

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

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Introduction

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

African countries were actively involved in the creation of the International Criminal Court and played a crucial role at the Rome conference when the Court's statute was drafted and adopted. To date, Africa represents the largest regional grouping of countries within the ICC's Assembly of States Parties. While African countries were initially supportive of the International Criminal Court the relationship degenerated in 2008 when President Omar Al Bashir of Sudan was indicted by the Court. Following this move the African Union, which is representative of virtually all countries on the continent, adopted a hostile posture towards the International Criminal Court. The African Union called for its member states to implement a policy of non-cooperation with the Court, which remains the stated position of the continental body. This study will argue that both President Omar Al Bashir, of Sudan, and subsequently President Uhuru Kenyatta, of Kenya, managed to politicize the ICC interventions in their country. Furthermore, Al Bashir and Kenyatta were able to Pan-Africanize their criticisms and contestations against the ICC, through the African Union (AU) which was pre-disposed to challenging the Court's interventions on the continent.

The study will suggest that even though both organizations share a mandate to address impunity, the stand-off between the ICC and the AU suggests that they are in fact engaged in practicing a variation of 'judicial politics' and 'political justice'. The study concludes that this process of politicization of the Court's interventions in Sudan and Kenya, ultimately subsumed the ICC into a political stand-off against the African Union (AU), with the United Nations Security Council as an unresponsive but implicated secondary actor. The study will also conclude that since neither the ICC nor the AU have managed to find a way out their impasse, then some innovative strategies need to be adopted to ensure that both organizations fulfil their mandate to address impunity on the African continent. This study will then offer insights into a prospective way forward for confronting impunity and holding leaders

accountable, while ensuring the promotion of peace and reconciliation on the African continent.

Africa and the Establishment of the International Criminal Court

The Trajectory of International Criminal Justice

The establishment of the ICC was the culmination of an evolution of international justice that can be traced back to the Nuremberg and Tokyo trials following the Second World War. The Rome diplomatic conference which led to the signing of the statute establishing the Court, in July 1998, was a long and arduous affair of international negotiation and brinkmanship. The majority of countries represented at the Rome conference, including African countries, were of the view that it would be a positive development in global governance to operationalize an international criminal justice regime which would hold accountable individuals who commit gross atrocities and violations against human rights. Specifically, the Court has jurisdiction over war crimes, crimes against humanity and genocide; and the intention is that its jurisdiction over the crime of aggression will not become operative by 2017. The reality of the Rwandan genocide of 1994 also convinced many African governments of the need to support an international criminal justice regime which would confront impunity and persistence of mass human rights violations on the continent. African countries were therefore part of a wider campaign of support for the ICC.

The Court also had its opponents. At the 1998 Rome conference, 120 participants voted for the final draft of the Rome Statute, but 21 abstained and seven voted against. From its inception, “the Court faced a strong challenge from the United States, which first signed the Statute and then ‘unsigned’ it” (Sriram 2009: 315). The failure of powerful countries, including Russia and China, proactively to support the Court and subject themselves to its criminal jurisdiction, immediately began to raise alarm bells about the reach and ultimately the efficacy of the Court. The concern was that the remit of the Court would be confined to the middle and weaker powers within the international system. The Statute required 60 ratifications to come into force which were obtained in April 2002, paving the way for the launch of the International Criminal Court in July 2002. The African governments subsequently raised objections about the self-exclusion by powerful countries, underpinned by concerns about how the original noble intentions of the Court had become subverted by the political expediency of great power interests.

Interventions of the International Criminal Court and Perceptions in Africa

The Advent of Political Justice

The Court’s current prosecutorial interventions are exclusively in Africa: the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Sudan (Darfur), Uganda, Libya, Côte d’Ivoire, Mali and Kenya. Through a combination of self-initiated interventions by the former Prosecutor, Louis Moreno Ocampo, as well as two UN Security Council referrals, and the submission by individual governments of cases to the Court, this Afro-centric focus has created a distorted perception, within the African continent, about the intention underlying the establishment of the Court. It is important to note that the cases in the Central African Republic, the Democratic Republic of the Congo and Uganda were self-referrals by the governments of these countries. However, the fact that these cases were referred by presidents of countries whose political intention was to target their political opponents, indicates that the ICC became a willing accomplice to the machinations of domestic politicians. This has discredited the ICC in the eyes of the political opponents who

were summoned by the Court and their supporters. This means that the ICC by association with the ruling regime effectively becomes instrumentalized as a ‘political weapon’ in these countries. Consequently, there is sense in which ‘political justice’ is informing the cases currently before the ICC notably in Sudan, Kenya, Uganda, DRC, Côte d’Ivoire, CAR, and Mali.

