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# PERSPECTIVES

Political analysis and commentary from Africa



**A FRACTIOUS RELATIONSHIP:**

**AFRICA AND THE  
INTERNATIONAL  
CRIMINAL COURT**

 HEINRICH  
BÖLL  
STIFTUNG

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# Editorial

The launch of the International Criminal Court (ICC) on 1 July 2002 provided the international community with a permanent global tribunal to prosecute individuals for genocide, crimes against humanity and war crimes. Building on the work of the ad hoc tribunals for Rwanda and the former Yugoslavia that were established by the United Nations in the 1990s, the creation of the ICC stemmed from the growing international desire to end the impunity of those responsible for most serious crimes.

Ten years into its existence, the Court handed down its first judgment on 14 March 2012, finding Thomas Lubanga Dyilo guilty of conscripting child soldiers in the conflict in the eastern region of the Democratic Republic of Congo (DRC). The decision was celebrated, rightfully, around the world as a milestone for international criminal justice and demonstrated the Court's determination to secure accountability for these grave violations. However, it also provided further fuel for those who hold to the notion that the ICC unfairly targets African leaders and that it, in the words of Rwandan President Paul Kagame, "was made for Africans and poor countries".

Although there continues to be widespread popular support across the African continent for the ICC and its mandate to prosecute high-level individuals accused of perpetrating international crimes, strong anti-ICC sentiments are brewing among sections of Africa's political elite and state actors.

Yet, if the Court is to work effectively and endure the tensions within the international political system, it will need the continuing support of governments and their citizens.

The African Union (AU) has become centre stage for the political contestation surrounding the Court. At a meeting in mid-May 2012, the Ministers of Justice adopted a draft protocol that brought the realisation of an African Court of Justice and Human Rights invested with international criminal jurisdiction a decisive step closer. Whether the African Court will be complementary or competitive with the ICC remains unclear. Many observers are, however, concerned that this initiative is intended

less to advance the reach of international criminal justice but rather to frustrate the work of the ICC and will possibly provide a means for Africa's political establishment to escape accountability.

How the Africa-ICC imbroglio can be resolved remains no easy task. Some observers urge that the ICC has to become more nuanced in its communication with the African continent and improve its understanding regarding the political dynamics of the environments it is engaging with; the complexities of which are adeptly highlighted in George Kegoro's analysis of the Court's intervention in Kenya. Tim Murithi, in his contribution, suggests that in order to prevent the AU-ICC relationship from complete collapse, the Court would need to stop simply just invoking its legal mandate and at times accept the political dimensions it is caught up in.

Others, like Nicole Fritz, emphasise that proactive complementarity - capacitating national jurisdictions in a way that they are able to try crimes incorporated in the Court's statute - is the most effective long-term policy response to ensure the greatest functioning of the ICC and international criminal justice.

Notwithstanding the contentious political dynamics surrounding the ICC, it is important to not lose sight of what the Court's main purpose should be: to serve the interests of victims, including the thousands who survived the gravest crimes on the African continent. Those men, and more especially women and children, that are still too often left feeling uncared for in the process of advancing justice as both the contributions by Ouattara and Scanlon remind us.

It is our hope that this edition of *Perspectives* will shed light on the diversity of the ongoing debates surrounding the ICC and inspire further discussion on ways to achieve a more collaborative relationship between Africa and the Court, in order to ensure the continent's continued and meaningful involvement in the international criminal justice project.

Jochen Luckscheiter  
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# Africa's Relations with the ICC

## A Need for Reorientation?

### Introduction

To date, Africa represents the largest regional grouping of countries within the International Criminal Court (ICC)'s Assembly of State Parties. African countries played an active role in the years preceding and during the 1998 Rome Conference, where the statute establishing the Court was adopted. Today, however, relations between the Court and the continent are severely strained. The African Union (AU), which represents virtually all countries on the continent, has adopted a hostile stance toward the Court and has called for its member states to implement a policy of non-cooperation with the ICC.

This article will discuss the trajectory of Africa's relationship with the ICC, and offer insights into how this troubled relationship can be reoriented in the interests of international criminal justice in Africa and around the world.



Tim Murithi

Tim is the head of the Justice and Reconciliation in Africa Programme at the Institute for Justice and Reconciliation in Cape Town, and a research fellow in the Department of Political Sciences at the University of Pretoria, South Africa. He has over seventeen years of experience in the field of post-conflict peacebuilding, reconciliation and reconstruction across Africa. He is the author of *The Ethics of Peacebuilding* (Edinburgh University Press) and is currently co-authoring a book on justice and reconciliation in Africa.

### The Establishment of the ICC

The Rome Conference, which led to the signing of the statute establishing the Court in July 1998, was a long and arduous exercise in international negotiation and brinkmanship. The majority of countries represented at the Rome Conference, including African countries, felt that it would benefit global governance to create an international criminal justice regime empowered to prosecute individuals guilty of gross atrocities and human rights violations, including war crimes, crimes against humanity and genocide. The reality of the Rwandan genocide of 1994 also convinced many African governments of the need to support an international criminal justice initiative to confront impunity and persistent mass human rights violations on the continent. For most participating countries, the inclusion in the Rome Statute of the crime of aggression further seemed to offer a means of restraining unwarranted interventions by more powerful countries. African countries were therefore part of a wider campaign of support for the ICC.

The ICC also had its opponents. From its inception, "the Court faced a strong challenge from the United States, which first signed the Statute and then unsigned it".<sup>1</sup> The failure of powerful countries, including Russia and China, to proactively support the Court and subject themselves to its criminal jurisdiction immediately raised alarm bells. Concerns were expressed that the Court's reach, and ultimately its efficacy, would essentially be confined to the middle and weaker powers within the international system. African governments subsequently raised objections about the self-exclusion of powerful countries from the Rome Statute, expressing concerns that the ICC's original noble intentions had been subverted by the political agendas of greater power interests.

Thus far the ICC has focused exclusively on African cases. This has created a distorted perception amongst African governments regarding the underlying intention behind the establishment of the Court.

### ICC Interventions and Perceptions in Africa

Thus far the ICC has focused exclusively on African cases. These include submissions by individual governments (Uganda, the Democratic Republic of the Congo [DRC] and the Central African Republic [CAR]); self-initiated interventions by the ICC chief prosecutor, Louis Moreno Ocampo (Kenya and Côte d'Ivoire<sup>2</sup>); and two UN Security Council referrals (Sudan [Darfur] and Libya). This apparently lopsided focus has created a distorted perception amongst African governments regarding the underlying intention behind the establishment of the Court.

While in light of the fact that African countries voluntarily signed up to be subject to the jurisdiction of the ICC it is impossible to come to the conclusion that the Court was established to solely prosecute African cases, proponents of the ICC nonetheless have to engage in convoluted and often incoherent arguments as to why there are no cases from outside the region. Similarly, even though an individual examination of each African case might yield a rational explanation for its remittance to the ICC, it would seem that there is a combination of domestic and international political factors that lies behind the Court's current exclusive focus on African cases. The same appears to apply to UN Security Council referrals to the ICC, which are similarly biased.

Irrespective of the prism through which one chooses to view the situation, the fact remains that war crimes are being committed across the world. Therefore it appears to African governments that the ICC, in a stance of selective justice, is only keen to pursue cases on their continent. Many suspect that this might be because African states lack the diplomatic, economic and financial might of the US, the United Kingdom, Russia and China. Accordingly, some African officials see an entrenched injustice in the actions of an international criminal court whose stated purpose is to pursue justice for *all* victims of gross violations.

A number of commentators and observers in Africa<sup>3</sup> have therefore called into question the moral integrity of the ICC. Accusations have been levelled that cases are being pursued, not on the basis of the universal demands of justice, but in the interests of political expediency: specifically, that the ICC avoids pursuing cases that might alienate its main financial supporters.

The ICC system and the Office of the Prosecutor have failed to make a strong case against this charge, which can ultimately only be refuted by actions demonstrating that this Court is for all. In the absence of such actions, the perception across the African continent remains that the ICC is just for the selected and marginalised few, ensuring the decline of the Court's efficacy across the African continent.

### **The AU's Rationale for Criticising the ICC**

It is often the case that the individuals and leaders who have been accused of planning, financing, instigating and executing atrocities against citizens

of another group in the name of civil war are the very same people later called upon to engage in the process leading to a peace agreement. These are also the people who are then charged with ensuring its implementation.<sup>4</sup> The problems inherent in such situations frequently generate significant tensions between peace, on the one hand, and justice, on the other.

