be necessary to initiate a radical over-haul of the international system in a manner that could lay the foundation for global justice and democracy.

Global challenges to the UN system: Global justice under siege

Criticisms of the organisation rarely come from within its ranks because the staff, for the most part, are constrained from openly articulating their views. It is therefore almost impossible to corroborate whether the views held by Ahlenius are widespread within the organisation or whether they are the vitriolic ramblings of a disgruntled and discredited former staff member.

We should not lose sight of the fact that the UN is the composite

formation of its Secretariat, the member states and its numerous agencies. A number of member states have openly voiced their concerns about the continuing relevance of an institutional architecture that was established in 1945 to in effect constrain the excesses of global powers. These criticisms have precipitated the numerous UN reform initiatives that have plagued the organisation for decades.

UN reform in its current formulation through the Open-ended Working Group is dominated by the discourse about the Security Council restructuring and is unlikely to bring about the establishment of global democracy. The likely scenario is that the appearance of progress towards UN reform will continue to plod along for another few decades until some member states come to a realisation about the abject futility of the exercise. If one takes the end of the Cold War as a turning point in history which could have served as a catalytic trigger for establishing global democracy, then after close to two decades the general lack of seriousness in bringing about genuine change is evident for all to see. The status quo is fully intact. The powerful members of the UN have demonstrated their ability to rachet up geo-political pressure to achieve their desired self-interests. They have also demonstrated their willingness to utilise the UN as a prophylactic to achieve their nefarious ends. The illegal Iraq invasion was the clearest demonstration of this predilection to perverting the international rule of criminal law, notably the Rome Statute establishing the ICC, which was already in force at the time. The US and UK governments deployed their considerable arsenal of legal opinion to make the case for a UN-sanction invasion of Iraq on the basis of humanitarian intervention. This is one situation in which the UN Charter came under direct threat from the dogmatic interests of the powerful Permanent Members (P5) of the Security Council. Fortunately, the diplomatic winds did not favour the US-UK plans for military adventurism because other members of the Security Council could not be compelled or coerced to assent to the Iraq invasion. The US and UK nevertheless amassed a coalition of the coerced and mounted their invasion, in direct contravention of the UN Charter, specifically Article 39 and its injunction against inter-

state aggression, and in violation of international criminal law which is a crime under the provisions of the Rome Statute. The current system of international criminal law will not be able to deliver justice for the victims of the US-led Iraq invasion for reasons discussed in chapter 3.

This event was nevertheless a notable nail in the coffin of the UN Charter, the self-exclusivity of powerful countries from international criminal law, and a clear illustration of the undemocratic character of the international system. If powerful P5 members of the Security Council can find it expedient to ignore the legal provisions of the UN Charter, why should any of the 192 members of the UN feel obliged to respect this international institution. Similarly, if powerful countries contravene the Rome Statute with impunity, what compunction is there for smaller and medium power states to respect its provisions. In the face of such actions the idea that the UN can foster global democracy is delusional. The UN itself has become an anachronism, a fossilised relic of World War II power configurations that is on the precipice of a deeply entrenched irrelevancy, to paraphrase Ahlenius above.

There are two other significant global events that make the adherence to the current configuration of an undemocratic United Nations a perilous path for the international community to take. The first occurs in the so-called geopolitical margins of international relations. Since the demise of the Cold War the Balkans, Asia, the Middle East and Africa and select regions of Latin America have witnessed the effervescence of violent political unrest and the direct challenge to state formations in these regions. This global occurrence was another indicator that the state-centric configuration of post-colonial societies is also proving to be an anachronism. The UN system is in effect a club of nation-states and is singularly handicapped when it comes to resolving disputes between illegitimate governments and the armed militia that seek to overthrow them through violent means. This demonstrates that the UN is not an adequate forum for sub-national groups to direct their grievances. This escalation of sub-national contestations against the state should have served as a clear signal that the UN had reached its

systemic limits and needed to transform itself in order to become more accessible to non-state actors, but this has not happened.[2] Paradoxically, a number of sub-national formations aspire to acquire their own states, for example Palestine and Kurdistan, in order to assure their positions at the UN club of states. However, if they were to achieve statehood the UN would still be tasked with how to manage the demands of the minorities that will end up existing within prospective Palestinian and Kurdish borders.

Another global event that poses a challenge to the UN is the escalation of international terrorism. The UN has become incoherent in its approach to defining and dealing with terrorism because some of its own members could be accused of being 'terrorist' in nature. Terrorism is not the central issue; the key problem is the absence of an international system that can effectively provide would-be-terrorists with a means to articulate their grievances in non-violent ways. History is increasingly replete with erstwhile so-called terrorists who are now feted by the international community as statesmen including Nelson Mandela of South Africa, Gerry Adams of Northern Ireland and the late Yasser Arafat who passed before he could witness the birth of an independent Palestine. Incidentally, in 2010 the issue of Palestine was addressed through an ad-hoc mediation process with the tangential support of the UN, but the UN is not an adequate forum to oversee these negotiations. The accession of Palestine to the Rome Statute and the self-evident political response of the US and Israel to this supposed adoption of international criminal law exposes how self-contradictory and hypocritical the global hegemon and its client states are.

The key point is that if the international system had been configured in a way that would pre-emptively flag the concerns and grievances of these erstwhile terrorists and their sub-national constituencies, then a considerable amount of bloodshed and suffering could have been avoided. The wider issue is that the international system, embodied by the UN and its specialised agencies, is in need of a more pronounced and radical overhaul than the proposed tinkering that is taking place under the guise of UN reform.

The fallacy of UN reform

The UN system still grants governments a monopoly on the representation of their societies and so it should since this is precisely what its Charter was designed to do when it was adopted over 60 years ago. In this regard, so long as efforts to bring about change continue to be pursued within the pre-established framework of UN reform, then governments will remain the gatekeepers of any proposed institutional models. Similarly, when it comes to the specific issue of UN Security Council reform, the Permanent Five (P5) members of the body will continue to assert and exert a gatekeeper role through their vetoes, in terms of the degree and extent of change that will be permitted. In this regard, the notion of UN reform is a self-evident fallacy, which will be detrimental and inimical to the future well-being and security of middle-level and smaller countries. As discussed earlier, this was manifest in the genocides in Rwanda (1994) and Srebenica (1995), as well as the Iraq invasion of 2003.

States do not have a legitimate claim to be the sole representatives of their societies apart from the legitimacy which they have imbibed themselves with. Similarily, the Permanent Five members of the UN Security Council do not have any legitimate claim to retaining their status apart from a twist of historical fate which saw themselves effectively 'muscle' their way into being a member of this grouping by virtue of their historically perceived military might.

The suggestion that tinkering with the number of members of the UN Security Council and extending the veto provision to emerging regional economic power houses, such as Germany, Japan, India and Brasil (G4), will increase the legitimacy of the body and allegedly 'democratise' the institution through regional representativity is another illusion. This UN 'democratisation' discourse has of course externalised Africa completely. Critiques of the Uniting for Consensus group (which question the basis upon which the G4 have been selected) are therefore valid and illustrate the self-evident fallacy of UN reform on this premise.

The discourse of UN reform also ignores the issue of whether the

wider UN system needs to be transformed. The issue of increasing the funding of the UN to adequately address the range of challenges facing societies around the world has also not been sufficiently addressed in the so-called reform processes. This masks the interest of the powerful members of the UN Security Council to maintain the status quo.

