

THE EVOLUTION OF INTERNATIONAL CRIMINAL LAW AND THE INTERNATIONAL CRIMINAL COURT IN CONTEXT⁺

By

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I. INTRODUCTION

The International Criminal Court (the ICC or the Court) was established under a treaty, the Rome Statute, to which states voluntarily sign on. Out of the 122 states that have to date signed on to the Treaty, 34 are African. Thus African states constitute the single largest bloc of countries who are States Parties to the Rome Statute. The second largest bloc is Latin American and Caribbean States with 27 States Parties.¹ Save in the case of a UN Security Council referral, the Court exercises its jurisdiction only over those individuals who are either nationals of a State Party to the Rome Statute, or who have committed an alleged crime on the territory of a State Party. We can therefore right away refute the belief, in some quarters, that the ICC is an imposition of some powerful states over weaker states, particularly African states, or that it is an

⁺ Address to the Parliament of Uganda at the Parliament Building, Kampala, Uganda, 26 September 2013. The views expressed herein are the author's alone and do not represent the Special Tribunal for Lebanon or the International Criminal Court.

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¹ Other States Parties are as follows: 18 Asia-Pacific; 18 Eastern Europe; 25 Western Europe and other States.

institution of the erstwhile colonial or imperialist powers, pursuing neo-colonial or imperialist agendas. Indeed some of the most powerful states on the world stage are not even States Parties. The Court is a consensual institution based on treaty, and is fully financed from contributions from its members.

II. WHAT ARE INTERNATIONAL CRIMES?

The International Criminal Court currently has the mandate to try individuals suspected of committing the crime of aggression, genocide, crimes against humanity and war crimes. The Rome Statute asserts that these crimes constitute “unimaginable atrocities that deeply shock the conscience of humanity” and that they “threaten the peace, security and the well-being of the world.” One may hasten to say that that the crimes are international crimes par excellence, because they violate internationally cherished values; they threaten the international legal order; some threaten the very continued existence of the human race; and they are an affront to the dignity of the human person. Nowadays you see reports of these crimes on the TV screen in your living room every day. They are indeed horrendous. Customary international law has for long condemned them as crimes against the law of nations, and has considered their perpetrators to be enemies of mankind, or *hostis humani generis*. They are crimes that concern the international community as a whole; and they are

committed, not against one state, but notionally against the entire international community.

In this respect the United States Military Tribunal at Nuremberg declared:

“An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances.”²

Thus, for example, a single act of murder, rape or torture becomes, a crime against humanity, which is an international crime, if it is committed as part of a widespread or systematic attack against a civilian population. It must not only be part of numerous similar acts but must also be committed in an organized and not random manner, in pursuance of state or organisational policy. This is what apparently happened in Northern Uganda and other African countries whose situations are before the ICC. An act of murder may also become genocide, another international crime, if committed in conjunction with other acts, with the intent to destroy, in whole or in part, a national, ethnical, racial or

² *In re List & Others* (1953) 15 Ann. Dig. 632, at 636.

religious group as such. This is what happened during the holocaust in Nazi Germany, as well as in Rwanda and in some parts of the former Yugoslavia. An act may also amount to a war crime if the act is committed in the context of an armed conflict as part of a plan, or as part of large-scale killings.

III. PROSECUTION AND PUNISHMENT OF THE PERPETRATORS

Since international crimes concern the entire family of nations, all states have an interest in their repression. One way of repressing these crimes is by holding the perpetrators accountable. Certainly, in a polity governed by the rule of law, every person is accountable for everything he or she does. Indeed, at the end of this age and during the Final Judgment, all of us, without exception, shall have to render an account of ourselves before our Creator for what we have done or omitted to do.³ If we were not accountable, then, we would continue to do bad things, including committing barbaric acts against our fellow human beings in violation of both the divine and secular law with impunity, knowing that we do not have to face the consequences for what we have done; or, as we say in the Luganda language, “*banankola*”? Victims of our conduct would also have no recourse and would have no justice. Many flee to other countries in search of freedom from tyranny. We have millions of such people roaming this [African] continent.

³ Rom. 14: 12; Matt. 12: 36.