**In the absence of dialogue and such action, the efficacy of the Court will continue to decline across the African continent.**

Specifically, in the situation in Darfur, Sudan, the ICC's decision to open a case against President Omar al-Bashir raised difficult questions about the relationship between peace and justice. The ICC Pre-Trial Chamber I has since issued an arrest warrant for al-Bashir on charges of genocide, crimes against humanity and war crimes. Meeting on 5 March 2009, shortly after the ICC's decision, the AU Peace and Security Council (PSC) issued a communiqué lamenting that this decision came at a critical juncture in the ongoing process to promote lasting peace in Sudan.<sup>5</sup> In this same communiqué, the PSC asked the UN Security Council to exercise its powers under Article 16 of the Rome Statute to defer the indictment and arrest of al-Bashir. When the UN Security Council failed to respond to its request, the PSC expressed its regret at the decision. On 3 July 2009 in Sirte, Libya, at the Thirteenth Annual Summit of the Assembly of Heads of State and Government, the AU resolved not to cooperate with the ICC in facilitating the arrest of al-Bashir. This predictably soured relations between the Union and the Court.

The AU made a case for postponing questions of accountability until the tensions between peace and justice were eased; in other words, it proposed sequencing the administration of justice. Yet there were undoubtedly also political reasons for such a request, as 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. Nonetheless, the AU's point that Sudan found itself at a critical juncture of its peace-making process in Darfur, and that al-Bashir is the key interlocutor

with the armed militia and political parties cannot be wished away or ignored. In the end, the Darfur situation does not offer any easy answers to the question of sequencing the application of retributive and restorative justice.

The government of Sudan, which is not a state party to the ICC, has thus far declined to comply with the ICC prosecutor in enforcing al-Bashir's arrest warrant. Other African countries, including Djibouti, Kenya and Chad, have also declined to arrest al-Bashir when he has travelled there. 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 carrying out its request.<sup>6</sup>

**Bensouda has a mammoth task ahead of her. The broken trust between the AU and the ICC needs to be mended; Bensouda will need to initiate dialogue with the AU leadership.**

On 29 and 30 January 2012, the Eighteenth Ordinary Session of the Assembly of AU Heads of State and Government was held in Addis Ababa, Ethiopia. Driven by the conviction that demands for accountability from African leaders should apply to all other leaders around the world, the AU reiterated its position of non-cooperation with the ICC. It further 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 al-Bashir of the Sudan".<sup>7</sup>

The AU has also 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.

### **Diverging African Opinions on the ICC**

Some African countries have expressed their reservations concerning the AU's stance. Botswana

has publicly disagreed with the Union's decision not to cooperate with the ICC, citing its international obligations under the Rome Statute. More recently Malawi, under newly sworn-in president Joyce Banda, also openly rejected the AU's stance toward the Court. Ahead of the Nineteenth AU Summit that was to be held in Lilongwe in July 2012, Banda announced that as a signatory to the Rome Statute, Malawi would be obliged to arrest President al-Bashir should he attend the meeting. Angered by Banda's decision, the AU opted to move the summit to Addis Ababa.

South Africa has also reiterated its commitment to upholding its legal obligations as a state party to the Rome Statute. However, due to its key role within the AU, it has played a more nuanced diplomatic game. In January 2012, South Africa indicated its desire for a more assertive role within the Union by seeking the appointment of Nkosazana Dlamini-Zuma, its former foreign minister, as the chairperson of the AU Commission. The election for this post was held at the AU Summit in July 2012. Even prior to declaring its ambition to lead the Commission, South Africa has acted cautiously in directly dealing with or raising the profile of the ICC's prosecutions.

South Africa is therefore caught between a rock and a hard place when it comes to the AU-ICC relationship. Indications are that it will more likely side with the AU than pursue the ICC's agendas across the continent. Given South Africa's important regional role, this ultimately does not augur well for the ICC. The initial indications based on the statements by newly elect AU Commissioner Dlamini-Zuma are that this posture towards the Court is not likely to change in the short-term.

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

In December 2011, the Assembly of State Parties appointed Fatou Bensouda, former attorney general and minister of justice of the Gambia, as the consensus choice for the office of the ICC prosecutor. As deputy prosecutor in charge of the ICC Prosecutions Division, Bensouda was a key member of the Ocampo team, and it is unlikely that she will digress significantly from the parameters stipulated in the Rome Statute. However, by appointing an African, the Assembly of State Parties is signalling that it does not view the Court as advancing an anti-African agenda.

Bensouda, who was sworn in as ICC prosecutor in June 2012, has a mammoth task ahead of her. The broken trust between the AU and the ICC needs to be mended; Bensouda will need to initiate dialogue with the AU leadership. Specifically, she will have to move quickly to distance herself from the confrontational stance that developed between the ICC and the AU under the Ocampo regime. Bensouda will have to communicate directly with African constituencies, governments and civil society, and utilise them to convey the message behind the objective and mandate of the Court.

On Darfur, Bensouda's hands are effectively tied by the stand-off between the AU and the UN Security Council. The Security Council has to date declined to issue a formal communication to the AU on the latter's request for deferment of the al-Bashir indictment. Some Security Council members have informally suggested that the AU should, in effect, "take a hint" and consider the Council's silence a form of communication. Such dismissive attitudes do not augur well for a mutually acceptable resolution of the impasse between the AU and the UN Security Council, which effectively also drags in the ICC and makes it appear complicit in not responding to the AU's request.

A key indication of Bensouda's progress in opening dialogue with the AU will be the full operationalisation of an ICC office in Addis Ababa, the headquarters of the Union. This will create an urgently required liaison function, and allow the Court to regularly engage the AU as an interlocutor in its own back yard.

### **The AU and the Future of International Criminal Justice in Africa**

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".<sup>8</sup> In this, the Union is in full agreement with the objectives of the ICC. According to AU officials, what the body takes exception to is being overridden by the strategies other international actors consider appropriate in fighting impunity on the African continent.

This sentiment is not unique to Africa. However, no other region of the world is subject to the ICC's prosecutorial interventions, so it is not possible to ascertain through comparison whether the AU's stance is in fact unreasonable. Any inter-governmental organisation would undoubtedly

**The AU, by its very nature, will gravitate first to a political approach to dealing with the past, emphasising solutions based on peace-making and political reconciliation.**

want to determine how its member states engage with issues relating to transitional justice, peace-building, democratic governance and the rule of law, free from overbearing and patronising external stipulations regarding how they should be going about it.

The ICC and the AU 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 body, while the ICC is an international judicial instrument. This divergence informs the different ways 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 approach to dealing with the past, emphasising solutions based on peace-making and political reconciliation. Conversely, the ICC 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-ICC relationship to become more nuanced in promoting accountability for past violations. On the one hand, the ICC has to acknowledge and communicate its awareness that it is operating in an international political milieu. This will require the ICC system to step down from the artificial pedestal on which Ocampo placed it with his assertion that it does not play politics. 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 will not require reopening the Rome Statute to further engineering and potential dismemberment. Bensouda can communicate her

intentions by issuing Office of the Prosecutor (OTP) policy papers on how the ICC will sequence its interventions to enable political reconciliation and peace processes to take their course and on how her administration intends to go about rectifying and remedying the misperceptions that persist across Africa.

For its part, the AU will need to move away from its exclusively political posture toward international jurisprudence and ICC interventions. In future, there could be cases in which the AU countenances the ICC to do what it was designed to do - with the proviso that, as a political organisation, the AU leadership would be reluctant to expose its membership to a precedent in which one of its own ranks is prosecuted by the ICC.

This strategy for reorienting the relationship between the AU and the ICC, therefore, would seem to be an unacceptable compromise by some actors on both sides of the organisational divide. This is particularly true where such compromise would contravene the principles of human rights by sacrificing them on the altar of political pragmatism. There is clearly merit in such opposition. However, in reality, the ICC has already demonstrated that it is prepared to play politics by failing to pursue certain prosecutions - for example, in Gaza, Sri Lanka, Iraq and Afghanistan.

These actors on both sides would prefer that their organisations stick to their guns. This scenario is in fact already playing itself out. The AU has undertaken a study to assess how its continental institution, the African Court of Justice and Human Rights, can be empowered with continental jurisdiction over war crimes, crimes against humanity and genocide. In May 2012, the AU Ministers of Justice adopted a draft protocol that brought the realisation of such aspirations another step closer. The July 2012 AU Summit decided to postpone the establishment of a continental jurisdiction, pending an analysis of the costs of its institutional development. The idea behind this move is essentially to establish a pan-African criminal court with the same mandate as the ICC. Such a court would in essence seek to 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. Thus there is no guarantee that the ICC would recognise a pan-African criminal court.

But whether the AU succeeds in establishing continental jurisdiction is beside the point. The key issue is that the AU sees its relationship with the ICC as so damaged that it is actively exploring how to make the Court's future presence in Africa irrelevant. International organisations such as the League of Nations have ceased to exist when their members effectively ignored their mandates. Whether the ICC will suffer the same fate in Africa, only time will tell; but the question compels us to acknowledge that there is an urgent case for reorienting the relationship between the AU and the ICC.