Ahlenius, commenting on UN reform, observed that 'disintegrated and ill-thought through "reforms" are launched without adequate analysis and with a lack of understanding'.[3] She added that this 'translates into a weakening of the overall position of the United Nations, and a reduced relevance of the organization'. Amongst some of the negative consequences of this drift by the organisation is its reduced 'capacity to protect the civilians in conflict and distress'.[4]

The net result of the proposed convoluted system of compromises as far as UN reform is concerned has not, and probably will not, address the deep and structural crisis of international legitimacy that continues to afflict the decision-making structures of the universal body. Ahlenius also concluded that as far as UN reform is concerned 'there is no transparency, there is a lack of accountability' and she was emphatic that she did 'not see any signs of reform in the organisation'.[5] What this suggests is that notions of participatory democracy need to be relocated at a global level.[6]

Contextualising global democracy

Deliberation about the extension of democratic governance principles from the national to the global level has increased in the last few decades.[7] The key issue is whether global democracy is desirable, and based on the critique developed above there is a prima facie case for exploring the strategies for a gradual transition towards such a dispensation.[8]

The argument being advanced in this chapter is premised on the normative desirability of promoting global democracy. Specifically, with regards to the typology proposed by Archibugi, Koenig-Archibugi and Marchetti, the establishment of global democracy has to ensure that institutions of global governance are responsive to citizens across

the world.[9] The ideal type that would achieve this is a form of world federalism defined by 'several layers of state or state-like authority and citizens who have a direct relationship of democratic authorization and accountability with each of them'.[10]

The fact that global democracy, if it is achieved, will necessarily be through a widespread process of consultation, means that the models developed do not need to rely exclusively on western models of governance. Cultural models of governance drawn from other parts of the world could equally provide invaluable insights into how the consent of the governed can be infused into global institutions.[11]

Against global democracy

There is a growing body of literature that is wary of forms of global democracy. Increasing federalisation is associated with a concomitant escalation of bureaucracy and a marginalisation of individuals and the negation of their autonomy. Christiano argues that global legitimation can be achieved through the promotion of democracy within states and by ensuring the fairness in negotiations among states.[12] In other words, 'a fair system of voluntary association among highly representative states' or a 'fair democratic association' is sufficient to address the problems of the prevailing state-centric system and the existing lack of global democracy.[13] However, this presupposes two things: that either democracy will inevitably emerge among all political communities across the world, or that there will be an external agent which will exert sufficient pressure to ensure that democracy is promoted within states. The first assumption has been negated by the lessons of history, which have demonstrated that while democracy can flourish for a period of time, undemocratic forces are always inherent within human societies and can undermine democracy promotion at periodic intervals. Furthermore, the widely held view that the state is a framework for the identification and advancements of the interests of a significant proportion of the population does not adequately address the issue of how states occasionally ignore and over-ride the

interests of minority cultural groups within their border, particularly when these groups seek to secede from the state often through violent means. The assumption that it is in fact possible to foster democracy within states without the contribution of an external process of norm-promotion could potentially enable exclusionary systems of government such as the former apartheid regime of South Africa, which reigned formally from 1948 to 1994, to utilise their monopoly over the means of violence to perpetuate their existence indefinitely. To effectively ensure that democratic transition becomes entrenched within a nation-state, an over-arching system of checks and balances has to be established to effectively monitor the consolidation of democratic principles and practices. The role played by the European Union (EU) in challenging attempts by its member states to contravene the rule of law or undermine democracy is a case in point that will further be elaborated below. The need for a system of norm-implementation suggests that simply promoting democracy within states is not a sufficient condition to achieve global legitimation. As discussed above, even if internal democracy was achieved and consequently utilised to forge a global democratic dispensation, it would not address the privileged position afforded to nation-states, and by extension the most powerful states, which is more an accident of history rather than an expression of the informed will of world citizens. States are the principle agents in the creation of international law largely because the international system relies on their cooperation. However, this does not address the issue of whether this current state of affairs is normatively desirable. Even though the consent of states is the main source of international law, it should not remain the only source for perpetuity. There is no convincing reason why a global assembly of parliamentarians elected through universal suffrage of world citizens cannot eventually become another countervailing source of international law. In fact, this would legitimise the international law, which is created by such a group of global parliamentarians, because it would include all sectors of humanity, and not only a small historically powerful section of society. Such a transformation could provide a necessary checks-and-balances

system against the excess of state collusion in decision-making, particularly when it is inimical to the interests of world citizens or communal groups. For example, prior the illegitimate US-led invasion of Iraq in 2003, world citizenry physically marched across the capitals of the world to protest against what subsequently became a travesty of justice and a direct infringement of the international rule of law embodied in the UN Charter and the Statute for the International Court of Justice. It was also a direct violation of the crime of aggression provision in the Rome Statute. However, world citizenry could not legislate against the subsequent invasion, clearly illustrating a vacuum in the international system, the lack of global justice, and the absence of a genuine global democratic architecture.

There is a view that suggests that fairness in negotiations among states is also a potential path towards entrenching global democracy. However, this also presupposes that an equitable system of multi-lateral diplomacy and negotiation can be achieved without a fundamental transformation of the structural and power inequalities fostered by a system that privileges countries that have the resources to control, dominate and subvert these processes. The reality of negotiation processes in the UN Security Council, which has the power to refer cases to the ICC, is a case in point. More than 60 per cent of the issues discussed by the UN Security Council are focused on Africa, yet the continent does not have any representation among the Permanent Five members of the Council, who co-opt the Council and project judicial imperialism. Given the fact that the P5 can veto all manner of decisions before the Council, it is a travesty of justice at its most basic level that African countries can only participate in key deliberations and decision-making processes as individual non-permanent members of the Council. Furthermore, there is no guarantee that African non-permanent members of the Council will in fact articulate and advance position that are in the interests of African citizens and vulnerable communities in countries that they do represent. UN Security Council negotiation and decision-making processes are in effect the highest manifestation of unfairness in the international system. If achieving

fairness in negotiations among states is the preferred route to achieving global legitimation, then a fundamental transformation of the UN Security Council and the elimination of the veto provision is a necessary pre-requisite action. The P5 are among the beneficiaries of the status quo within the international system, reproducing in effect a form of diplomatic apartheid. The fact that the asymmetrical distribution of global political, economic and military power has remained relatively unchanged since the end of the Cold War means that the potential beneficiaries of global democratic transformation would in effect be the societies in the so-called developing regions of the world – Africa, Asia, the Middle East and Latin America.