Again, under a polity governed by the rule of law, the best way of establishing whether or not an individual is accountable for alleged wrongs is through a fair trial by the courts of law. For those familiar with the Bible we read in the Book of Deuteronomy 25: 1 – 3 as follows:

“When men have a dispute, they are to take it to court and the judge will decide the case, acquitting the innocent and condemning the guilty. If the guilty man *deserves* to be beaten, the judge shall make him lie down and have him flogged in his presence with the number of lashes *his crime deserves*, but he must not give him more than forty. If he is flogged more than that, your brother will be *degraded* in your eyes.” (NIV)

This text flags some important issues for us. First, the text talks of men or people having “a dispute.” As we shall see presently, in the context of international criminal justice, the “dispute” is between the international community as a whole, and the alleged “international criminal”, over what the latter is alleged to have done to the former.

Secondly, when the dispute arises, or when the crime is committed, it must be resolved by judges in a court of law, not by self-help or by reprisals.

Thirdly, in case the judges find the alleged perpetrator of an international crime guilty, and they determine that he or she *deserves* punishment, they must impose a punishment that his or her crime *deserves*; it must reflect the seriousness of the offence, the extent of harm occasioned and the degree of his or her culpability or moral blameworthiness, this is the principle of retributive justice. The Special Court for Sierra Leone recently sentenced Mr. Charles Taylor, former President of Liberia, to 50 years imprisonment, for the heinous crimes it convicted him of.

Punishment is important, not only for retributive justice, but also for deterrent purposes. It serves to deter not only the convicted offender, but also people who might be inclined to behave in the same way as the convicted offender. In the case of international criminals, particularly those who consider themselves to be untouchable, punishment serves to remind them of the old adage that says: “be you so high, but the law is above you.” Indeed, the very issuance of an international warrant of arrest, even before it is executed, has potential deterrent effect. As Professor Dugard has aptly observed,

“Already it has become more difficult for war criminals to travel abroad. International arrest warrants await them at some international airports. I cannot believe that, at least in some cases, this does not act as a deterrent.”⁴

Honourable members are familiar with some situations in our region where this observation is applicable and I do not need to belabour the point any further.

IV. WHO HAS JURISDICTION TO PROSECUTE?

Under customary international law every state has, not only, a right, but also a duty, to try and punish any individual who commits any international crime on its territory. National sovereignty, a fundamental principle of customary international law, vests that right in the state. And where there are competing claims to jurisdiction, the state on whose territory the crimes were committed (or the territorial state) has the right to act first. From this state’s right to act first, the ICC Rome Statute derives the notion of complementarity. This notion subordinates the Court’s powers to prosecute an individual for an international

⁴ John Dugard, “Preventing and Prosecuting Crimes against Humanity in the 21st Century”, Distinguished Lecture on Human Rights and International Justice (The John D. and Catherine T. MacArthur Foundation), Abuja, Nigeria, February 14, 2005.

crime to those of the state. So the ICC's powers are secondary, while those of the territorial state are primary. However, primacy does not mean exclusive and it does not entitle a state to do nothing or to do so deceitfully. This explains why, in the sequel of the post elections violence in Kenya, Kenya politicians with the mediation of Kofi Anan, undertook to set up national judicial mechanisms to try and punish those suspected to have been responsible for the mayhem. It was only after the government failed to set up those mechanisms that Kofi Anan handed over the matter to the ICC Prosecutor, as had been agreed; and, with the approval of the Court's Pre-trial Chamber, the Prosecutor initiated the investigations and the subsequent prosecutions. This was meant to ensure that those responsible for orchestrating the post-election atrocities would not go unpunished and that the thousands of victims and their survivors would not be denied justice.⁵ As Kofi Anan points out in the article, "Justice for Kenya":

"There have been efforts to paint the I.C.C. cases as an assault on Kenya's sovereignty. The supporters of Mr. Kenyatta and his running mate, Mr. Ruto, who won the presidential election earlier this year despite the charges against them, have spoken often of the meddling of 'foreign powers.' But the record is clear and there

⁵ See *International Herald Tribune* (news paper) 10 September 2013 at p. 6.

should be no doubt: it was the Kenyan government's failure to provide justice to the victims and their survivors that paved the way to the I.C.C., a court of last resort. Nor do these trials reflect the court's unfair targeting of Africa, as has also been alleged. They are the first steps toward a sustainable peace that can only be assured if Kenya's leaders are not above the law.”