The key issue is that the AU sees its relationship with the ICC as so damaged that it is actively exploring how to make the Court's future presence in Africa irrelevant.

Some observers have argued that another way to help ease the situation would be to enhance the national systems' capacity to try crimes incorporated in the Rome Statute, as the ICC would then have no brief to intervene. The challenge in Africa is that a small number of countries, including South Africa, Uganda and Kenya, have domesticated elements of the Rome Statute to empower local jurisdictions with the legal basis to prosecute crimes falling under the purview of the ICC. The process of the domestication of the Rome Statute is proving slow and laborious, and it will be a number of years before most African countries conclude it. Consequently, the Rome Statute and the ICC will continue to play a substantive role on the African continent – particularly if the UN Security Council continues to refer human rights atrocities committed in Africa to the ICC.

### **African Civil Society and the ICC**

While generally supportive of the Court, African civil society does not have a common view regarding the role of the ICC on the continent. Some feel that the ICC properly confronts and subverts attempts by African leaders and governments to dodge

accountability for past atrocities in an environment where domestic legal systems are unable to, or incapable of, dealing with them. Others, however, 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.

Ultimately, due to the state-centric nature of international relations, the matter will be resolved at the governmental level.

Although African civil society initiatives are receiving scant attention from the AU and most African states, they continue to play a critical role in policy analysis, victim support, documentation and awareness raising. Civil advocacy and lobbying activities aimed at African governments on issues relating to international criminal justice can contribute toward a more constructive dialogue between the Union and the Court. The ICC needs to improve its outreach and active engagement with African civil society through meetings across the African continent, and also to extend a more accommodating welcome to representatives arriving to engage with the ICC at The Hague.

## Conclusion

Ideally, national criminal jurisdiction should take precedence in efforts to address impunity; the ICC

is a court of last resort, not a court of first instance. While the preamble of the Rome Statute recognises that “grave crimes threaten the peace, security and well-being of the world”,<sup>9</sup> it does not elaborate how the Court will contribute toward advancing the aforementioned peace, beyond ensuring that the perpetrators of such crimes are punished. The ICC’s activities in Africa have focused on exercising its criminal jurisdiction without engaging in the wider issue of how it can contribute toward consolidating peace.

There is an urgent need to reorient the AU and ICC relationship. Both organisations must 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 the case of the AU - they need to find a way to ensure that the administration of justice complements efforts to promote political reconciliation. A continuing contest between the implementation of international justice and the securing of political interests of African countries will not augur well for improving the relationship.

Finally, the UN Security Council has an important role to play in formally communicating with the AU on issues relating to Sudan and Kenya that have been raised in that body.

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## Endnotes

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- 2 It should be noted that in the case of Côte d’Ivoire a referral by a state party was not possible as the country is not a state party to the Rome Statute.
- 3 For a wide range of diverse opinions see: Schabas W, “The International Criminal Court”, in: Black D & Williams P (eds.), *The International Politics of Mass Atrocities: The Case of Darfur*, London: Routledge, 2010, pp. 134–53; Palmer N, Clark P & Granville D (eds.), *Critical Perspectives in Transitional Justice*, Antwerp: Intersentia, 2012; and Happold M, “Darfur, the Security Council and the International Criminal Court”, *International and Comparative Law Quarterly*, 55, 2006.
- 4 Meernik J, “Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia”, *Journal of Peace Research* 42(3), pp. 271–289.
- 5 African Union Peace and Security Council, Statement on the ICC arrest warrant against the President of the Republic of Sudan, Omar Al Bashir, PSC/PR/Comm. (CLXXV), 5 March 2009.
- 6 de Waal A, “Darfur, the Court and Khartoum: The Politics of State Non-Cooperations”, in: Waddell N & Clark P (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, London: Royal African Society, 2008, p. 31.
- 7 African Union, “Decisions, Resolutions and Declarations of the Assembly of the Union”, Eighteenth Ordinary Session of the Assembly of Heads of State and Government, Assembly/Au/Dec.397 (XVIII), Addis Ababa, Ethiopia, 29 to 30 January 2012, para. 8.
- 8 African Union, “Decisions, Resolutions and Declarations of the Assembly of the Union”, Assembly/Au/Dec.397 (XVIII), para. 2.
- 9 Rome Statute of the International Criminal Court (2002), preamble.

## Interview

# South Africa and the ICC

### A Testy Long-Term Relationship

South Africa started out as a vocal supporter of the International Criminal Court (ICC) when the court opened its doors in 2002. However, since then the relationship between the two has been complicated. In an interview with the Heinrich Böll Stiftung (HBS), Nicole Fritz of the Southern Africa Litigation Centre (SALC) traces South Africa's highs and lows relative to the ICC, and offers insights on how the relationship could be improved in order to promote international criminal justice in Africa.

**HBS: What did you make of South Africa's show of support for the ICC in the case of the United Nations Security Council's referral of the Libyan situation?**

**Fritz:** The UN Security Council's referral of the Libyan situation to the ICC during South Africa's second tenure on the council in 2011 was not only a strong endorsement of the institution, but also fairly surprising. It is only the second time such a referral has been made; and in the earlier case of Darfur, the referral was not so swift and decisive. It followed several years of conflict and a Security Council-mandated commission of inquiry.

The Libya referral is noteworthy, not for being the second of its kind, but because many informed commentators predicted that the Security Council would never again employ its powers of ICC referral. The indictment of Sudanese president Omar al-Bashir following the Darfur referral inspired accusations of an imperialist, anti-African bias at the ICC, provoking antagonism from the African Union [AU]. Consequently, many had considered any future referral – particularly concerning another African country – too divisive to risk.

South Africa was only one of a unanimous, fifteen-member UN Security Council to vote to refer the situation of Libya to the ICC. But South Africa was seen as particularly supportive of the Court when, in seeking to distance itself from the

subsequent killing of Gaddafi, it insisted that he should have instead been surrendered to the ICC.

**HBS: In line with the African Union response you mentioned, South Africa was much less supportive of ICC involvement in Sudan. How do you explain this sudden change in South Africa's position regarding the ICC?**

**Fritz:** I see South Africa's position vis-à-vis the ICC less as a pendulum swing from one extreme to another than as inconsistency, hesitation and occasional uncertainty as to its positions.

It must be noted that South Africa's opposition to the ICC in the case of Sudan – as well as of Kenya – has been expressed largely through AU structures.

It must be noted that South Africa's opposition to the ICC in the case of Sudan – as well as of Kenya – has been expressed largely through AU structures. It has acted in these instances as a member of the AU, rather than as an individual country. South Africa likely felt very invested in the Sudanese peace negotiations, since the AU's mediation efforts were led by former South African President Thabo Mbeki. This made South Africa fairly susceptible to and influenced by suggestions that the indictments might endanger peace, and that they would likely only isolate the Sudanese government, encouraging even more hard-line positions and complicating negotiations.

Still, even while opposing the Sudanese indictments, South Africa was simultaneously demonstrating support for the ICC. At a 2010 conference held in Uganda to review the



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Rome Statute, South Africa joined Denmark in championing positive or proactive complementarity, a policy that would enhance national systems' capacity to try crimes incorporated in that statute.

Finally, it is worth noting that for all South Africa's apparent opposition to the Sudanese indictments at the international level, in South Africa itself an arrest warrant has been secured for Bashir. In this, the Department of Justice was arguably motivated by threatened civil society court action to oppose Bashir's attendance at President Zuma's inauguration. The existence of the arrest warrant was only disclosed when President Zuma was criticised for having apparently agreed with AU colleagues at a summit meeting to withhold cooperation from the ICC. The disclosure was made in order to reassure the public that South Africa was not departing from its obligations to the ICC.

While South Africa warrants criticism for its inconsistency, it should be noted that it is not alone in this. On the UN Security Council at present you have the US, China, Russia and India – all states that refuse to be party to the ICC and so hold themselves exempt. Yet all are happy to use the ICC against others, as indicated by the referrals of Darfur and Libya.

**HBS: The case of Sudan spurred debate on peace and justice in Africa and the role of international criminal justice. How do you assess this issue?**

**Fritz:** There is just no way to know empirically that justice procedures will imperil peace. The peace/justice dilemma admits of no easy answers.

There are, however, some developments to suggest that international criminal justice proceedings far from impeding, actually enhance peace. Some commentators point to the exclusion of Mladic, owing to his indictment by the International Criminal Tribunal for the former Yugoslavia, from the Dayton Peace Accords as being central to the achievement and success of that agreement. Similarly, some have suggested that Charles Taylor's indictment was critical to the avoidance of further bloodshed and violence in West Africa.

International criminal justice is still in its infancy and we have no way of knowing how its processes are likely to affect individuals' calculations regarding their motivations and actions. We're unlikely to ever definitively know. And so our yardstick for evaluating whether and when indictments should be issued shouldn't be so much about likely projected threats to peace. I'm not saying that this should never be

a consideration, only that it's difficult to know and so the indictments should be evaluated instead on their own terms – as to whether the individual targeted is reasonably suspected of committing horrific crimes.