In this regard, on March 2005, the AU issued a declaration known as *The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus*, which was a statement in response to the Report of the High-Level Panel on Threats, Challenges and Change, issued in December 2004.[14] The AU issued a position on UN reform and, in particular, on the reform of the Security Council by noting that 'in 1945, when the UN was formed, most of Africa was not represented and that in 1963, when the first reform took place, Africa was represented but was not in a particularly strong position'.[15] The AU goes on to state that 'Africa is now in a position to influence the proposed UN reforms by maintaining her unity of purpose'; furthermore, it notes that 'Africa's goal is to be fully represented in all the decision-making organs of the UN, particularly in the Security Council'.[16] The Common African Position enumerates what 'full representation' of Africa in the Security Council means by demanding 'not less than two permanent seats with all the prerogatives and privileges of permanent membership including the right to veto' and 'five non-permanent seats'.[17] On 27 May 2010, the chair of Inter-Governmental Negotiations on Security Council Reform, Ambassador Zahir Tanin of Afghanistan, issued the first-ever negotiating text on Security Council reform. In this document, the AU position which was articulated by Sierra Leone, a current non-permanent member of the UN Security Council, retained the original position

by stating that 'Africa seeks the abolition of the veto, but alternatively, so long as it continues to exist, its extension to all new permanent members in the Council as a matter of common justice.' As noted above, the virtual impossibility of eliminating the veto provision from P5 members (due to their combined coercive power to subvert any such initiative) in the short to medium term weakens the argument that achieving fairness in negotiations among states is a potential route to global legitimation.

One argument suggests that attempting to address domestic issues through global fora would fundamentally undermine the core principles of democratic control and addressing issues at the level where they are most pertinent. However, with the passage of time this argument has become a non-sequitur as domestic issues are directly impacted upon by global forces or conditions. For example, the protection of a domestic environment and addressing the issue of depleting natural resources cannot be divorced from the impact of climate change or the trade practices of multi-national resources. In fact, attempting to address environmental issues at an exclusively local level is to engage in an exercise of damage limitation rather than promoting sustainable change. The pursuit of international criminal justice is by definition a process that requires a transparent and accountable system of global governance, which can be influenced by world citizens. Global processes now almost always impact upon domestic concerns and there is a need for institutional frameworks for local actors to democratically participate in their regulation.

Regional models of multi-level governance

Carol Gould has compared and contrasted arguments pertaining to regional and global democracy. Regions have become 'important settings for increased transnational cooperation and regulation, particularly concerning economic and social justice matters'.[18] Gould argues 'that no forward-looking democratic theory can claim to be complete without considering these important new domains'.[19] In particular,

she has identified the relative benefits of regional coordination and cooperation as 'the retention or enabling of a certain level of cultural diversity around the world'.[20]

There are important lessons that can be learned from the multi-level frameworks of governance currently being developed by the European Union and the distribution of authority at the supranational, regional, national and local levels. As far as human political communities are concerned, the most established expression of the pooling of sovereignty is the creation of the European Union, cemented recently by the compromise decision by the Convention of Europe to agree to a set of terms which lay the foundation for closer integration (after the Convention is ratified by governments and the constituent populations). The EU promotes norms of democracy and human rights protection that establish a standard which can offer the countries and regions in conflict within the European sphere of influence an incentive to subscribe to peaceful approaches of managing and regulating their own affairs. The European Union through its Council of Europe and other institutions systematically intervenes diplomatically and has begun to intervene through policing action, in Macedonia for example, to manage conflicts and bring about conditions for sustainable peace in the countries within its sphere of influence.

A similar process is underway on the African continent in the form of the newly created African Union. The overall objective is to create a transnational or supranational structure of governance that can bring pressure to bear on the behaviour of states and gradually transform attitudes and practices to build and promote sustainable peace and security. The international system has not developed a framework for incorporating these 'supra-nations' into the system of global governance. The concept of multi-level governance has begun to gain currency. In the European Union for example, the 'supranational, national, regional and local governments are enmeshed in territorially overarching policy networks'[21] or what we can also conceptualise as 'overlapping sovereignty'. There is no reason why multi-level governance cannot be adopted to the global level even with the inclusion of non-state actors

and transnational corporations as part of the framework of policy and decision-making.

The utility of multi-level governance structures and institutions is that problems can best be solved at the level of competence of the actors. States can avoid getting entangled in peacebuilding at the grass-roots level beyond providing the security conditions, which are conducive towards encouraging sustainable peacebuilding and reconciliation. This, therefore, is a model that relies on less control from the centre and more power and autonomy devolved to the localities. The principle of subsidiarity according to which decision making should be kept as close to the people as possible should be emphasised as a central pillar in the evolution of global governance. Likewise, in a multi-level global governance framework governments would be held to account, through a higher supranational entity, for any actions that undermine peace and the general human and gender rights of their citizens. This would be a radical shift away from the notion that nations exist in a state of anarchy with no overarching authority.

Given the close proximity of regional institutions of cooperation to the nascent crisis in their member states, they are more likely to take an active interest in managing potential issues so that they do not spill over into other neighbouring states. This is certainly the impetus behind the AU's evolving African Peace and Security Architecture (APSA), for example. Furthermore, countries within regional groupings are coordinating their response to economic and environmental issues particularly in the face of the increasingly manifest forces of globalisation. For example as noted above, the AU adopted a common position to negotiate on the issue of UN Security Council reform.

The AU has adopted a range of norms of governance articulated in its Constitutive Act of 2000; its Charter on Democracy, Elections and Governance of 2007; as well as the Protocol Establishing the Peace and Security Council of the African Union of 2002. It has also established a range of institutions such the Pan-African Parliament and the African Court of Justice and Human Rights to increase levels of participation and oversee the implementation of the rule of law. Over the last eight

years of its existence, the AU has played a crucial role as a 'norm-promoter' particularly with regards to peacemaking and democratic governance. The AU has a range of human rights mechanisms such as the African Union Commission on Human and People's Rights based in Banjul, Gambia, which regularly receives and adjudicates issues pertaining to states. The institution regularly issues pronouncements on the internal behaviour of its member states.[22] The AU is however still a loose collective of independent nation states and therefore does not have the democratic legitimacy to compel its member states to uphold the treaties, protocols and conventions that they have signed up to. In this regard, the AU is still beset by a democratic deficit.

The AU has for the most part not been able to exert influence on decisions made outside of Africa, for example on the issue of improved funding of international development and human security institutions. This is largely due to the fact even though the AU exists it has not yet effectively unified African policy and decision making. However, in 2007, at the regular annual Assembly of Heads of State and Government, the AU initiated a continent-wide debate about the desirability of deepening continental political integration and the formation of a Union Government of Africa premised on models that were first proposed during the era of decolonisation in the early 1960s. For the time being, this debate has become mired in disagreement as to the precise nature and reach of the proposed Union Government of Africa. Therefore, the AU is already grappling with the issue of regional democracy.

Even if regional democracy was to be achieved in Africa, given the current level of economic development within the continent, this would not negate the need for the international system to play a proactive role in promoting peace and security on the continent. Specifically, Africa still depends on the ad hoc contributions to finance its own peace operations in Somalia through the AU Mission in Somalia (AMISOM) or its partnership in Darfur through the Joint AU-UN Hybrid Mission in Darfur (UNAMID). In this regard, regional democracy would be insufficient to address these challenges and would

have to be complemented by a more representative and adequately funded system of global democracy. The important insight that these models of multi-level governance provide is that it is possible to replicate and gestate an embryonic form of global democratic governance.

The World Federation of Nations: Towards a new global democratic architecture

The primary challenge of deepening global democracy is how to combine structures of international authority with mechanisms of citizen representation and participation. This chapter has sought to establish the principle that radical transformation is required to achieve global democracy, which is the basis upon which the legitimacy of global justice can be established. UN reform will not significantly alter the power imbalances neither will it empower the citizens of the world to assert their right to hold global institutions accountable for their actions. Consequently, institutions like the ICC will continue to be politicised even under a 'reformed' UN. Furthermore, radical transformation is also necessary to empower world citizens, through their own agency, to be in a position to actively reduce the socio-economic inequalities that plague the majority of humanity. The UN has become the anachronistic caterpillar, which has ossified and is now ready to shed its depleted edifice through a process of metamorphosis which will allow a new more legitimate global body politic to emerge.