I fervently believe that this information serves to set the record right.

There are also other practical advantages to allowing the territorial state to exercise its jurisdiction first. These are: respect for the national sovereignty of the state and to allow it to do justice; the familiarity of those involved in proceedings with the local laws, procedures and languages; the existence of a legal infrastructure; and cost-effectiveness and expeditiousness. You would here appreciate the enormous cost incurred in conducting proceedings in far away Hague instead of the national courts.

However, for one reason or other states on whose territory international crimes are committed are often unable or unwilling to carry out their primary responsibility to prosecute the perpetrators. For this reason, both customary

international law and a number of treaties, enable other states to do so. This law accomplishes this goal under the principle of universal jurisdiction. Under this principle, every state has jurisdiction to try and punish anyone suspected of having committed an international crime regardless of his or her nationality or that of the victims, and regardless of the State on whose territory the crimes were committed.⁶ Customary law also imposes an obligation on every state on whose territory a suspected perpetrator may be found to try and punish that person. If it does not, then, it must surrender the perpetrator to any other state that may be able and willing to do so. This ensures that no international criminal escapes justice for lack of jurisdiction over him or her.

Lamentably, however, states rarely exercise universal jurisdiction over international crimes; in fact, until recently, only very few of them have had legislation on their statute books incorporating those crimes in their national *corpus juris* or vesting their courts with jurisdiction over them. In 1970, the United Nations General Assembly expressed concern that “war crimes and crimes against humanity [were] being committed in various parts of the world” and that “war criminals and persons who committed crimes against humanity [were] continuing to take refuge in the territories of certain States and [were]

⁶ See also *Queen v. Desire Munanyeza* [2009] QCCS 2201 (Quebec Superior Court, 22 May 2009) where the Canadian court tried and convicted the accused, a Rwandan national, of genocide, crimes against humanity and war crimes committed in Rwanda in 1994.

enjoying protection.”⁷ Some of the reasons for this lethargy are: the complexity of the cases and the attendant high cost involved in their prosecution; the undue homage to the doctrine of non-interference in the internal affairs of other states; the lack of political will; and the lack of moral authority, in the sense that states are reluctant to point an accusing finger at others, because they themselves behave in the same manner and have skeletons in their closets. When you point a finger at another person, the remaining four are pointing at you!

To remedy this unsatisfactory situation in the international legal order and to combat impunity for the ever-rising incidence of international crimes, *ad hoc* international tribunals were created. The first of these were the International Military Tribunal based in Nuremberg and the International Military Tribunal for the Far East based in Tokyo. The two tribunals were set up in 1945 and 1946 respectively by the Allied Powers after their triumph over Hitler and the Axis Powers, to try the major war criminals. These two tribunals were followed fifty years afterwards, at the end of the cold war, by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), set up by the United Nations in the early nineties following the military conflicts in the two countries. They were set up to prosecute persons responsible for serious violations of international

⁷ United Nations, General Assembly, *Resolution 2712*, 15 December 1970, A/RES/2712(XXV).

humanitarian law committed in the two countries during the conflicts. Other hybrid tribunals established in East Timor, Sierra Leone and Cambodia followed. The latest in this category of tribunals, is the Special Tribunal for Lebanon (STL) established, again, by the U.N. Security Council to try persons “responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others” in the attack of 14 February 2005.⁸ In setting up these tribunals, the United Nations saw prosecution and punishment of violators of international humanitarian and criminal law as a means of maintaining or restoring peace in the countries concerned. Given the reluctance or inability of states to exercise domestic criminal jurisdiction in these cases, these tribunals have served a veritable role in filling a vacuum, and in ensuring justice, accountability and in combating impunity.