The Reality of Selective Justice

In addition, there is the issue of international political perceptions of the ICC interventions in Africa. By examining each African case one might be able to formulate a rational explanation why all the current cases of the ICC are from Africa. One can observe that there is a combination of domestic and international political interests behind the submission of, for the time being, only African cases and UN Security Council referrals to the ICC. The UN Security Council is effectively dominated both diplomatically and financially by its Permanent Five (P5) – the China, France, Russia, United Kingdom and United States, which constitute the global power elite. The reality is that African countries voluntarily signed up to be subject to the jurisdiction of the Court, so some have questioned why they subsequently have criticized the Court for doing its work. However, one might even argue that it is possible for a neutral observer, who critically analyzes the facts, to develop the perception that the ICC was established for the sole purpose of prosecuting cases from Africa, given the fact that all of the 36 individuals who have been summoned are African.

Irrespective of the prism through which one chooses to assess the situation, there is a perception among several African governments that the Prosecutor has been selective in submitting cases to the ICC Pre-Trial Chambers. The selective justice in the Court’s current prosecutions is seen as an injustice towards the African continent and a form of ‘judicial politics’. War crimes are being committed across the world and the ICC has opened a number of preliminary investigations in non-African countries including Afghanistan, Georgia, Colombia, Honduras, and Korea. In 2014, the ICC opened preliminary investigations on the potential war crimes committed in Iraq by military personnel, and political leaders, from the United Kingdom, based on a dossier submitted by civil society activists. However, the slow pace, and as some have argued the ‘non-movement’ on bringing preliminary investigations to the point of issuing summons and initiating prosecutions of non-African cases suggests to analysts and politicians on the African continent, that a more insidious agenda is in fact in operation as far as ICC interventions and Africa are concerned. Hence, it appears to African governments that the ICC is keen to pursue cases on their continent only, where the states are weak when compared to the diplomatic, economic and financial might of the US, the United Kingdom, Russia, and China. This has hit a diplomatic nerve within the African continent. According to some African officials, there is an entrenched injustice in the selective actions of this international criminal court system whose primary function is to pursue justice for victims of gross violations. Proponents of the Court also have to engage in highly convoluted and incoherent arguments as to why there are no cases from outside of Africa.

The Moral Integrity of the ICC System

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

actions to demonstrate that this Court is for all and not for the select and marginalized few. In the absence of a dialogue reinforced by concrete action to demonstrate otherwise, the legitimacy and efficacy of the Court will continue to decline across the African continent. This is already evident in the Kenya and Sudan.

Crisis in Kenya: The Challenge of Holding Leaders Accountable

A History of Violence in Kenya

Following the presidential elections held in Kenya on 27 December 2007 the results of the poll were heavily contested by the two main political parties the Party of National Unity (PNU) and the Orange Democratic Movement (ODM). The election results were announced on 30 December and the incumbent President Mwai Kibaki was hastily sworn in as the President of the country amid protests from the opposition leader, Raila Odinga, of the Orange Democratic Movement (ODM). The Chairman of the Electoral Commission of Kenya (ECK), Samuel Kivuitu, confessed after the fact that he was not certain who had won the presidential election. There were therefore grounds for ODM to contest the results of elections but PNU also continued claiming that it had won the election legitimately. The tension created by this contested result further fuelled the violent protests that afflicted the country in the early months of 2008. Specifically, the political disagreement over the outcome of the poll led to the outbreak of sporadic and widespread violence across Kenya which affected communities in the low-income areas of the capital city of Nairobi, as well as in key urban and rural centres including Mombasa, Kisumu, Eldoret and sections parts of the Rift Valley, Nyanza, Western and Coastal Provinces. Over a six to seven week period an estimated 1,200 people were killed in the violent clashes that ensued and approximately 350,000 people were internally displaced and forced to flee their homes as a direct result of the violence.