World Federation of Nations

Based on ideas that have been promoted by the World Federalist Movement for close to half a century, perhaps the time has come to think about creating a new structure for global governance. This would require reactivating humanity's political imagination. It is evident that a new Global Democratic Architecture (GDA) is required. The GDA would be premised on a fundamental shift away from

privileging the nation state in global affairs. A World Federation of Nations would feasibly include the following organs: World Parliament, World Court (affiliated to the ICC) Council of Supra-Nations, Assembly of Nation States, Committee of Sub-National Groups, Global Forum of NGOs, Global Committee of Unions and Transnational Corporations. Any progress towards practical implementation will of course require much more deliberation about the purpose and functions of the various organs. The objective of setting out these organs here in this fashion is to provide food for thought and stimulate deeper reflection.

WFN Council of Supra-Nations

This council would see the grouping of existing and emerging supranational entities like the European Union and the African Union. It would have a deliberative and decision-making capacity as well as the ability to sanction other actors for failing to uphold the implementation of international law developed by the Assembly of Nation-States, the Committee of Sub-national Groups, and the WFN Parliament.

WFN Assembly of Nation-States

The grouping of nation states would have the ability to continue to develop international law on any issues.

WFN Committee of Sub-National Groups

The grouping of sub-national groups would be representative and involved in having democratic oversight on international legislation being developed by the Assembly of Nation-States. This Committee of Sub-National Groups would also be empowered to petition either the WFN Parliament, the WFN Assembly of Nation-States or the WFN Council of Supra-Nations. The criteria for being considered a sub-national group would have to be determined through a global

consultation process. The modalities for representation would need to be determined through global consultation.

WFN World Parliament

As a practical objective the idea of a world parliament or some other democratically constituted global assembly is slowly gaining currency.[23] A WFN World Parliament would be able to formulate international law on a par with the Assembly of Nation States. In addition, it would have an oversight function of the implementation or non-implementation of international law and the ability to sanction the non-compliant actors. The role of the World Parliament would be to make global decision-making and the implementation of laws a more inclusive process. Members of the World Parliament would be elected through universal suffrage. The World Parliament would therefore require states to be more accountable to a global polity with regard to their actions and allocation of resources. This is one basis upon which humanity as a whole can begin to prevent unilateralism undermining collective and collaborative problem solving. In terms of the potential routes to a global assembly Andrew Strauss suggests 'a popularly elected representative body that will begin very modestly with largely advisory powers, and that following the trajectory of the European Parliament, would only gain powers slowly over time' (see below for a detailed discussion of the practical steps to such an evolution).[24]

WFN Global Court of Justice and the International Criminal Court

A prospective Global Court of Justice would assume the existing functions of the International Court of Justice and other global judicial institutions. The ICC, which is an independent and permanent institution, could be formally affiliated to, without necessarily being incorporated into, the Global Court of Justice. The difference in terms of the current situation that the ICC finds itself in is the establishment of a global democratic order whose legitimacy is not contested. This can only enhance the prospects for upholding the international

rule of law and avoiding situations in which judicial imperialism is part of the lived experience of sections of humanity.

The normative proposal for a new Global Democratic Architecture (GDA) would have to be elaborated through a comprehensive and widespread process of global consultation.

Transformation of UN ECOSOC

WFN Global Forum of NGOs and civil society groups

The WFN Global Forum would have an institutional framework for the representation for non-governmental organisations, civil society groups, ecumenical groups and other associations. This group would have a largely consultative function with regard to the other branches of the Global Democratic Architecture. The standards and criteria for membership, codes of conduct and ethics would be established through a global consultation process.

WFN Global Committee of Unions and transnational corporations

The WFN Global Committee would have an institutional framework for the incorporation of unions and transnational corporations as the inauguration of formal global union citizenship and global corporate citizenship. This group would have a largely consultative function with regards to the other branches of the Global Democratic Architecture. The standards and criteria for membership, codes of conduct and ethics would be established through a global consultation process.

All these institutions would fall under the umbrella of a World Federation of Nations (WFN). Other programmes and specialised agencies, autonomous organisations, committees, ad hoc and related bodies within the current United Nations system would also need to adjust their statutes and mandates in order to correspond to the transformed WFN system.

Practical steps to the WFN through a UN Charter Review Conference

The founders of the UN recognised that the moment would arrive when it would become imperative to transform the organisation and included a practical mechanism to review the body's Charter. Specifically, Article 109 of the UN Charter provides for a 'General Conference of the Members for the purpose of reviewing the present Charter'. This Charter Review Conference could be convened at a specific date and place if it is approved by 'a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council'.[25] Therefore, in practice there are no major obstacles to convening a Charter Review Conference apart from securing the necessary percentages described above. In addition, the decision-making process at such a Charter Review Conference would be relatively democratic in the sense that 'each member of the United Nations shall have one vote in the conference'. This Charter Review Conference could be initiated through a process of mobilising the will of two-thirds of the General Assembly and nine members of the Security Council. The latter provision means that the P5 cannot veto any proposed UN Charter Review Conference. Such a Charter Review Conference could adopt a recommendation to substantially alter the UN Charter and introduce completely new provisions including a change in the name of the institution to, for example, the World Federation of Nations. The adoption of these new recommendations could be on the basis of a two-thirds vote of the conference and each member of the UN would have one vote.

The major challenge will arise when it comes to ratifying any revised or new charter. Article 109 further stipulates that any alteration of the UN Charter can only take effect 'when ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations including all the permanent members of the Security Council'. In essence, if a UN Charter Review Conference makes recommendations, then these have to be further ratified by the governments of member states including all P5 members.

Therefore, the final ratification of a new Charter could potentially be held hostage by a veto from any of the P5, in what is in effect an undemocratic provision inserted by the founders of the UN undoubtedly to serve their own interests of ensuring that any provisions meet with their approval.

There are precedents for Charter Review processes leading to the establishment of new international organisations, notably the Organization of African Unity's transformation into the African Union, initiated by a meeting of Heads of State and Government in 1999. Therefore, a UN Charter Review Conference could lead to the formation of the WFN through broad-based and inclusive consultations that include governments, civil society, business, trade unions, and academics. Despite the potential veto of P5 members at the ratification stage, the General Assembly can nevertheless take the initiative and convene a UN Charter Review Conference. The recommendations adopted at a UN Charter Review Conference would be imbued by a degree of moral legitimacy and therefore any efforts to sabotage the full adoption of such recommendations by the P5 would further expose the injustice entrenched in the international system.