**HBS: Going back to your earlier point, what generally drives South Africa's inconsistency in relation to the ICC, and what are the implications of this inconsistency for the country's standing in the international arena?**

**Fritz:** To some extent, South Africa's inconsistency regarding the ICC is driven by its affiliations to different groupings and institutions, and its attempts to reconcile these diverse allegiances. In many respects, South Africa's inconsistency regarding the ICC is a product of its foreign policy – *an effect* of its continental and

To some extent, South Africa's inconsistency regarding the ICC is driven by its affiliations to different groupings and institutions, and its attempts to reconcile these diverse allegiances.

international standing, rather than a cause of that foreign policy or standing.

I recognise that that's a fairly simplistic reduction; yet it is the case that South Africa's identification as an emerging power in a new international order is largely derived from its power and influence within Africa – a belief that it carries and leads the continent. South Africa also wants to be seen as a responsible member of the international community. Both its constitutional principles and the crimes of its past enjoin it to subscribe to the ICC and the cause of international justice. However, these two affiliations – to the African and international communities, respectively – sometimes pull South Africa in different directions. Thus, South Africa sometimes compromises its ICC obligations in order to facilitate an African consensus.

That's not to say that when South Africa is in firm as to its ICC obligations, that stance is always driven by AU positions rather than adopted entirely of its

own accord. But I do think it is important to see that South Africa's foreign policy and its international and continental standing have greater implications for South Africa's ICC position than vice versa.

Of course, there are examples of the latter. One of these is South Africa's key role in advocating for a deferral, in terms of Article 16 of the Rome Statute, of the investigation and prosecution of Sudanese President al-Bashir. The UN Security Council can make such deferral by resolution for a period of a year. South Africa has staked much in suggesting that this process would resolve the current peace/justice dilemma in Sudan. Yet there has been no clear explanation as to why an Article 16 deferral would, in fact, help. It might rather merely generate perverse incentives for Bashir to try and remain in power in perpetuity, obliging the UN Security Council to keep renewing the deferral. This development would clearly defeat both peace and justice.

I think that in making so much of this proposal without being able to articulate how it is likely to play out, South Africa potentially damages international perceptions of its capacity to assume global leadership.

**HBS: How do you think South Africa could address problems with the ICC without undermining it?**

**Fritz:** As indicated, South Africa has sought to champion proactive or positive complementarity. I see this initiative as the single most important way in which South Africa might address problems with the ICC without undermining the Court.

I don't think African leaders and representatives are wrong to be concerned that all the situations currently before the ICC emanate from Africa: Uganda, the Democratic Republic of Congo, the Central African Republic, Kenya, Cote d'Ivoire and Libya. But they are wrong to suggest that this is solely due to an anti-African bias, as if they were powerless to affect the situation. The ICC is only authorised to investigate and prosecute where relevant national jurisdictions are unable or unwilling to do so. If African states undertook their own investigations and prosecutions of these crimes, the ICC would be disqualified from proceedings.

Yet one has to recognise that the socio-economic conditions of many African states make such complex, costly, time-consuming investigations and prosecutions almost impossible. It isn't enough for the international community to capacitate the ICC to act in these types of situations and to assume that this, alone, exhausts its obligations

Much more must be done to capacitate domestic jurisdictions so that they can carry out prosecutions. It is that capacitation that will ultimately be much more effective in deterring international crimes.

to international justice. Much more must be done to capacitate domestic jurisdictions so that they can carry out prosecutions. It is that capacitation – ensuring that national jurisdictions uphold rule of law – that will ultimately be much more effective in deterring international crimes. For this reason I think South Africa is right in, and should be applauded for, its support of positive or proactive complementarity.

In addition, South Africa has provided a strong model of a domestic jurisdiction able to carry out investigations and prosecutions of international crimes. Its law domesticating the Rome Statute – the Implementation of the Rome Statute of the International Criminal Court Act – is exemplary in allocating powers and competence to national policing and prosecuting authorities in respect of international crimes. Unfortunately, South Africa has appeared less strong in the application of that law than in its conceptualisation, as evident in cases where it has failed to act. One example of such a case is the lack of response to the submission of a dossier by SALC documenting crimes against humanity by senior Zimbabwean officials who regularly travel to South Africa.

Proactive or positive complementarity is a long-term policy designed to ensure maximum effectiveness of the ICC and international criminal justice. More immediate response will require that South Africa cultivates and maintains a strong, open relationship with the ICC and its officials and that it promotes attempts to improve relations between the AU and the ICC.

**HBS: How could South Africa use its seat in the UN Security Council and its new position as chair of the African Union Commission to help improve Africa-ICC relations?**

**Fritz:** South Africa's seat on the Security Council allows it to be an effective conduit between that

organ and the AU as regards the ICC. The very fact that there was a UN Security Council referral of Libya to the ICC at a time when the Security Council was relatively Africa-heavy – South Africa, Nigeria and Gabon all occupied seats – in itself did much to mitigate the perception of conflict between the AU and the ICC.

That said, as a key sponsor of the Article 16 deferral proposal for the Bashir indictment, South Africa has a responsibility to better explain why this proposal will in fact ameliorate, rather than worsen, the situation. If it cannot, it must abandon the proposal. South Africa also needs to impress on established powers within the Security Council that the international criminal justice project's sincerity and bona fides will always be suspect as long as that project appears arbitrarily selective – requiring African states to comply while others, like the US, China and Russia, remain exempt.

South Africa will need to be much more attentive to the tenor of the AU's language in respect of the ICC.

Obviously, South Africa's seat in the UN Security Council amplifies its role in the AU. Nonetheless, I believe it is South Africa's role within the AU, rather than within the Security Council, that has the greater potential to improve relations between Africa and the ICC.

With Nkosazana Dlamini-Zuma's appointment as chairperson of the AU Commission, South Africa has a prime opportunity to reset relationships with the ICC, moving away from the dysfunction that characterised previous interactions between these bodies. South Africa will need to be much more attentive to the tenor of the AU's language in respect of the ICC, better co-ordinating and strategically advancing AU positions vis-à-vis the ICC. It will also need to ensure that the proposal to extend international criminal jurisdiction to the African Court isn't just a ruse to frustrate the workings of the ICC, but meaningfully assists in deterring international crime and ending impunity.

**HBS: How can civil society support the South African government in standing by its commitments, both domestically and on the international stage?**

**Fritz:** Civil society's role is vital; that has been demonstrated time and again. My earlier example of the pressure exerted on the Department of Justice to secure an arrest warrant for Sudan's Bashir is just one case where civil society has influenced the South African government to fulfil its obligations to the ICC.

My organisation SALC, together with the Zimbabwe Exiles Forum, has recently received judgment in a case we brought before South African courts seeking investigation under South Africa's own ICC Act of crimes against humanity committed in Zimbabwe. Unfortunately, we were obliged to pursue legal action after national policing and prosecuting authorities failed to act on a detailed dossier we submitted in 2008. That dossier extensively documents instances of torture committed in Zimbabwe, as well as the systematic nature of the crime and the identities of perpetrators.

The judgment - historic and precedent-setting - upheld our arguments: finding that the prosecuting authorities and police had acted unlawfully and unconstitutionally in refusing to investigate those crimes. It set aside their initial decision and ordered that they commence an investigation and pursue the suspected perpetrators named in the dossier. This is the first time that a South African court has pronounced on the country's obligations under both the Rome Statute and its own ICC Act.

The judgment holds out the strongest prospect yet of Zimbabwean officials having to account for their crimes given the culture of impunity that prevails in Zimbabwe. It also upholds South Africa's obligation as a responsible member of the international community and its interest in not being a safe haven for perpetrators of international crimes.

South African civil society has been at the forefront of advocating and lobbying for the international court. But although generally supportive, civil society is not uncritical of the role of the ICC. It has done, and continues to do, a good job of communicating to the ICC its perceptions of problems and suggestions for improvement.

# The ICC

## Powerful Tool or Paper Tiger in Advancing International Gender Justice?

*“Finally, the indomitable Fatou Bensouda is set to take over the reins of prosecutorial powers in the ICC. We look forward to a Court that will balance its operations in a way that all state parties will be reassured of a sense of belonging; a court that will make sexual violence a priority.”<sup>1</sup>*

As the above quote suggests, the appointment of an African woman, Fatou Bensouda, as chief prosecutor of the International Criminal Court (ICC) in June 2012 has been heralded as a decisive moment for the Court as it enters its tenth year. The new prosecutor has already outlined fresh priorities for the Court, including a commitment to include sexual and gender crimes in future charges, as well to improve the Court’s tense relationship with African states. Consequently, the choice of Bensouda as prosecutor provides a window to “stock-take” the Court’s achievements – as well as its shortcomings – in advancing gender justice.