A National Accord and Reconciliation Agreement was mediated by the Kofi Annan-led Panel of Eminent Personalities, under the auspices of the African Union (AU), on 28 February 2008. The Agreement stipulated the need to convene commissions of inquiry to assess the electoral process and also to investigate the post-electoral violence. These were duly convened as the Independent Review of Elections Commission (IREC), headed by the retired South African Justice Johann Kriegler, and the Commission of Inquiry into Post-Election Violence, under the chairmanship of the Kenyan Justice Philip Waki.

The 2007 and 2008 post-electoral violence in Kenya was one of the most violent and destructive periods in the country's history. It would be limiting to analyse this post-electoral violence as an aberration that spontaneously emerged. It would be more accurate to consider the 2007 as the logical consequence of the continuous political ethnic manipulation that has been taking place prior to the introduction of multi-party politics in 1992 (Ndegwa, 1997: 607). Both the 1992 and 1997 electoral polls were beset by violent ethnic clashes. The root causes of those clashes are linked to the twin problems of economic impoverishment and ethnic chauvinism. The tragedy of Kenya's situation is that the seeds of dissension that manifested after the elections in the form of spiralling violence were sown in the very fabric of the post-colonial nation-state, when the country inherited its current constitution, system of government and its electoral system from the former British colonial administration (Davidson, 1992). Throughout its colonial and post-colonial history Kenya has been a plagued by the scourge of ethnic manipulation. Essentially, the problem in Kenya stems from the persistent and increasing 'ethnicization' of the political sphere (Anderson, 1991). Africa's

post-colonial states were almost systematically afflicted by the process of ethnic manipulation for the instrumentalisation of political power to gain, secure and entrench economic advantage (Fanon, 1961). Along these lines, Kenyan politics through the reign of its four post-colonial presidents - Jomo Kenyatta, Daniel Arap Moi, Mwai Kibaki and Uhuru Kenyatta - has degenerated into a realm of ethnic contestation.

Efforts to Domesticate the Prosecution of International Crimes

The Kenyan Commission of Inquiry into Post-Election Violence (CIPEV – the Waki Commission) was mandated to investigate the facts and circumstances surrounding the post-electoral violence. Together with the Independent Review of Elections Commission (IREC), the Waki Commission has highlighted the key issues that enabled a flawed election and generated the violence during the 2007 polls in Kenya. On 11 December 2008, the Kenyan Parliament passed the International Crimes Bill which effectively domesticated the Statute of the International Criminal Court. The passage of this Bill empowered the Kenyan state to investigate and prosecute international crimes committed locally or abroad by a Kenyan or committed in any place against a Kenyan. The passage of this Bill was a key recommendation of the Waki Commission. The next step was supposed to be the establishment of a Special Tribunal of Kenya to begin the process of adjudicating on the cases relating to the organisers and perpetrators of the post-electoral violence in Kenya. However, this process became co-opted and corrupted by some political leaders who were wary of being prosecuted by the Tribunal for the role they played in fomenting violence after the 2007 poll.

The Aborted Special Tribunal of Kenya

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

Astutely, the Waki Commission ensured that the recommendations in its report were accompanied by sunset clauses that would initiate consequences for in-action or intransigence. Specifically, the Waki Report states that if ‘an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted’, then ‘a list containing names of, and relevant information on, those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court’ (CIPEV, 2008: 473). The Waki Report further states that ‘the Special Prosecutor shall be requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons’ (CIPEV, 2008: 473). By establishing these conditionalities the Waki Commission effectively indicated that it was prepared to internationalise Kenya’s transitional justice process, if the domestic politicians failed to institute a viable process. This sunset clause in effect laid the foundation for the Prosecutor of the ICC to intervene in Kenya. Subsequently, Kofi Annan submitted the list of suspects to the first Prosecutor of the ICC, Louis Moreno Ocampo, who selected six names, which were subsequently reduced to four names by the ICC trial chambers.