In the absence of political will within the UN to convene a Charter Review Conference, an alternate strategy would be to establish the WFN through the convening of a new and separate treaty, which could be approved and adopted by 'which ever internationally progressive countries were willing to be pioneers'.[26] With reference to a global parliamentary assembly, or as this proposal suggests the WFN Parliament, 'even twenty to thirty economically and geographically diverse countries would be enough to found the parliament' and 'the treaty agreed to by these countries would establish the legal structure for elections to be held within their territories including a voting system and electoral districts'.[27] There is no reason why these pioneering countries would have to give up their membership of the UN whilst forming the World Federation of Nations, since almost all countries belong to more than one international organisation simultaneously. In fact, there could be an advantage of the pioneer members of the

WFN to retain their membership of the UN and actively use their positions to advocate for the new Global Democratic Architecture and convince an ever-increasing number of countries to join them in the new formation. The constitution of the WFN could be framed in such a way that any country could join the formation so long as it is willing to meet its obligations under the WFN treaty. If the WFN treaty begins to gain momentum then 'other less proactive countries would have an incentive to take part rather than be side-lined in the creation of an important new international organization'.[28] When membership of the WFN reaches an optimal number of countries, then one could begin to see the gradual withering away of the relevance of the UN until it undergoes the same demise as the League of Nations. In fact, the UN itself was established by a pioneering group of countries, so it has already provided an example of how to successfully achieve the establishment of the WFN. In terms of the way forward what is required is for a group of progressive states to begin drafting a General Assembly resolution to put the UN Charter Review Conference on the agenda and to also in parallel begin to finance the drafting of the treaty and constitutional framework of the WFN.

Conclusion

The Westphalian nation-state model is hindering the emergence of more democratic forms of global governance, notably the effective legitimation of global justice. Specifically, the UN system is unlikely to achieve a genuine transition to global democracy, which is the foundation for legitimate global justice, because of the nature of the nation-state and the persistence of realpolitik. It is unlikely that tinkering with the edges, in the form of so-called UN reform, will generate institutional models that will lead to a deepening of global democracy. Yet the global challenges, including mass atrocities, across regions and within states continue to mount without an adequate forum for those most affected by these challenges to voice their concerns.

The transition to global democracy and justice cannot be left to

its own devices. The current global system is defined by the selective respect and administration of international criminal law and a self-evident democratic deficit that enables the phenomenon of judicial imperialism to persist. If the status quo is permitted to remain, this model of elite global governance, manifested through the P5 of the UN Security Council, will not reform itself but merely replicate and reproduce existing forms of exclusivity and mechanisms of subjugation by co-opting a few more members. In effect, UN reform will not reform the problem of judicial imperialism.

There is therefore a need for global rules and standards to restrain the judicial, political and economic excesses that are currently undermining the fabric of societies worldwide. If one speaks of providing more opportunities for the global citizenry to participate in global affairs, and a more accountable system of global justice, then it is logical that people should be represented at the global level by some kind of world people's assembly. The peace marches that took place in April and May 2003 around the world brought an estimated ten million people out into the streets to air their voices against an illegal war in Iraq which was perpetuated by the US and UK governments, who were both founder members of the UN Security Council and who are quick to always brand themselves purveyors of international peace and security. However, these marches and the agency of multitude did not really have a major impact on transforming the policies that were ultimately adopted. There was a revolution in global consciousness but not a parallel echoing of this transformation at the level of the institutions of global governance. It is therefore necessary to ensure that the next time an issue of global concern is voiced by the peoples of the world there will be an institution which can articulate these concerns and translate them into policy decisions which can contribute towards improving the democratic transparency and judicial accountability of the global decision-making and implementation process.

The increase in issues of common concern to world citizens at the global level justifies the formation of new arenas for democratic decision-making. There are of course important questions about the

feasibility of global democratic institutions at this point in time. One school of thought maintains that there are ongoing democratic struggles in the national context, which need to be allowed to play out before we can begin to talk about global democracy. There is also a viewpoint that maintains that democracy only functions effectively in relatively small polities and coherent communities. However, the multi-level models of governance embodied by the EU and the AU suggest that supranational institutions can assist countries to make a transition to, and sustain, democratic institutions. A new Global Democratic Architecture would be premised on the vertical disaggregation of the power of nation-states to a supranational grouping of regions and downwards to sub-national communal formations.

This chapter proposed that there a sufficient case can be made for the establishment of a World Federation of Nations, with a Global Court of Justice and the ICC as its judicial arms, to embody this new Global Democratic Architecture. A UN Charter Review Conference can launch such a process; alternatively a separate and stand-alone treaty could establish the WFN.

Chapter 9

Conclusion: The Promise of Global Democracy for International Criminal Justice

Introduction

This book sought to provide a radical critique of the ICC, an analysis of how the Court has been instrumentalised by global and domestic hegemonic power to dance to the tune of political interests. The issue is no longer whether international criminal justice and the ICC is beholden to global power, the issue is how the ICC is subservient to global power and therefore an instrument of judicial imperialism. Article 16 of the Rome Statute in effect entangles the ICC system to the UN Security Council, which is dominated by the P5 who are also the most powerful countries in the world. The establishment of the ICC was a step forward for the international criminal justice system and a notable achievement for humanity. As we approach two decades of the existence of the Court, it is now clear that the establishment of the ICC was only the first step in a much larger project of reconfiguring the entire international system. The ICC will not be able to work

in the interests of justice for all victims – including Syrians, Iraqis, Ukrainians, Sri Lankans, Congolese and Darfuris – until the archaic and undemocratic UN Security Council is dismantled and replaced with a global system of regional representation that reflects the realities of the 21st century. Given the seeming impossibility of this task, it is incumbent upon a coalition of willing countries to establish a new democratic world organisation and leave the UN Security Council to wither away into obscurity in the manner that the League of Nations ceased to exist. However, the ICC is not the problem. The problem is the anachronistic international system which allows the more powerful to rise above the rule of international law. The status if the ICC will not change until this global system changes.

The strange bedfellows of international criminal justice

Benjamin Netanyahu, the prime minister of Israel, and Omar Al Bashir, the president of Sudan, have something in common – they both want to avoid ending up on trial at the ICC. The Court has stoked Netanyahu's displeasure because its prosecutor, Fatou Bensouda, had the audacity to launch a preliminary investigation into the Israel-Palestine crisis retroactively from June 2013. The first ICC prosecutor, Luis Moreno-Ocampo, proved to be a wily 'political' operator in assiduously avoiding taking on the Palestinian case. This is not least because of the intense political lobbying that he was subjected to by an array of ideological lobbyists. It appears that Moreno-Ocampo's subsequent place of employment at the plush air-conditioned offices of the Fédération International de Football Association (FIFA) in Switzerland is more suited to his skill set, which enabled him to dribble his way out of tricky geo-political situations. Earlier in his reign, Moreno-Ocampo has revealed that when he was attempting to prosecute the Kenyan case of post-electoral violence, he was approached by a number of Western governments to ensure that Uhuru Kenyatta did not succeed in the presidential poll, which reveals the prevalence of judicial imperialism. Of course, the opposite transpired and Kenyatta won the

poll. Moreno-Ocampo's argument with regards to the Palestine case was that he could not launch a preliminary investigation into the Israel-Palestine situation, because neither Palestine nor Israel were members of the State Parties to the ICC.

This argument was summarily nullified when Palestine obtained the status of state observer to the UN General Assembly. On 1 January 2015, it signed up to the Rome Statute and became a member of the ICC. When the rationale for the argument that Moreno-Ocampo had been making was removed through Palestinian membership of the ICC, then the options available to the ICC prosecutor diminished rapidly. Faced with a compelling case that could ultimately issue arrest warrants to both Palestinians and Israelis, Bensouda took the plunge when she decided to uphold her oath of office and commit to investigating all cases in which there is prima facie evidence of human rights violations. She now finds herself in a maelstrom of discontent from an unholy alliance that includes Bashir as well as the Netanyahu and Donald Trump administrations. The only question now is what is coming next for the ICC from this band of un-merry brothers?