Ad hoc tribunals do, however, have shortcomings. First, they were established and the law they applied was promulgated *ex post facto* – after, and not before, the crimes were committed. This conflicts with the principle of legality, which requires that a person should be tried and punished only for violation of a law that existed at the time of the alleged crime. In connection with this assertion it may of course be argued, and it has in fact been argued, that the law did indeed

⁸ [UN Security Council, Security Council Resolution 1757 \(2007\) \[On the establishment of a Special Tribunal for Lebanon\], 30 May 2007, S/RES/1757.](#)

exist under customary international law, but only that there were no courts to enforce it. Secondly, as some would argue, the *ad hoc* tribunals dispensed victors' justice, meaning the "victors" in a conflict got to impose their justice against the "vanquished" in a conflict. This was clearly the case in respect of the post – World War II tribunals. Third and lastly, again as some may argue, *ad hoc* tribunals dispensed selective justice. They were or are country-specific, and limited to specific periods, covering only specific episodes. For example the tribunal for Rwanda is confined to crimes committed between 1 January and 31 December 1994, fullstop. Though atrocities continued to be committed in some of those countries the tribunals' jurisdiction did not extend to them. Additionally, other equally revolting episodes in other countries have taken place, but no international tribunals were set up to deal with them. There was thus a glaring need for a permanent international criminal court with a global mandate to address this ugly and recurring aspect of international life in all parts of the world.

The International Criminal Court (ICC) was established in Rome in July 1998 to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished."⁹ As a permanent court, the ICC serves as a perpetual notice to anyone in any part of the world, particularly those in

⁹ Para 4 of the Preamble to the Rome Statute.

positions of power and influence, that they are not above the law. It reminds them that if they were to be tempted to commit heinous crimes, there is somewhere in The Hague is a Prosecutor monitoring their conduct and that Prosecutor is vested with the power to indict them before that Court; and that if they are found guilty they may be punished.

It is however important to underscore the Rome Statute's provision that the Court "shall be complementary to national criminal jurisdictions."¹⁰ This means that the Court is a court of last resort. It comes into the picture only when the country concerned has failed to exercise its jurisdiction over alleged perpetrators of international crimes;¹¹ or when it is unable genuinely to exercise jurisdiction. Instances of inability to exercise jurisdiction would include a total or substantial collapse of a country's judicial system, inability to arrest the accused or the necessary evidence or testimony.¹² The Court also comes into the picture where a state has purported to exercise jurisdiction, but it has done so in

¹⁰ Article 1.

¹¹ See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*: Appeal of Mr. Katanga against the "Oral Decision of the Trial Chamber II of 12 June 2009 on the Admissibility of the Case", 2-5 September 2009; and *Prosecutor v. Ruto et al. and Prosecutor v. Mathaura et al.*, Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 20 June 2011.

¹¹ See *Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Case No. ICC-01/11/-01/11, Decision on the Admissibility of the case against Saif Al-Islam Gaddafi, Pre-Trial Ch. I, 31 May 2013. The Pre-trial held the Libyan government was unable to exercise its jurisdiction because, among other things, its national judicial system could not yet be applied in full in "areas or aspects relevant to the case, were not able to obtain the accused [then under the custody of the Zintan Militia] and the necessary testimony or to secure witness protection

¹² See Article 17(3) of the Rome Statute of the International Criminal Court.

a manner that does not meet international standards or is shoddy or unjustifiably protracted or is intended to shelter the perpetrators from criminal responsibility.

It is also apposite to stress that when a state assumes jurisdiction over a perpetrator of international crimes, it does so on behalf of the rest of the international community. That is why the international community remains vigilant and interested in the way the state conducts the proceeding. And when it is not satisfied with the way the state has done so, the international community then steps in, through international mechanisms such as the ICC to ensure that justice is done.

V. THE ICC AT WORK

The ICC started work in 2003. Currently the Court is seized of cases arising from eight situations in Kenya, Uganda, the Darfur region of the Sudan; Democratic Republic of the Congo, Central African Republic, Ivory Coast, Libya and Mali. Some of the situations have been referred to the Court by states, others by the UN Security Council, and others have been commenced on the initiative of the Prosecutor. So far, the accused persons have included two sitting Presidents (Mr Al Bashir and Mr Kenyatta) and a sitting Vice-President

(Mr. Ruto); they also include a former President (Mr. Bagbo), a former vice-President (Mr. Pierre Bemba), senior Cabinet Ministers, and military or rebel leaders.