Conflict in Sudan: The Challenge of Holding Leaders Accountable

Post-colonial Sudan was beset from the outset with political tension, which escalated in the early 1970's into a war of secession by the south. By the 1990s, the Sudanese National Islamic Front (NIF) of President Omar Bashir, who took over power through a military coup in 1989, launched an Islamist-based domestic and foreign policy, thus perpetuating tension and among the Christian and Animist communities in the south of the country. The long standing dispute between the Sudanese government and secessionist southern Sudan People's Liberation Movement/Army (SPLM/A) significantly affected the dynamics of the region. Relations with Ethiopia and Eritrea, who were in engaged a border war, deteriorated. The conflict between the Government of Uganda and the Lords Resistance Army (LRA) in northern Uganda is also affected by the situation in the Sudan, since Ugandan resistance militia are launching their attacks from Sudanese territory. Hundreds of thousands of Sudanese refugees are now camped in neighbouring countries.

The Conflict in Darfur and the Sudan Regime's Atrocities

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

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

The United Nations Referral of the Darfur Situation

In addition to the fighting there has been a pattern of organized attacks on civilians and villages, including killings, rape and abductions. A particular conflict strategy seemed to be predicated on the forced displacement, through the destruction of homes and the livelihood, of farming populations in the region. The issue of whether the events could be described as ethnic cleansing or genocide increased the level of controversy surrounding the Darfurian catastrophe. Some analysts argued that the 'scorched earth policy' evident in the attacks was in fact an attempt by one group of people to eliminate or annihilate another group. For example, an attack in one area of Northern Darfur known as Tawilah on 27 February 2004, resulted in 30 villages being burned to the ground and over 200 people being killed, 200 women and girls being raped, and an estimated 350 women and children being abducted. In August 2004, the UN Special Rapporteur on Extra-judicial, Summary or Arbitrary

Executions, Asma Jahangir, released a report which indicated that beyond doubt the Sudanese Government bears responsibility 'for extra-judicial and summary executions of large numbers of people in Darfur' (United Nations, 2004: 2).

Estimates indicate that sixty percent of the villages in this region of Darfur, which is home to about 1.5 million people have been destroyed, burned or abandoned because of fear of attacks from the warring parties, aerial bombardments from Government troops and compulsory recruitment by the SLA and JEM. The pressure increased on neighbouring countries, notably Chad with over 1 million refugees fleeing out of Darfur. There are an estimated 400,000 internally displaced people and the estimates of those who have been killed number in the hundreds of thousands due to the violence and by attrition through mass starvation. In 2005, the unfolding situation motivated the United Nations Security Council (UNSC) to refer the situation in Darfur, Sudan, to the International Criminal Court.

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

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

ICC Interventions in Sudan relating to the Darfur Region

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

The African Union was making the case for sequencing the prosecution by the Court due to the fragile peace in Darfur, this argue will be elaborated later in this study. There were undoubtedly political reasons for such a request by the AU, since the arrest and arraignment of a sitting Head of State in Africa could set a precedent for a significant number of other leaders on the continent, who could potentially be subject to the criminal jurisdiction of the International Criminal Court for their own actions. Therefore, rallying behind Al Bashir, who was re-elected as the President of Sudan in April 2010, could be construed not only as a face-saving exercise but also one that seeks to prevent the Court from having such a remit in the administration of international justice on the continent. However, the African Union made the

point that Sudan finds itself at a critical juncture of its peacemaking process in Darfur and Al Bashir is the key interlocutor with the armed militia and political parties. This argument clearly cannot be wished away or ignored.