The creation of the ICC was a cause for celebration among gender activists, who had fiercely campaigned to ensure that the 1998 Rome Statute establishing the ICC included provisions to ensure accountability for crimes of sexual and gender-based violence. Central to their campaigns was the desire to ensure that international law (at best) no longer subsumed gender crimes under the category of “outrages to personal dignity”. Indeed, the statute was significant in a number of ways, including the breadth of gender-based crimes it recognised; the status these crimes were afforded; the conditions for the Court’s procedures; and stipulations about the Court’s “fair representation” of men and women, respectively. In the context of these spheres of the Court’s activities, this analysis will focus on the ICC’s progress in advancing gender justice, as well as the challenges that still remain.

The recognition that gender-based crimes could no longer be ignored was laid bare in the early 1990s by the atrocities in the former Yugoslavia

and Rwanda. Through the work of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), documented evidence of mass, orchestrated sexual violence led to an expansion, for the first time in international law, of the definitions of “crimes against humanity” and “war crimes” to address a wide range of gender-based violations. Building on the work of these *ad hoc* tribunals, the Rome Statute explicitly recognises rape, sexual slavery (including trafficking of women), enforced prostitution, forced pregnancy, enforced sterilisation and other forms of grave sexual violence in international and non-international armed conflicts

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as war crimes and crimes against humanity.<sup>2</sup> As such, rape in international and non-international armed conflicts was recognised as a crime that may not be accepted by any state, and as a crime that can be tried in the courts of any state, even those not party to the conflict. In addition, the principle of complementarity encourages state parties to integrate the provisions of the Rome Statute into their domestic laws, thus further cementing international condemnation for gender crimes.



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However, despite the acceptance of these legal norms regarding gender-based crimes, substantial strides need to be made to transform the existing widespread legal and cultural acceptance of sexual violence. Beyond the ICC's progressive definition of rape as a war crime, considerable international resistance remains over the acceptance of the principle that sexual violence in conflict is a political crime. As recently as 2007 China, Russia and South Africa argued in the United Nations Security Council that sexual violence was an unfortunate byproduct of war, and not a matter of international peace and security. As Kathleen Cravero, assistant secretary-general to the United Nations Development Programme, noted: "Rape is too often seen as "collateral damage" of conflicts ... we are missing the point: rape is a crime and must be stopped".<sup>3</sup>

Indeed, since its creation the Court does not seem to have curbed the prevalence of gender crimes during armed conflicts. Incidents of sexual violence against women and men continue unabated, and impunity for these crimes remains widespread. As legal analyst Kelli Askin has observed, the literature on conflict "is so replete with depictions of rape during war that it is exceptional to read in detail about one (war) without reading about the other (rape)".<sup>4</sup> In Africa alone, recent conflicts in Libya and Mali, as well as ongoing internal or cross-border conflicts and mass displacement in the Democratic Republic of the Congo, Somalia, Somaliland, the Central African Republic and Sudan, have presented evidence of widespread and systematic sexual violence.

As a result, serious questions have emerged over the Court's commitment to prosecuting gender-based crimes, which many argue continue to be under-investigated and prosecuted. On the surface, the Court's record does not look unhealthy – of its seventeen indictments, twelve include charges of gender-related crimes. However, as Brigid Inder, executive director of Women's Initiatives for Gender Justice, has revealed, as many as 40 percent of charges for gender-based crimes before the ICC have been dismissed in cases for which confirmation hearings have been held.

Of particular concern to gender activists is the fact that the trial of the Congolese Thomas Lubanga Dyilo, the only completed trial before the ICC, failed to address issues of sexual violence. Controversially, Lubanga was charged solely with the recruitment

**Serious questions have emerged over the Court's commitment to prosecuting gender-based crimes, which many argue continue to be under-investigated and prosecuted.**

of child soldiers in the DRC, despite significant evidence of rape and sexual slavery committed by his forces in the Union des Patriotes Congolais (UPC).<sup>5</sup> As the trial chamber noted in its judgement of March 2012, "while all 129 victims claimed they had suffered harm as a result of the enlistment or conscription of children ... many also alleged they had suffered harm as a result of other crimes, such as sexual violence and torture or other forms of ill treatment, which are not the subject of the charges against the accused".<sup>6</sup>

Also of concern has been the Court's process of charging two other DRC militia leaders – Germain Katanga, former senior commander of the Force de Résistance Patriotique en Ituri (FPRI), and Matthew Ngudjolo, former leader of the Front des Nationalistes et Intégrationnistes (FNI) – on five accounts of sexual slavery, rape and outrages upon personal dignity. In May 2008, counts of sexual slavery were controversially removed from the indictments on the ground of the Court's inability to ensure victim protection. Although the situation was later rectified in June 2008, when the witnesses were admitted to ICC's witness protection programme, the case again drew attention to the challenges faced by the Court.

Charges against Jean-Pierre Bemba Gombo also caused alarm in 2009, when the pre-trial chamber declined to confirm all charges of sexual violence. The prosecution claimed that Bemba bore responsibility for numerous acts of rape perpetrated against civilians in the Central African Republic. However, while the pre-trial chamber did find sufficient evidence to establish that these rapes had taken place, it held that the prosecution had acted inappropriately by bringing "cumulative charges" of rape. Thus it confirmed only the charges of rape as a crime against humanity and as a war crime, and dismissed other charges of sexual violence

categorised as torture and outrage upon personal dignity.<sup>7</sup> Bemba's trial began in November 2010 and is unique in having the first ever all-female bench.<sup>8</sup>

The pre-trial chamber's decisions have led some observers to call for a review of the prosecutor's strategy for investigating and presenting evidence of gender-based crimes. This is an issue Bensouda must address. Both the Lubanga and Bemba cases revealed that a lack of communication between the investigator and the prosecutor may jeopardise the successful prosecution of sexual crimes.<sup>9</sup> These cases also revealed that a failure to present gender-related charges coherently may result in challenges during the confirmation of charges phase.<sup>10</sup> Accordingly, many analysts argue that while the ICC has the potential to establish precedents in addressing gender-based violations, in reality this is simply not happening.

There are several reasons for the Court's difficulties in pursuing prosecutions for sexual and gender-based crimes. First, it has been shown that investigators often neglect cases of gender-based violations if they have not been specifically tasked with identifying sexual violence crimes. Further, as former prosecutor Luis Moreno-Ocampo has noted, the stigma surrounding rape in many cultures often discourages victims from disclosing their experiences of sexual violence.

Furthermore, while the issue of complementarity is a welcome concept, the reality is that post-conflict national justice systems are often debilitated, and thus ill-equipped to investigate or prosecute sexual and gender-based crimes.<sup>11</sup> Given the wider global problem of effectively prosecuting gender-based crimes domestically, there is a need to consider more broadly how realistic it is to rely on judicial processes to provide accountability for these crimes.

Notwithstanding the Court's record in prosecuting gender crimes, as noted above, the Rome Statute contains a number of procedural requirements to ensure gender sensitivity within its structures. For example, the statute mandates the "fair representation" of men and women in the selection of judges and other staff, and the Court is required to appoint advisors with specific expertise on gender-based crimes. In addition, the statute requires that all of the Court's personnel, from judges to registry staff, have training in matters of violence against women and children.

Some achievements in this area include the fact that overall, women represent 47 percent of

all Court staff, and eleven of the ICC's nineteen judges in 2010 were women. Also significant was the appointment of Professor Catherine Mackinnon as special gender advisor to the prosecutor in 2008. Her brief is to supply strategic advice to the prosecutor's office on dealing with sexual and gender-based crimes. Yet despite the number of appointments of women, criticism has been levelled at the slow pace of appointments of women to senior management positions under prosecutor Ocampo. In addition, as Danya Chaikel revealed in 2010, only sixty-one of the total 335 counsel registered to practise before the ICC were women; and less than 4 percent of counsel were African women.<sup>12</sup> Given the Court's attention to conflict in Africa, this is seen by some as an alarming reality – another issue Bensouda will need to address.

**There is a need to move beyond celebrating the legal semantics of the Rome Statute and instead address the ICC's ability to deliver.**

The Rome Statute does outline comprehensive protective measures for both victims and witnesses, and special provisions exist to ensure the safety of rape victims who act as witnesses before the Court.<sup>13</sup> However, as Brigid Inder notes, women are not significantly represented among victims, despite the widespread allegations of gender-based crimes presented to the Court. Kristin Kalla, executive director of the ICC's trust fund for victims, has observed that justice for victims is as much about the process – being heard respectfully and sensitively – as about the outcome; however, such attention to process appears to be lacking in the Court.<sup>14</sup> As Chidi Odinkalu, chairperson of the Nigerian Human Rights Commission, has noted: "People have the mistaken impression that it is just heads of state, motivated by their own self-interest, who have criticised the ICC – it's not ... the first alarm bells were sounded by victims' communities – they have a sense of being used, abused, dumped and not cared for. Bensouda's accession gives the ICC an opportunity to redeem relationships with

victims' communities, show them that it is capable of caring".<sup>15</sup>

It is evident that the ICC has the capacity to demonstrate a global commitment to confronting impunity for gender-based crimes. What is also apparent is that there is a need to move beyond celebrating the legal semantics of the Rome Statute and instead address the ICC's ability to deliver.