This process of instigating preliminary investigations is standard operating procedure for the Court. When the prosecutor ultimately decides that there is no case to be answered for then the case is quietly withdrawn from purview of the ICC. When cases prove to be treacherous terrains of contestation, the prosecutor can enter into a semi-permanent holding pattern, in which she perpetually postpones making a decision on a preliminary investigation. This continues to be the reality faced by victims of militia violence in Colombia for example. If there is a will, there is a way. The length of time between the UN Security Council's referral of the Libyan case and the then prosecutor Luis Moreno-Ocampo's launch of a preliminary investigation, and the ICC's Pre-trial Chamber decision to formally issue a summons to the late Muammar Gaddafi to appear before the ICC, took the whole of two months. This same speed criterion was applied to the Israel-Palestine case, one would expect a summons to be issued in 2015, assuming of course that there is any case to be answered in the Israel-

Palestine situation. A summons could include those who launched the katusha rockets from the Hamas controlled territory, as well as Israeli politicians and generals who issued commands to bomb Gaza. In all likelihood the preliminary investigation into the Israel-Palestine case could fall into the category of semi-permanence. In fact, because of the ICC's interventions into the Palestinian situation, Washington, Tel Aviv and their allies will now seek to systematically undermine the ICC. Observers of the Court will do well to monitor how this process will unfold and manifest itself.

We should therefore not be in any doubt about the political reasons why some ICC cases are held in abeyance, while others are fast-tracked with all of the alacrity of Usain Bolt exploding from the starting blocks of a 100-metre sprint race, as was the case with the launch of the prosecutions in Libya. The backstory to this event has been a systematic campaign by African governments to expose the ICC as a tool for global powers to discipline, control and punish regimes which are not aligned to their interests or as an instrument of judicial imperialism. No doubt this agenda has irked Bensouda, an African and former attorney general of Gambia, and her team at the ICC. The 2003 Iraq invasion described by Kofi Annan as an 'illegal war' will not yield any prosecutions through a UNSC referral, so long as it remains dominated by the present P5.[1] This is a manifestation of the ability of global power politics to suppress international criminal law when it becomes convenient to do so. This is a manifestation of the subservience of international criminal justice to the vicissitudes of global empire. In effect, it is the manifestation of judicial imperialism. This means that global power will continue to be able to prevent the application of international law where it is warranted, notably in Palestine. Similarly, the failure of UNSC to refer Syria to ICC, due to the brinkmanship and juvenile politicking of the Permanent Five members of the Council, despite obvious war crimes exposes the fact that when it comes to international criminal justice the legal criteria for criminal liability is not sufficient for a case to become before the ICC for prosecution.

On the political education of lawyers and jurists

The picture that emerges is that world powers are not above using the international criminal justice system for their own political ends through the practice of judicial imperialism. What emerges is what some observers have argued all along: that the ICC system of prosecutors and judges is beholden and subservient to the global power elite. Consequently, the legal profession has to change tack in order to preserve its own integrity. Lawyers and jurists can become so enamoured and ensnared by their sense of self-righteous and over-zealous supplication to judicial processes that they can fail to see, or deliberately choose not to look, when these same processes are being abused and manipulated for political ends. There are extremely capable individuals who are working in these courts and tribunals and they must make the argument in defence of the independence of their courts. If they feel that they do not have to make these arguments, and that they can hide behind a shield of objective and neutral justice, then they will realise that their shield can be pierced by the self-evident double standards and hypocrisy of their politicised actions. They need to grow political antennae and acknowledge the highly politicised milieus in which they operate. They need to become political actors!

Bachmann proposes that 'international criminal tribunals in particular are political and must be political, and their political agenda should be as transparent as their legal one'.[2] This is in stark contrast to the protestations of international lawyers, jurists and legal scholars who emphasise that they only focus and rely on the use of legal criteria in undertaking their work. This is a throwback to the professional training that lawyers receive in the nascent stages of their indoctrination as lawyers, secular priests of society, whose mission is to uphold the law above all else. The legal 'Hippocratic oath' stipulates that lawyers should protect the legal system where it exists, even though the system may have imperfections, the lawyer's mission is not to dismantle it but to try and make it more perfect. The political analyst witnessing how judicial institutions are routinely manipulated, co-opted and instrumentalised by self-interested actors, recognises that merely tinkering around the

edges will not improve a legal system. In fact, the transformation of the political system is more effective at enabling the judicial institutions to conduct its work without political interference.

This suggests that the one-sided indoctrination that is imposed on law students by their professors does them a great disservice, particularly when they proceed out into the world and discover the corrupting power of politics in judicial processes. Specifically, law students need to engage with the multiple dimensions of politics in their educational curricula, not as an after-thought or a 'guest seminar', but as part and parcel of their programme. This will not guarantee that they will be immune from the consequences of politics when they graduate, but it will empower them with the conceptual tools to analyse and recognise the corroding effects of politics in the law, and strive to find ways to insulate their institutions from phenomena such as judicial imperialism. In the case of international criminal law, conceptual tools in political analysis are an integral part of the lawyer and jurist's toolkit.

To throw lawyers into the political ocean without these conceptual tools is to cast them into a whirlpool of forces which they may find difficult to understand. Sending lawyers who sing from the song sheet which they received during their studies, that their work is not impacted upon by the political undercurrents in which they operate, is like sending actors who can only perform in silent theatre to undertake roles in a tempestuous opera.

The converse also applies to politicians and political analysts, in terms of the need for sufficient education in the centrality of upholding the rule of law. Specifically, politicians in particular need to be well versed, and constantly reminded, that the separation of powers, between the executive political branch, on the one side, and the legislative and judicial branch of government, on the other is vital to achieving and maintain human freedom, equality and dignity.

The African Union and the ICC

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'.[3] According to officials of the AU, what the body takes exception to is in effect being constrained by how other international actors choose to fight impunity on the African continent. This sentiment is not unique to Africa. There is no other region of the world, which is subject to the prosecutorial interventions of the ICC, so it is not possible to compare or contrast whether the AU's stance is in fact unreasonable. All inter-governmental organisations undoubtedly would want to determine how their member states engage with issues relating to transitional justice, peacebuilding, democratic governance and the rule of law, without feeling that there is an overbearing and patriarchal entity in effect stipulating how the continent should be going about doing so.

It is an understatement to note that the relationship between the AU and the ICC got off to a bad start and still remains strained a decade later, even though organisations share a convergence of mandates to address impunity and to ensure accountability for violations, atrocities and harm done in the past. Where the organisations diverge is in the fact that the AU is a political organisation and that the ICC is an international judicial organisation. In this divergence lies how the two organisations 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 more on peacemaking and political reconciliation. The ICC on the other hand will pursue international prosecutions, because this is written in its DNA, the Rome Statute. On paper it would appear that the two approaches might never converge. Yet there is scope for the AU to become more nuanced in the situations in which it would side with and support ICC interventions to promote accountability for past violations. Conversely, the ICC essentially has to acknowledge and communicate that it is aware that it is operating in an international political milieu and that on occasion it would have to nuance or sequence its prosecutions to enable political reconciliation processes to run their course. This will require the ICC system to step

down from the artificial pedestal on which Ocampo has placed it, asserting that it does not play politics, when in fact it appeared that everything that it did was politically tainted. In effect, the ICC will need to embrace the political lessons of its past transgressions and omissions, and openly acknowledge that, in the absence of a world government, it works in an inherently unrestrained international political system. Bensouda and her team will need to reframe the ICC's orientation in this regard. This may require re-opening the Rome Statute to further engineering and potential dismemberment. However, even prior to revisiting the Rome Statute, Bensouda can communicate her intentions by issuing OTP Policy Papers on how the ICC will sequence its activities to enable peace processes to take their course and how her administration intends to go about rectifying and remedying the misperceptions that persist across Africa.