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

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

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

ICC Interventions in Kenya

On 31 March 2010, Pre-Trial Chamber II granted former ICC Prosecutor Ocampo his request to open an investigation using his *proprio motu* powers in the situation in Kenya. On 15 December 2010, Ocampo identified six individuals who he considered to be suspected of orchestrating the most serious crimes during the Kenyan post-electoral violence of 2007 and 2008. The so-called Ocampo Six included Uhuru Kenyatta (former Deputy President), William Ruto (former Minister), Henry Kosgey (former Minister and Member of Parliament), Joshua Arap Sang (Radio Presenter), Mohammed Ali (former Head of the Police) and Francis Muthaura (former Head of the Civil Service). Subsequently, the ICC Pre-Trial Chamber II found that there was a reasonable basis for all six to appear before the Court for alleged crimes against humanity. On 8 March 2011, the ICC issued a summonses to appear before the Court. In 7 and 8 April 2011, all six individuals voluntarily appeared before Pre-Trial Chamber II. Between 1 September and 5 October 2011, the confirmation of charges hearings took place. On 23 January 2012, the Pre-Trial Chamber II found that the ICC Prosecutor's evidence failed to satisfy the evidentiary threshold required in the case of Henry Kosgey and Mohammed Ali. In terms of Francis Muthaura, even though his charges were initially confirmed, they were subsequently dropped. On 29 March 2012, the ICC Presidency constituted Trial Chamber V to conduct the Ruto, Sang and Kenyatta cases. In a subsequent ruling the ICC postponed Kenyatta's trial to April 2013 after the presidential election. Legal analysts would argue that this was well within the ICC's right, however, political analysts

have argued that this was a pragmatic political decision by the ICC in order to avoid entangling itself in the Kenyan presidential poll which took place in 2013. This intention was however subverted by events on the ground as the ICC became increasingly politicized within the Kenyan domestic political scene.

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

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

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

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

On 12 October 2013, an Extraordinary Session of the Assembly of Heads of State and Government of the African Union was convened in Addis Ababa, Ethiopia, to discuss Africa's relationship with the ICC. The African Union issued a series of decisions, including the need to 'safeguard the constitutional order, stability and integrity of member states' by ensuring that 'no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such a capacity during their term of office' (African Union, 2013: paragraph 10(i)). Furthermore, the AU Heads of State called for suspension of the trials of Kenyatta and Ruto until they have completed their terms of office. In a controversial move, the AU Assembly also stipulated 'that any AU member state that wishes to refer a case to the ICC may inform and seek the advice of the African Union' (African Union, 2013: paragraph 10(viii)). In a direct challenge to a case before the International Criminal Court, the AU Assembly decided 'that President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its member states have been adequately addressed by the UN Security Council and the ICC' (African Union, 2013: paragraph 10(xi)).

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

The UNSC Meeting on a Deferral of the Kenyan Cases

On 15 November 2013, at the 7060th Meeting of the UN Security Council, a Resolution seeking to request the International Criminal Court, under Chapter VII of the UN Charter, to defer the investigation and prosecution of President Kenyatta and Deputy President Ruto for 12 months, in accordance with Article 16 of the Rome Statute, failed to win a majority. In terms of the vote, seven members voted in favor and eight members abstained, which prevented the securing of a mandatory nine votes and no veto to pass the resolution. This enabled African member states for the UNSC at the time to criticize the Council for its selective application of the powers of the ICC, notably in situations that were not under the 'patronage' of the P5 members.

The ICC Assembly of State Parties meeting on Leadership Immunity

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

On 22 November 2013, there were early indications that the ICC system was open to addressing the concerns of African countries when the 12th Session of the Assembly of States Parties to the Rome Statute of the International Court convened a special segment, at the request of the African Union, on the theme of 'Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation'. The speakers included the former AU Legal Counsel, Djenaba Diarra, and the Kenyan Attorney General, Githu Muigai. Diarra commended the Assembly of States Parties for convening the debate and then went on to reiterate her organization's concern about the failure of the International

Criminal Court to undertake prosecutions outside Africa, as well as the impact of international criminal proceedings upon efforts to promote peace and stabilize regions. Muigai argued that immunities for sitting heads of state already exist in domestic jurisdictions and that it would be anachronistic for them not to be recognized and implemented at an international level.