No matter how beautifully crafted the language of the Rome Statute, questions remain over the Court's commitment to pursue gender justice in the ten years since its creation. Nonetheless, as Rhoda Copelon observed, "the Rome Statute is a watershed and the ICC a fragile, partial, yet crucial opportunity".<sup>16</sup> It is now up to Fatou Bensouda to ensure that this opportunity is grasped.

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# On the Brink

## Kenya and the International Criminal Court

### Introduction

In the weeks following Kenya's contested presidential election on 27 December 2007, more than one thousand people were killed, thirty-five hundred were injured and approximately three hundred and fifty thousand displaced. The violence was perpetrated by actors on both sides of the political and ethnic divide, and included arson, rape, torture and murder.

The violence erupted after incumbent President Mwai Kibaki, of the ruling Party of National Unity (PNU), was declared re-elected for his second term. The main opposition party, the Orange Democratic Movement (ODM), led by their presidential candidate, Raila Odinga, rejected the election results as fraudulent. Subsequently, ODM supporters were mobilised to attack ethnic Kikuyu and generally those perceived to be PNU supporters. A second, retaliative wave of violence followed, targeting ethnic groups perceived to be affiliated with the ODM.

The African Union soon intervened in the crisis, appointing a mediation team led by former UN Secretary General Kofi Annan. On 28 February the mediation process yielded an agreement: Kibaki would remain president, but would share power with his main challenger, Raila Odinga. Odinga would become prime minister, a position created specifically for him.

The mediation process also established a commission of inquiry to investigate the post-election violence. The Waki Commission (named after the commission's chairman, Justice Philip Waki) was tasked with ascribing responsibility for crimes that had occurred following the elections. The commission placed the names of those regarded as primarily responsible for the violence in a secret envelope, and recommended further investigation. The commission also recommended that the Kenyan government establish a special national mechanism to dispense justice in relation

to the post-electoral violence; and that if this could not be accomplished, consideration should be given to referring the Kenyan situation to the International Criminal Court (ICC).

In February 2009, the Kenyan parliament voted against a bill to establish a special tribunal as recommended by the commission, and the coalition government took no further action. Subsequently, Luis Moreno Ocampo, the first prosecutor of the ICC, reviewed extensive documentation from the Waki Commission and, in accordance with the powers granted to him under Article 15 of the Rome Statute of the ICC, exercised his right to initiate an investigation without referral from the state party (i.e. the Kenyan government) or the UN Security Council. Ocampo's request to commence investigations into the Kenyan situation was authorised by the pre-trial chamber in March 2010.

On 15 December 2010, in a move widely viewed as responding to calls for even-handedness, the prosecutor of the Court announced that he would present two separate cases. The first case requested summonses for ODM's chair, Henry Kosgey; William Ruto, who at the time was an ODM government minister; and Joshua Sang, a radio announcer. The second case charged members of the PNU camp, including Deputy Prime Minister and Finance Minister Uhuru Kenyatta; former head of the Kenyan police, Hussein Ali; and the head of the civil service, Francis Muthaura.

This was a notable event in that all the ICC's previous cases had been referred by state parties themselves (with the exception of the Sudan and Libya situations, which were referred by the UN Security Council). Previous cases had also shared an important feature: the individuals charged were anti-establishment figures. Consequently, it had been relatively easy for the ICC to secure the cooperation of the governments in question.

The prosecutor's decision to commence an Article 15 investigation into the Kenyan situation



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In appearing alongside persons facing ICC cases, the president openly declared his support for their push to combine forces against the common threat of prosecution by the ICC.

could be viewed as a major risk on his part, since the exercise of this power was unprecedented. However, Ocampo's initiative was vindicated when the pre-trial chamber on 23 January 2012 confirmed charges against Ruto and Sang in the first case, and Kenyatta and Muthaura in the second.

This article examines how the disparate responses to the ICC cases from Kenya's top political leadership have contributed to the politicisation of justice in relation to the country's post-electoral violence. It argues that these political manoeuvres have undermined Kenya's coalition government, as well as the Court; and that they expose the country to the potential for significant political instability.

### Key Moments in the Politicisation of the ICC Process in Kenya

As a sign of political commitment to justice regarding the post-election violence, the president and prime minister signed a coalition agreement in which they undertook to remove public officials charged with related crimes from their offices. Thus, when the ICC prosecutor announced the names of the six Kenyans he regarded as bearing the greatest responsibility for the violence – some of whom were key advisors to the president – it was expected that they would be required to leave their posts. However, President Kibaki shielded his senior officials from public pressure to resign by pre-empting any discussion on the matter. Shortly after the prosecutor's announcement he announced that the public officials among the six would be allowed to remain in office until confirmation of the charges against them.

In January 2011, a few days after the ICC announcement, opposing presidential hopefuls Ruto (ODM) and Kenyatta (PNU) convened a high-profile political rally in Eldoret, the epicentre of the post-election violence. The rally's purpose was ostensibly to promote peace between the two men's

respective ethnic groups, the Kalenjin and Kikuyu, whose members were regarded as key actors during the violence. However, Ruto and Kenyatta had other reasons for this show of unity, since the accused on both sides of the ICC cases had been lobbying for a united front against the Court. The attendance by President Kibaki at the rally came as a great surprise to the public. In appearing alongside persons facing ICC cases, the president openly declared his support for their push to combine forces against the common threat of prosecution by the ICC.

At the same time, the Kenyan government began a diplomatic offensive under Article 16 of the Rome Statute. It sought the support of the African Union (AU) for a proposed application to the UN Security Council to defer the cases for a year on peace and security grounds. An AU summit held at the end of January 2011 resolved to support Kenya's application, but the UN Security Council subsequently rejected it.

In principle, Kenya has a right to invoke article 16. However, its decision to seek AU support for its application conjured the AU's role in the ICC's pursuit of Sudanese president Omar al-Bashir for war crimes the previous year. Through a succession of resolutions, the AU had urged its member states not to cooperate in al-Bashir's arrest under two ICC warrants, arguing that an arrest would jeopardise Sudan's peace and security. Kenyan authorities hoped for a similar result appealing to the AU to approach the UN Security Council on their behalf. While the application to the Security Council did not succeed, it further demonstrated the Kenyan government's frustration with the ICC.

When the ICC announced the confirmation of charges against four of the six Kenyans in January 2012 – including Ruto, Muthaura and Kenyatta – it raised expectations that the president would honour his previous commitment by requiring Muthaura and Kenyatta to vacate their offices (Ruto had already been relieved of his duties as minister of education in August 2011 after falling out of favour with Odinga, who has since become his rival).

However, the president shifted the goalposts for a second time, directing the attorney general to appoint a task team to advise the government on how to respond to the ICC decision. The attorney general subsequently indicated that since Muthaura and Kenyatta intended to appeal against the confirmation of the charges, they could remain in office until the outcome of the appeal.

The confirmation of charges, however, came with other complications for the president. The Court's detailed justification of the confirmation expressly implicated the president in the acts of which Kenyatta and Muthaura were accused. In confirming the charges against these two, the Court virtually treated the president as a suspect.

While the government issued an official denial of the ICC's implication of Kibaki in the charges against Kenyatta and Muthaura, the Court's account resonated with Kenyans' individual experiences. It was viewed by sections of the population as confirmation of what they had long suspected: the president had actively participated in the post-election violence.

At the beginning of February 2012, Muthaura and Kenyatta finally bowed to pressure from the diplomatic community and parliamentarians allied to Prime Minister Odinga. They resigned their government posts, leaving on their own terms rather than being dismissed, as should have happened a year earlier. Kenyatta, however, retained his position as deputy prime minister on the spurious argument that resigning from this post would lead to the dissolution of the coalition, a political fate to which he proclaimed himself unwilling to subject the country.

While the content of the ICC decision to confirm charges against Muthaura and Kenyatta further alienated the president from the Court, there was worse to come. An MP friendly to the Kenyatta/Ruto group tabled a letter in the Kenyan parliament that deepened the rift. The letter, widely regarded as a forgery, alleged that the British government was working with Odinga and the ICC to ensure that Kibaki was charged with crimes arising from the post-election violence once he retired from office.