VI. IS THE COURT OUT TO TARGET AFRICA?

Because all the situations before the Court to date are from Africa, the Court has been accused of unfairly targeting Africa and for deliberately trying to undermine the African States' sovereignty and independence. Whether or not these accusations are correct will depend on (1) Africa's relationship to the Court, (2) how the situations came to the Court, (3) whether or not the Court is biased against Africa, and whether or not African states have been unfairly prevented to exercise their domestic jurisdiction.

As for national sovereignty and Africa's relationship with the Court, we have already noted that the ICC is a consent-based body, which states, in the exercise of their national sovereignty, join voluntarily by signing on to its Statute. We have also noted that with 34 African states having become states parties, the African bloc is the largest. In fact Senegal, an African state, was the first state to ratify the Rome Statute. As to how the African situations got to the Court, the record shows that four of the total eight were referred to the Court by the

African states concerned, that is to say, Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali. For what we discussed earlier concerning Kenya, we can also say that the ICC's assumption of jurisdiction over the Kenyan situation was an implementation of an earlier agreement by the Kenyan government. These self-referrals thus clearly demonstrate that the five states needed and sought the assistance of the Court to investigate and to bring to justice those who committed international crimes on their respective territories. So, who is targeting who here?

As for the Ivory Coast, the government of that country under the presidency of Bagbo, though not a state party, signed a declaration voluntarily accepting the jurisdiction of the Court with respect to crimes committed either on its territory or by its nationals. When Wathala came to power he too confirmed what Bagbo had done before; he then subsequently handed the ex-President to the Court for prosecution for the crimes committed under his watch. So, is it fair to say that the ICC went out of its way to target the Ivory Coast?

Lastly, the situations concerning the Darfour region of the Sudan and Libya were referred to the Court by the UN Security Council in exercising its powers under the Charter to maintain peace and security. It did so after determining that those situations constituted a threat to international peace and security; it also determined that trial and prosecution of the individuals responsible for those

unsavoury situations, would contribute to the restoration or maintenance of peace and security. African states fully and actively supported these decisions. For instance, while the US did not support the Sudanese referral and abstained from the referral vote, the African members of the Security Council, Tanzania and Benin, voted in favour.

More telling is the unanimous vote of the Security Council to refer the situation in Libya to the Court. Two African states, South Africa and Nigeria, were among the member states of the Council who co-sponsored the Council's resolution on the subject - a resolution which was adopted with the active support of the Arab League. Honourable Members, those are the facts. Judge fairly.

VII. CONCLUDING REMARKS

Africa lags behind other continents in terms of development. Of the 50 member states that the UN classifies as the "Least Developed Countries", 34, which is 68 per cent, are African. This means that 63 per cent of all the members of the African Union, fall in the LDC category. The majority of our people, the people that you represent, wallow in poverty. It is imperative that Africa pulls itself out

of this abysmal situation. However, in my view, this cannot happen when millions of Africans, who should be busy developing their counties, languish in refugee camps, internally displaced people's camps or in "safe villages." Africa can only develop in peace and freedom. But, in my submission, there can be no peace and no freedom without justice. Furthermore, there can be no justice without the rule of law.

The rule of law is pivotal to Africa's development. But there can be no rule of law when some individuals in society believe, and are allowed to act as if, they are above the law - committing all manner of crime with impunity, or saying *banankola ki?* In this respect I fully endorse the view that the ICC is indeed "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."¹³ In my view, when given a chance, the ICC constitutes a visible and effective antidote to impunity. Honourable Members of Parliament, the ICC is worthy of your full and unflinching support.

Lastly, in 2010 Uganda hosted the ICC Review Conference, at which the States Parties to the Rome Statute agreed to a definition of the crime of aggression and

¹³ Statement by the United Nations Secretary-General Kofi Annan at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court. (<http://www.un.org/icc/speeches/718sg.htm>)

to amend the Statute accordingly. The Court will be able to try individuals alleged to have masterminded acts of aggression against other states, once at least 30 States Parties ratify the amendment, or the Kampala Accords, as it is popularly known.¹⁴ I do therefore hope that African States Parties will ratify the amendment. By doing so, they will help to strengthen the rule of law and to demonstrate to the rest of the world their resolve and desire to live with each other in peace, concentrating all their energies and resources and energies on the development so urgently needed.

Thank You.

¹⁴ Article 5 (2) of the Rome Statute provides: “ The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”