A Question of the Legitimacy of the International Criminal Justice System

According to a number of African governments, a court that does not apply the law universally does not justify the label of a court (Branch, 2011: 213). This is particularly important if the jurisdiction of the Court does not apply to some Western or P5 countries that are actively engaged and operating in African conflict zones. What would happen if a citizen of these non-signatory states to the Rome Statute commits war crimes in Africa; who will administer international justice in those particular cases? Although pursuant to the territoriality principle the ICC would have jurisdiction over such crimes if committed on the territory of an African States Party to the ICC Statute, African leaders seem to be convinced that the Court would not take up the cases, the same way they seem to be convinced, and subsequently proven to be accurate in believing, that the UNSC would not take any step in deferring the prosecution of the Kenyatta and Ruto cases. This glaring discrepancy undermines the evolving international justice regime and reverses gains made on constraining the self-serving agendas of powerful countries, particularly where their relations with weaker states are concerned.

The view in Africa is that if one demands accountability for African leaders then the same justice should be demanded also of Western, Russian and Chinese leaders, particularly in situations where there is the perception that these leaders have committed the most serious crimes of international concern (Schabas, 2010). In the absence of an over-arching system of global political administration or government, international criminal justice will always be subject to the political whims of individual nation-states.

Diverging African Opinions on the International Criminal Court

Following the 18th Ordinary Session of the Assembly of AU Heads of State and Government in Addis Ababa, where the African Union reiterated its position not to cooperate with the International Criminal Court, stipulating that all AU States had to abide by this decision and that failure to do so would invite sanctions from the Union, some African countries have expressed their reservations about the Union's position on the International Criminal Court. Botswana publicly disagreed with the AU's decision not to cooperate with the Court, quoting its international obligations under the Rome Statute. South Africa also has reiterated its commitment to upholding its legal obligations as a State Party to the Rome Statute. However, while Botswana has been emphatic and unwavering in its support for the Court's actions, South Africa has played a more nuanced diplomatic game due to its key role within the African Union.

In January 2012, South Africa sought the appointment of Nkosazana Dlamini-Zuma, its former Foreign Minister, as the Chairperson of the African Union Commission indicating its desire to play a more assertive role within the Union. At the July 2012 AU Summit in Addis Ababa Dlamini-Zuma was ultimately victorious with 37 member states voting for her as the new Chairperson of the Union's Commission. South Africa has adopted a cautious approach towards dealing directly with or raising the profile of the ICC's prosecutions, given its stated position to uphold its international commitment to the Rome Statute. South Africa, therefore,

is caught between a rock and a hard place when it comes to the AU-ICC relationship. Given the appointment of Dlamini-Zuma as the Chairperson of the AU Commission, and her initial pronouncements on this issue, indications are that it more likely will side with the African Union rather than pursue the Court's agenda on its behalf across the continent. This ultimately does not augur well for the ICC, given South Africa's important regional role.

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

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

Ocampo's Judicial Politics

The former Chief Prosecutor Ocampo was emphatic that he did not 'play politics', but it was all too obvious that he was more enthusiastic about initiating prosecutions in African cases only, not even undertaking preliminary investigations into alleged war crimes in Gaza, Sri Lanka and Chechnya, due to the politically sensitive nature of such actions. The Office of the Prosecutor has conducted preliminary investigations in Afghanistan, Georgia, Colombia, Honduras, Korea and Nigeria. However, in Ocampo's version of international justice these preliminary investigations took on an air of permanency. 'Permanent preliminary investigations' are essentially a technical way of avoiding launching prosecutions indefinitely.

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

Bensouda, however, has a mammoth task, since the trust that has been broken between the African Union and the ICC still needs to be mended. She will need to initiate genuine problem-solving dialogue with the African Union leadership, beyond the photo opportunities that have since been documented. Three years after assuming the office, she has not managed yet to distance herself from the confrontational relationship between the Court and the African Union that was exacerbated during the Ocampo regime. Bensouda still has a significant amount of work to do to communicate effectively and directly to African constituencies, governments and civil society and utilize them to convey the objectives and

mandate of the Court. As of 2014, Bensouda has convened a series of direct talks with Dlamini-Zuma, the Chairperson of the AU Commission. However, this has not translated into a rapprochement between the two organizations. The ICC's outreach in this regard has been abysmal and consequently the vacuum of information has been exploited for political gains by politicians to their own advantage.