Odinga reacted angrily to the implication that he was conspiring with the ICC, dismissing the letter as a forgery by people who, he claimed, ought to be behind bars at The Hague – a presumed reference to Ruto and Kenyatta. Although the letter gained little traction with the public and was declared a sham, even by the security agencies of the Kenyan government, Kibaki cold-shouldered a British minister sent to Kenya to explain his government's position in relation to the letter.

The fake letter was clearly calculated to achieve two purposes: first, to sunder the relationship between Kenya's president and both the ICC and its major supporters in the European Union; and

second, to fuel the president's fear of his own ICC trial, so as to strengthen his resolve to shield other suspects from the Court.

In March 2012, in yet another move by Kibaki to shield the accused from the ICC, Minister for Justice and Constitutional Affairs, Mutula Kilonzo – a lone voice in the PNU on the issue of the ICC – was transferred to another ministry after articulating the position that Ruto and Kenyatta could not run for president while facing charges before the ICC.

**Ruto and Kenyatta have skilfully manipulated the ICC cases against them to build political support, declaring that the cases will not affect their presidential ambitions.**

The ICC process has also affected Odinga's position as prime minister and presidential candidate in the elections scheduled for March 2013, in that it has given his opponents grounds to discredit him. Ever since having been named by the prosecutor in December 2010 Ruto and Kenyatta have used their numerous public rallies to depict the ICC as a tool of foreign interests bent on influencing the Kibaki succession in favour of the prime minister.

Ruto and Kenyatta have skilfully manipulated the ICC cases against them to build political support, declaring that the cases will not affect their presidential ambitions. Their supporters have announced plans to raise five million signatures in a petition to the ICC to postpone trial of the Kenyan cases until after the country holds its next elections. This petition is unlikely to succeed, potentially increasing still further the immense influence the trials will have on Kenya's domestic politics.

The mobilisation by Ruto and Kenyatta has not been without effect on public opinion. In presidential opinion polls conducted in August 2010 – three months before the ICC prosecutor named Kenyatta and Ruto as suspects – Kenyatta and Ruto polled 12 percent and 10 percent respectively, while Odinga received 46 percent. Since then, the prime minister's popularity has gradually been sliding. By portraying him as the villain, Kenyatta, especially,

has succeeded in eroding Odinga's support base. Polls conducted in April 2012 showed Kenyatta polling 22 percent and Ruto 8 percent, while Odinga had slid to 34 percent.

### Effects of ICC Politics on Kenya

Kenya faced significant violence during its elections in 1992, and again in 1997. Even before the 2007 post-election violence, Kenya had signed and ratified the Rome Statute. This indicated the country's support for the fight against impunity, and suggested that Kenya was, in principle, prepared for the rigours that possible engagement with the ICC would invite.

The ICC's intervention following the 2007 elections gave the current government an opportunity to demonstrate Kenya's outrage against political violence, and to send a warning that the future use of violence to achieve political ends would not be tolerated. But while public support for accountability for the violence has always been high, a number of factors have combined to make this impossible. These include lack of political will and weakness on the part of those public institutions responsible for law enforcement.

Prosecution can support peace efforts by stigmatising and sidelining persons regarded as responsible for violence. The coalition agreement requiring persons charged with post-election crimes to vacate office was meant to achieve this end. However, the potential support that the ICC cases may have demonstrated for Kenya's peace process has been severely undermined by the prevarication that the country's political leadership has exhibited on this key decision. By shielding Kenyatta, Ruto and Muthaura from full responsibility for the charges against them, Kenya's political leadership has ensured that the opportunity afforded by the ICC intervention was not grasped.

The fact that Muthaura and Kenyatta remained in government for so long after they were charged before the ICC meant that they could continue to participate in decision-making on behalf of the Kenyan government and its interaction with the ICC, while at the same time also being the subjects of the cases before it. This conflict of interest has contributed to Kenya's unbalanced relationship with the Court.

The 2008 power-sharing agreement was the single most contested item in the national dialogue and reconciliation process following the 2007

elections. Its importance was reflected in the fact that it immediately brought an end to the hostilities fuelling the post-election violence. But as noted, ICC politics is now embedded in Kenya's succession struggles. In addition to affecting transitional politics, the ICC cases have strained day-to-day relations within the coalition government.

**The ICC's intervention following the 2007 elections gave the current government an opportunity to demonstrate Kenya's outrage against political violence.**

Kibaki's legitimacy was greatly undermined by the controversial manner in which he was sworn in as president for his second term. The signing of the power-sharing agreement greatly ameliorated his position and gave him the much-craved credibility that has allowed him to serve his second term as president.

However, his vacillation regarding the coalition agreement to dismiss persons suspected of post-election crimes, and a general lack of balance in conducting the affairs of the government in relation to the Court, have re-opened questions as to his legitimacy. The president's choices in relation to the ICC cases have tarnished his image, especially for those sections of the population that never supported his presidency in the first place.

Kibaki's implied support of Kenyatta and Ruto's presidential ambitions is an inherently risky enterprise. If their candidatures ultimately fail because of the legal challenges they face, it is not unlikely that the support they have built will translate into political instability for the country. In that event, it may be difficult for the president to manage his own succession peacefully. Further, Kibaki will be unable to defend himself against accusations that his partiality towards Ruto and Kenyatta will have cost the nation its relative stability.

Prime Minister Odinga has been more supportive of the ICC process in Kenya, his supporters having led the call on the president to suspend Muthaura and Kenyatta from office once charges against them were confirmed. However,

his position as an equal partner in the government has always been in doubt. When in February 2010 Odinga suspended two government ministers (including Ruto) over allegations of corruption, for example, not only did the ministers defy the suspension, but Kibaki subsequently reversed the prime minister's decision.

Depending on the issue at hand, Kibaki and Odinga have swung between cooperation and rivalry. In all major issues where they have taken different positions, Kibaki has prevailed. Also, Odinga's position as a presidential candidate in the next elections has reduced his appetite for the kind of political risks attendant on outright support for the ICC.

Ruto and Kenyatta both seem to have decided to ride their luck as far as the ICC cases are concerned. Ruto has applied to the Court to defer the commencement of the trials until after Kenya's next elections. Kenyatta and Muthaura, meanwhile, have applied for a change of the trial venue to Kenya or neighbouring Tanzania, arguing that The Hague is too far away and that the travel costs would be too great.

It is likely that Ruto and Kenyatta are linking their cases to Kenya's next elections in a deliberate effort to increase their leverage over Kenya's domestic politics. Accordingly, they will enter the presidential race and see what comes of that. Regardless of their success in the elections, however, they may be hoping to cash in on the support they have amassed for themselves in exchange for a political deal entailing some kind of protection from the ICC trials. Whatever the case, the political endeavours of Kenyatta and Ruto, with the apparent support of Kibaki, are designed to shield the two from trial and to undermine Kenya's capacity to cooperate with the ICC.

If Ruto or Kenyatta successfully runs for president, it is likely that the winner will use his position to control the response of the Kenyan state to the ICC intervention. Both men are indifferent to the fact that this would significantly affect the country's international standing.

### Conclusion

Kenya suffers from a legacy of political violence. The Waki Commission warned that the country runs the risk of becoming a failed state unless deliberate measures are taken to address this legacy. Yet Kenya has repeatedly failed to establish a local justice

mechanism, as recommended by the commission, to try offences committed during the post-election violence. The attorney general's task force on Kenya's response to the ICC cases reported that, despite the country's stated commitment to local justice mechanisms – and even though the police had announced investigations against the four public officials facing ICC charges – only one of them has ever been formally questioned by the police.

While Kenya's political leadership has consistently resisted the ICC process, it has made not even minimal arrangements to establish a local justice mechanism that could be used as a pretext for its opposition. The cynical manner in which the Kenyan government has chosen to treat the ICC intervention may well contribute to the fulfilment of the commission's prediction.

Meanwhile, the ICC's involvement in Kenya has

Although the Kenyan cases have navigated difficult stages in reaching their current phase, the greatest risk still lies ahead: will the accused turn up in court for their trials?

reinforced difficulties in the relationship between the Court and the AU, stemming from its involvement in the Sudan situation. The political leadership in Kenya and Sudan have found common cause in resisting the Court, and have played a leading role in its demonisation on the African continent.

Although the Kenyan cases have navigated difficult stages in reaching their current phase, the greatest risk still lies ahead: will the accused turn up in court for their trials? If the ICC manages, against the odds described, to put the Kenyan accused on trial, this will go a long way towards confirming its authority to try all persons regardless of their official position. On the other hand, the accused may manage to get Kenya to shield them from trial. This outcome, coupled with the unresolved situation around Sudanese President al-Bashir, will deal the ICC and the international justice project a blow from which it will be difficult to recover.