There could potentially be cases in the future in which the AU would allow the ICC to do what it was designed to do; with the proviso that given its nature as a political organisation, the Union leadership would be reluctant to expose its membership to a precedent in which one of its ranks is prosecuted by the ICC. This is of course an unpalatable position to take for human rights activists and advocates of utility of prosecuting those who commit egregious atrocities. This would specifically be in contravention of the principles of human rights, which will have to be sacrificed at the altar of political pragmatism. There is clearly merit in the position of the human rights organisations. However, in the real world the ICC has already demonstrated that it is prepared to play politics by failing to pursue certain prosecutions, such as in Gaza, Sri Lanka, Iraq, and Afghanistan, without fear or favour.

In effect, both the AU and the ICC would need to reorient their stances. The AU would need to move away from its exclusively political posture towards embracing international jurisprudence and the limited interventions by the ICC. Conversely, the ICC needs to move away from its unilateral prosecutorial fundamentalism and recognise that there might be a need to sequence its interventions to give political reconciliation an opportunity to stabilise a country.

This strategy for repairing the embattled relationship between the AU and the ICC would seem an unacceptable compromise by some actors on both sides of the spectrum. Their preference would be for their organisations to stick to their guns. This scenario is in fact already playing itself out. The African Union is undertaking a study to assess how its continental institution, the African Court of Justice and Human Rights, can be imbued with continental jurisdiction for war crimes, crimes against humanity and genocide. The idea behind this move is essentially to establish a pan-African criminal court with the same mandate as the ICC. In effect, the AU's criminal court would be seeking to effectively circumvent all future ICC interventions on the African continent. Whether this would lead to African State Parties withdrawing from the Rome Statute is not yet clear. Furthermore, while the Rome Statute makes provisions for complementarity with national jurisdictions it does not have similar provisions for continental jurisdictions, so there is no guarantee that the ICC would recognise a pan-African criminal court. Whether the AU succeeds in establishing a 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 actively exploring how to make the Court's presence in Africa an irrelevancy in the future. International organisations like the League of Nations have ceased to exist when their members effectively ignored their mandates. Will the ICC suffer the same fate in Africa? The response to this question cannot be answered for years to come, but it compels us to acknowledge that there is an urgent case to repair the embattled relationship between the AU and ICC.

The prospects for the AU-ICC relationship

In terms of concrete initiatives to repair the relationship between the AU and the ICC, the Court needs to reorient its stance towards the African Union. In particular, the ICC system, including the OTP, registry and assembly of state parties, needs to improve its outreach

and active engagement with African civil society, through meetings across the African continent as well as adopting a more welcoming and accommodative approach to representatives when they come to engage with the ICC at The Hague. The Court's second chief prosecutor, Fatou Bensouda, needs to appoint a senior political advisor to essentially act as a liaison with political organisations like the African Union. This might 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 that are still war-affected.

As far as the African Union is concerned, it can also adopt a range of initiatives to contribute towards repairing the inter-organisational relationship. In particular, the AU needs to assess how and when the ICC can function as a partner to the AU in terms of addressing the violation of human rights on the continent, through a deliberate dialogue with the African Court of Justice and Human Rights, particularly in the lead up to the operationalisation of the Malabo Protocol. The AU can also engage in a dialogue with the ICC and utilise the presence of African countries in the ICC Assembly of State Parties to further communicate its views to the Court system. The role of civil society in these processes cannot be overlooked. In particular, African civil society should continue to play an important role in undertaking policy analysis, victim support, documentation, awareness raising, advocacy and lobbying aimed at African governments on issues relating to international criminal justice. African civil society should also adopt a balanced view when analysing the impact of the ICC's interventions on peacebuilding processes on the continent. This will require adopting a posture of constructive criticism towards the ICC.

The prospects for international criminal justice

Article 16 can be amended to include a reference to enabling the UN Security Council to adopt a resolution under Chapter VI of the UN Charter which provides for other efforts at addressing the issue of

impunity including reconciliation and other peaceful means. If Article 16 included a reference to Chapter VI then the retributive justice which would be meted out by the Court could be sequenced to enable restorative justice processes to take impact upon the target society. The Rome Statute can be reviewed to accommodate the provision of sequencing the administration of justice. With specific reference to Article 29 on the statute of limitations, there is no time limit for the ICC to act with respect to situations which fall under its jurisdiction. Therefore, the prosecutor and the Pre-Trial Chamber can deliberately sequence an investigation or prosecution of a particular case in order to enable restorative justice processes, including truth commissions, to lay the foundation for peace and reconciliation. The prosecutor should utilise her or his discretion under Article 53 to decide whether an investigation or prosecution is in the interests of justice. This discretion could be the basis for justifying a sequencing of the Court's intervention in a particular case, particularly if fragile peacebuilding processes are underway. Article 10 stipulates that nothing in the Rome Statute 'shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law'.[4] Therefore, in the medium to long term, initiatives could be undertaken to further elaborate on the notions of justice in international law to include both retributive and restorative dimensions. This could also provide an international legal framework for the ICC to more effectively complement the efforts to promote restorative justice in countries in transition.

Re-legitimising the international criminal justice system

The legitimacy of international law and governance relates to the extent to which authority can be justified and accepted by its referents.[5] This requires a commonality of norms, transparency, participation and accountability, which are buttressed and underpinned by constitutionalism. Legitimacy is predicated on securing and maintaining the voluntary compliance of subjects to a system of rules and duties which underpin an order. Legitimacy cannot be sustained

by a mere myth; it requires the respect for norms that regulate society. The legitimacy of international criminal law will remain contested for as long as powerful individual state actors continue to undermine it to pursue their self-interests, through judicial imperialism. The legitimacy of the international criminal justice system will remain in question for as long as it remains susceptible to geo-political manipulation.

One solution to this problem is to situate the legitimating factor of international criminal law within a new global constitutional order, which can constrain the behaviour of even powerful states. Yet, international criminal justice is only of the issues facing humanity that need to be addressed through global institutions which are applicable to actors within the international system. Consequently, simply appealing to nation states to uphold their commitments under the Rome Statute and to improve on cooperation with the ICC is a necessary but not sufficient requirement to make international criminal justice universally applicable. The international system has been in need of a radical restructuring, since the current dominant institution such as the United Nations, with its myriad noble institutions, was established more than 70 years ago. Small and medium powers have a political incentive to transform the international system because it does not work to their advantage. The P5 members of the UN Security Council have no interest in transforming the system, evident in the fact that they have only paid lip service to the processes of 'UN reform' for the last quarter of a century, back to the early 1990s, when the Cold War detente became a reality. Western triumphalism over Russia and China and its messianic attempts to recreate the rest of the world in its own image has undermined efforts to forge and reconstruct a new geo-political system that is inclusive of all stakeholders irrespective of the level of power they yield. The corruption of the ICC, and the wider international criminal justice regime, is only one symptom of an inadequate global governance system that is in need of radical surgical transformation.