On Darfur, Bensouda's hands effectively are tied by the stand-off between the African Union and the UN Security Council. The UN Security Council, to date, has declined to issue a formal communication to the African Union on its request for the Bashir indictment to be deferred. Some members of the UN Security Council have stated informally that the African Union should take the 'hint' and consider the Council's 'silence' as a form of communication. Such dismissive attitudes do not augur well for a mutually acceptable resolution of the impasse between the African Union and the UN Security Council, which in effect also drag in the ICC and make it appear complicit in not responding to the African Union's request. A positive indicator that both Bensouda, the wider ICC system and the AU are serious about opening dialogue will be the establishment of a fully operational ICC office in Addis Ababa, the headquarters of the African Union, to serve as liaison office and means for the Court regularly to engage the Union as an interlocutor in its own backyard.

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

The African Union constantly 'reiterates its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union' (African Union, 2000). This suggests that the AU is committed to hold all perpetrators of mass atrocities to account, based on the treaty that established it. According to officials of the African Union, what the body takes exception to being constrained by how other international actors choose to fight impunity on the African continent.¹ This sentiment is not unique to Africa. There is no other region of the world which is subject to the prosecutorial interventions of the ICC, so it is not possible to gauge the reasonableness of the AU's stance comparatively. All inter-governmental organizations undoubtedly would want to determine how their member states engage with issues relating to transitional justice, peacebuilding, democratic governance and the rule of law, without feeling that there is an overbearing and paternalistic entity in effect stipulating how the continent should be going about doing so.

It is an understatement to note that the relationship between the African Union and the ICC commenced badly and, indeed, one could not imagine a worse start. Both organizations share a convergence of mandates to address impunity and to ensure accountability for violations, atrocities and harm done in the past. The organizations diverge in that the African Union is a political organization and the ICC is an international judicial organization. In this divergence lies the key to how the two organizations go about 'addressing impunity and ensuring accountability for past violations, atrocities and harm done'. The African Union, by its very nature, will gravitate first to a political solution and approach to dealing with the past, which places an emphasis on peacemaking and political reconciliation. The ICC, by contrast, will tend to pursue international prosecutions, because this is written into its DNA, the Rome Statute. On paper it would appear that the two approaches may never converge.

Yet, in terms of charting a way forward, there is scope for the African Union to become more nuanced in the situations in which it would side with and support ICC interventions to promote accountability for past violations. Conversely, the ICC essentially has to acknowledge and communicate that it is aware that it is operating in an international political milieu and that on occasion it would have to craft or sequence its prosecutions to enable

political reconciliation processes to run their course. This will require the ICC system to step down from the artificial pedestal on which Ocampo has placed it, asserting that it does not play politics, when in fact it appeared that everything that it did was tainted politically. In effect, the ICC will need to embrace the political lessons of its past transgressions and omissions, and acknowledge openly 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 Court's orientation in this regard. This will not require re-opening the Rome Statute to further engineering and potential dismemberment. Bensouda can communicate her intentions by issuing Policy Papers of the Office of the Prosecutor on how the Court will order its activities to enable peacemaking to proceed and how her administration intends to go about rectifying and remedying the misperceptions that persist across Africa.

There potentially could be cases in the future in which the African Union would countenance allowing the International Criminal Court to do what it was designed to do namely hold leaders, and other perpetrators, accountable for their actions. This is with the proviso that given its nature as a political organization, the Union leadership would be reluctant to expose its membership to a precedent in which one amongst its ranks is prosecuted by the Court. This is, of course, an unpalatable position to take for human rights activists and advocates of prosecuting those who commit egregious atrocities. Specifically, this would be a contravention of the principles of human rights, which would have to be sacrificed at the altar of political pragmatism. There is clearly merit in the position of the human rights organizations. However, in the real world the ICC has already demonstrated that it is prepared to play politics by failing to pursue certain prosecutions or encouraging the UN Security Council to pursue cases without fear or favor, such as Syria, Gaza, Sri Lanka, Iraq, and Afghanistan where international crimes may have been committed.

Indeed, both the African Union and the International Criminal Court, both which in fact have been practicing a variant of 'political justice' and 'judicial politics', need to reorient their stances. The African Union would need to move away from its exclusively political posture towards embracing international jurisprudence and the limited interventions by the International Criminal Court. Conversely, the Court needs to move away from its unilateral prosecutorial fundamentalism and recognize that there might be a need arrange its interventions in order to give political reconciliation an opportunity to stabilize a country.