## Interview

# “Justice Will Be the Foundation of Sustainable Peace and Stability”

## The ICC in Côte d’Ivoire

**O**n 5 December 2011, former Ivorian president Laurent Gbagbo appeared before the International Criminal Court (ICC) to face charges of crimes against humanity for his role in the six months of violence that followed Côte d’Ivoire’s disputed presidential election in November 2010. However, evidence gathered by human rights groups equally implicates forces of victorious president Ouattara in perpetrating atrocities, leading some observers to caution against “victor’s justice”. The ICC has already announced that further warrants of arrest will be issued, but doubts over the Court’s impartiality are unlikely to fade quickly.

In an interview with the Heinrich Böll Stiftung (HBS), Ali Ouattara examines the ICC’s involvement in Côte d’Ivoire and offers insights on the current and future implications of the Gbagbo trial for both the court and the country.

**HBS: At least so far, the ICC has charged only Gbagbo. Is this a sign that the international criminal justice project does not work?**

**Ouattara:** The ICC is a very young court. It will celebrate ten years of existence on 01 July 2012. It only gave its first verdict on 14 March 2012, when it recognised Thomas Lubanga’s guilt in the enlistment of child soldiers. The Court is in the process of being developed, so it would be premature to say that it does not function. With regard to the situation in Côte d’Ivoire, we could nevertheless reproach the Court for having not yet gotten to the bottom of things.

International justice can assist states to recover from crises and to fight impunity, and in this context Gbagbo’s transfer to the ICC is a positive step. It can bring justice to the many victims of serious crimes in Côte d’Ivoire. But it is crucial for the ICC to issue warrants to parties on both sides of the conflict. Both sides committed crimes that fall under the Court’s jurisdiction. It is only by administering equitable and impartial justice to all sides of the conflict that the ICC will be able to avoid any

appearance of bias, and thereby bring justice and reconciliation to Ivorians. The Court should move quickly in issuing warrants to both parties, since delays will create presumptions of bias.

It is only by administering equitable and impartial justice to all sides of the conflict that the ICC will be able to avoid any appearance of bias.

**HBS: Côte d’Ivoire’s situation is unique, in that the country has accepted the Court’s jurisdiction but has not ratified the Rome Statute. How has this impacted on the prosecution process?**

**Ouattara:** Côte d’Ivoire has been a pre-situational country – that is, in a preliminary examination phase – since 2003. This is when the former president recognised the ICC’s jurisdictional power in accordance with Article 12.3 of the Rome Statute establishing the ICC. This recognition gave full power to the prosecutor to conduct inquiries in Côte d’Ivoire, and therefore also to issue arrest warrants.

During and following an attempted coup in 2002, both rebel and government soldiers are alleged to have committed war crimes; but unfortunately, whenever the prosecutor tried to come to Côte d’Ivoire to investigate, the former regime used the country’s period of reconciliation as a pretext to stall investigations. This lack of cooperation kept the Court from investigating properly. The new government has now confirmed recognition of the Court’s jurisdiction, and the pre-trial chamber has decided to extend investigations retroactively to 2002. This has given new hope to victims on all sides.



Ali Ouattara

Ali is the president of the Ivorian Coalition for the International Criminal Court, and president of Réseau Equitas Côte d’Ivoire. He is also the former president of the Ivorian section of Amnesty International. A respected consultant in the area of international criminal justice, Ali is recognised both nationally and internationally as a tireless defender of human rights.

**HBS: Against this backdrop, how likely is it that the current regime will cooperate with the ICC in prosecuting individuals from its own camp?**

**Quattara:** The present authorities have promised to cooperate with the ICC when it issues warrants for their supporters. Just as with the arrests of Gbagbo's followers, they will be able to send out a strong signal by enabling the national legal system to charge human rights violators from their own camp. Up till today, the Ivorian authorities have always affirmed that they will hand over any of their own supporters who are found guilty of crimes falling under the ICC's jurisdiction.

That said, we cannot know categorically whether the present government will cooperate in the event that the ICC charges one of their own. We hope that the authorities are sincere, and that they will practise what they preach. The government should demonstrate its sincerity by proactively charging certain individuals close to it whose crimes fall under the national investigation initiated by the president of the republic. We would find such a move reassuring.

Many victims feel abandoned. Others are frustrated because they regularly face their persecutors.

**HBS: In this context, what has been the role of civil society, and of the Ivorian Coalition for the ICC, in particular?**

**Quattara:** Since its establishment, the Ivorian Coalition for the ICC has led a campaign against impunity. It has lobbied for universal ratification of the Rome Statute for the establishment of the ICC, and for an international criminal court that is just, effective, independent and impartial.

Currently, formal ratification is not possible, because the Ivorian Constitutional Court found that the state's constitution is in conflict with the statute for the establishment of the ICC. However, thanks to our pleas to the former government, Côte d'Ivoire has accepted the ICC's jurisdiction. We also made a comparative analysis of the constitution and statute, and recommended constitutional reforms to the former government to overcome the obstacles. With the assistance of the Ivorian civil society, we

continue our work with the new government. Our action is aimed at the political, administrative, legal and legislative authorities, as well as at the entire population. We hope that the new legislature will make ratification a reality.

Besides the campaign to ratify the Rome Statute, the Ivorian Coalition for the ICC carries out a number of projects on the ground. These include training seminars for lawyers, victims, parliamentarians, religious and traditional leaders, journalists and NGOs. We also raise awareness in Abidjan and the interior of the country through a theatrical presentation called *Dame CPI* [Lady ICC]. We visit schools to sensitise pupils and teachers about justice, non-violence and the fight against impunity. We publish reports on the human rights situation in Côte d'Ivoire, and we organise public conferences, press conferences and colloquia.

Finally, we are part of the universal campaign to ratify the Rome Statute for the establishment of the ICC in other countries around the world.

Ivorian civil society organisations are collaborating with the ICC. In fact, whenever the prosecutor's office or clerk comes to Abidjan, NGOs are invited to the meetings.

**HBS: Is there any way to ensure that the rights of all victims are recognised? And what demands have victims themselves brought forward in the effort to prosecute perpetrators of violence?**

**Quattara:** To answer your first question, all victims from all sides must be recognised by both national and international justice. Both the Ivorian authorities and the ICC must inform victims about their rights. Victims must know the various procedures, their own roles, the role of their legal representatives, how to fill in forms, and so forth. Unfortunately, to date neither the ICC nor the Ivorian authorities have undertaken any action in this regard.

A few months ago, the coalition introduced some training seminars; but it does not have the capacity or resources to meet the numerous requests it has received. Many victims feel abandoned. Others are frustrated because they regularly face their persecutors. The victims place great hope in the ICC to dispense justice and reparation. It is for this reason that they organise themselves, get training and strive to obtain support and advice from lawyers and legal representatives.

It is important to note that the ICC would benefit from being proactive in undertaking more visible

action, so that the victims of these crimes can develop more trust in the process. This is the price that must be paid if the mission is to succeed.

It is important to note that the ICC would benefit from being proactive in undertaking more visible action, so that the victims of these crimes can develop more trust in the process.

**HBS: What are the implications for Côte d'Ivoire and the court itself if the ICC fails to convict Gbagbo and/or fails to prosecute perpetrators from both sides of the political divide?**

**Quattara:** The Court's credibility is at stake in Côte d'Ivoire. It must lead a fair and impartial trial against the former president. It must think of the victims when performing all its acts. Some victims feel that the former president is the cause of their suffering or the reason for their family members' disappearance. They must therefore get justice.

Other victims believe that their misfortune comes from the supporters of the new regime. They must also be supported in charging the current president's close allies who committed serious crimes. Again, the ICC must not stop at prosecuting one side only. All violators from both parties must be charged.

Justice will be the foundation of sustainable peace and stability in Côte d'Ivoire. The ICC's role is therefore critical. It must play this role well by being fair, equitable and impartial, as mandated by its founding statute.

*Translated from French into English by Nathalie Heynderickx.*

# ODILI DONALD ODITA

Odita was born in 1966 in Enugu, Nigeria, and has lived in the United States virtually all his life. He is currently based in Philadelphia and New York.

Odita's large-scale, abstract wall paintings operate at the intersection of Western modernism and African culture. His vast, animated expanses of fractured, rhythmic planes, equally informed by television test band patterns, African textiles, post-colonial discourse, sensory overload, and digital technology, speak to a contemporary experience of dislocation and decentredness.

He has had numerous exhibitions around the world, and was included in the 52nd Venice Biennale in 2007. He has had solo exhibitions at the Rose Art Museum, Kiasma Museum of Contemporary Art, Helsinki, Brandeis University, Jack Shaiman Gallery, New York, the Studio Museum in Harlem, and the Contemporary Arts Center, Cincinnati, Ohio.



## About the artwork

Title: Point of Return, 2010

Dimensions: 234cm x 234cm

Technique/ Material: Acrylic on canvas

Courtesy of the artist, Stevenson Gallery, Cape Town and Jack Shaiman Gallery, New York

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