Is the ideal of global justice that is universally applicable too elusive to achieve? This book suggests that it is not an elusive goal, but in

order to achieve it the global governance system has to be radically restructured and transformed into a more democratic dispensation. The ICC is a permanent institution and will not cease to exist. The only prospect for enabling it to do its work in an impartial and neutral manner is not to continue issuing pointless platitudes to state actors about the importance of upholding international law, but to radically transform the system of global governance. In effect, this would require the establishment of a democratic and legitimate system of global governance, which will increase the prospects of cases being selected without political control.

For Schabas, 'justice ... cannot be the preserve of the courts, the way it is at the domestic level. Inevitably, it is a mixture of the judicial and the political'.[6] Schabas suggests that 'the challenge for those involved in the judicial wing of this process is to ensure the *greatest legitimacy* without at the same time *encouraging the myth* that what they are doing is *devoid of any political dimension*'.[7] The only way that humanity can advance its interest of pursuing freedom, equality and dignity by international law is to pursue the re-configuration of politico-legal power. The dismantling of the current UN system and the establishment of a more democratic dispensation in which international law will not be co-opted to serve the interests of the power elite. The antidote to judicial imperialism is the dismantling of the UN Security Council in its current formation and the reconstitution of an international system that is premised on the freedom, equality and dignity of all of its constituent parts.

Conclusion

The International Criminal Court 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 recognises 'that such grave crimes threaten the peace, security and well-being of the world'[8], 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 politicised situations that the ICC has become involved in and may engage in the future. 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 in the wider issue of how its actions contribute towards consolidating peace. The Court's relationship with Africa and, in particular, with the African Union 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 International Criminal Court is undermining the prospects for the development of international justice, particularly on the African continent. The refusal by 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 Al Bashir of Sudan and Kenyatta of Kenya, as well as the African Union, were able to politicise and pan-Africanise their criticisms of the ICC, to the extent that the dominant view in the 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 legalised 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 'court'; the only word left in its appellations is the word '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 in ability 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 on the utility and necessity of the issue of sequencing. The ICC needs to recognise the merits of sequencing and establish the necessary modalities to operationalise 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 African Union and the ICC, if both institutions are to achieve the goal of holding leaders accountable for mass atrocities. Both organisations need to recognise 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 African Union - 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 securing the political

interests of African countries, continued tension between the two organisations will not augur well for improving the relationship. The UN Security Council also has an important role to play to communicate formally with the African Union 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 African Union and International Criminal Court, which will have to be predicated on addressing the perceptions of political justice and judicial politics which persist.

Regrettably, what is lost in this contentious debate about the politicisation of international criminal justice is the need for the human dignity of the victims of mass atrocities in other parts of the world where interventions are cordoned off by judicial imperialism notably in Palestine, Iraq, Syria, Afghanistan, Yemen, Crimea, Chechnya, Tibet and many others. More importantly, human dignity will not be achieved exclusively by the judicial fiat of a coterie of prosecutors and judges based in The Hague, but through laborious and arduous processes of dealing with the past, acknowledging the harm done through truth telling and demonstrating genuine remorse for past violations. Then, and only then, can the potential for some form of redress be achieved and the prospects for reconciliation be enhanced. This is a tall order, but it is always worthwhile to remember the central theme in Nelson Mandela's philosophy of reconciliation, 'it always seems impossible until it is done'.

Notes

Chapter 1

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About the Author

Professor Tim Murithi is Head of the Peacebuilding Interventions Programme at the Institute for Justice and Reconciliation in Cape Town, and also Extraordinary Professor of African Studies at the Centre for African and Gender Studies at the University of the Free State, South Africa. He was previously Claude Ake Visiting Professor, Department of Peace and Conflict Research, Uppsala University and Nordic Africa Institute, Sweden. He is also a senior associate at the Centre for Mediation, University of Pretoria; and a Research Associate at the Institute for Democracy, Citizenship and Public Policy in Africa, University of Cape Town. He is a member of the Technical Committee of the Tana High-Level Forum on Security in Africa. Senior Research Associate at the Nordic Africa Institute, Sweden. He has over 25 years of experience in peace, security, governance, transitional justice and development in Africa. He has also held posts at the Department of Political Studies, University of Cape Town; Department of Peace Studies, University of Bradford, United Kingdom; Institute for Security Studies, Addis Ababa; African Gender Institute and Centre for Conflict Resolution, University of Cape Town; and United Nations Institute for Training and Research (UNITAR), Geneva, Switzerland. He has also served as an Adviser to the African Union Peace and Security Department and Department for Political Affairs, Southern Africa Development Community (SADC) as well as United Nations

Development Programme, United Nations Office of the Special Adviser for Genocide Prevention and the Responsibility to Protect, UK DFID and German GiZ. From 1995 to 1998 he taught at the Department for International Relations, Keele University, England, where he also obtained his Ph.D in International Relations.

Professor Murithi is on the International Advisory Boards of the *Journal of Peacebuilding and Development*, *African Journal of Conflict Resolution*, *Journal of African Union Studies*, *African Peace and Conflict Journal, Brazilian Journal of African Studies and Peacebuilding*. He has authored over 100 journal articles, book chapters and policy papers. He is the author and editor of ten books, including as author: *The African Union: Pan-Africanism, Peacebuilding and Development* (Ashgate, 2005) and *The Ethics of Peacebuilding* (Edinburgh University Press, 2009); co-author of *The African Union Peace and Security Architecture: A Handbook* (FES, 2014). He is co-editor of: *The African Union: Autocracy, Peacebuilding and Diplomacy* (I.B.Tauris, 2018); *The African Union Peace and Security Council: A Five Year Appraisal* (ISS, 2012); *The African Union and its Institutions* (Jacana, 2008) and *Zimbabwe in Transition: A View from Within* (Jacana, 2011). He is the editor of *Towards a Union Government of Africa: Challenges and Opportunities* (ISS, 2008), *Routledge Handbook of Africa's International Relations* (Routledge, 2014) and *The Politics of Transitional Justice in the Great Lakes Region* (Jacana, 2016). He is General Editor of the Routledge/Europa Series on Perspectives in Transitional Justice.

"Professor Tim Murithi's book comes at a time when international criminal justice is under fire: criticised by victims for its selectivity and inefficiency, and instrumentalised or marginalised by the global powers according to their self-serving interests. Professor Murithi suggests that the very unequal foundations of international criminal justice and the global governance system are to blame. International criminal tribunals tend to replicate and reinforce rather than to correct the balance of power among the most influential states who implement an imperialist agenda to serve their purpose, which their supporters conveniently do not acknowledge or interrogate. This timely and relevant book presents current analyses and opinions from Africa, which are regrettably often neglected and ignored by those who discuss international criminal justice in Europe and North America."

Professor Klaus Bachmann, University of Social Sciences and Humanities in Warsaw, Poland, and editor of When Justice Meets Politics: Independence and Autonomy of Ad Hoc International Criminal Tribunals

Fanele
(Zulu;Xhosa;Tswana) = necessary.
This is a necessary book.