This strategy for repairing the embattled relationship between the African Union and the ICC would seem to be an unacceptable compromise by some actors on both sides of the spectrum. Their preference would be for their organizations to stick to their ideological guns. In fact, this scenario is playing itself out already. The African Union is undertaking an assessment of how the mandate of its continental institution, the African Court of Justice and Human Rights, can be expanded to establish a continental jurisdiction for war crimes, crimes against humanity and genocide (African Union, 2013: para 10(iv)). The idea behind this move is essentially to establish a Pan-African Criminal Court with the same mandate as the International Criminal Court, and thereby prosecute all of future cases which fall under its jurisdiction on the continent. The AU's criminal court would in essence be seeking to circumventing all future ICC interventions on the African continent. Whether this would lead to African States Parties withdrawing from the Rome Statute is not yet clear. Furthermore, while the Rome Statute makes provisions for complementarity with national jurisdictions, it does not have similar provisions for continental jurisdictions, so there is no guarantee that a Pan-African Criminal Court would be recognized by the International Criminal Court. However, whether the African Union succeeds in establishing a continental jurisdiction is besides the point; the key issue is that the continental body views its relationship with the

International Criminal Court as having deteriorated to such a point that it is exploring actively how to make the Court's presence in Africa an irrelevancy in the future. International organizations such as the League of Nations have folded when their members effectively ignored their mandates. Will the International Criminal Court suffer the same fate in Africa? The response to this question cannot be given for years to come, but it compels us to acknowledge that there is an urgent case to chart a different path for the relationship between the African Union and International Criminal Court.

African Civil Society and the International Criminal Court

A key constituency that seems to almost have been entirely over-looked in the battle of inter-governmental organisations is that of the victims. Civil society actors have sought to raise this issue and maintain it on the agenda. African civil society does not have a common view as regards the role of the International Criminal Court on the continent. There are several schools of thought among civil society and the wider public. There are those who view the Court as a necessary palliative to the gross impunity which has wreaked havoc with the lives of African citizens. There is the critical view that the International Criminal Court is not a panacea to cure Africa of all of its ills and rid it of its criminal elite. The pro-ICC civil society camp views the Court as confronting and subverting attempts by African leaders and governments to circumvent accountability for past atrocities. It argues that the domestic legal systems are incapable of dealing with the most serious crimes of international concern, and therefore the Rome Statute's jurisdiction has to be operationalized. The ICC-skeptics question whether justice meted out in The Hague ultimately will bring about any genuine change on the ground, if there is no political will to do so. They argue that even though African legal systems may not be able to live up to some illusionary 'international standard of the administration of justice', there is no reason to sub-contract the judicial process to a remote and aloof Court in The Hague. They further argue that the Court's exclusive focus on African cases during its first ten years of operation is tantamount to judicial imperialism and a neo-colonial encroachment into national jurisdictions, along the lines of the criticisms of the AU.

On 26 January 2011, approximately 30 civil society organizations from about 20 African countries wrote collectively to African members of the ICC Assembly of States Parties urging them to support the Court. Even though these civil society initiatives are receiving scant attention from the African Union and the majority of African states, they can contribute towards encouraging a more constructive dialogue between the Union and the Court. Ultimately, the matter will be resolved at the level of governments due to the state-centric nature of international relations.

Sequencing Justice to Promote Peace and Reconciliation

There are a number of provisions within the Rome Statute which enable the ICC to sequence its interventions in a way that complements efforts to promote peace. In particular, the notion of justice remains an essentially contested concept (Grono and O'Brien, 2008). In fact there are multiple dimensions to justice. Retributive justice seeks to ensure prosecution followed by punishment for crimes or atrocities committed (Villa-Vicencio and Doxtader, 2004). Restorative justice strives to promote societal harmony through a quasi-judicial process of truth telling, acknowledgement, remorse, reparations, forgiveness, healing and reconciliation. Retributive or punitive justice is generally administered by a state-sanctioned legal institution or through the remit of international law. Restorative justice draws upon a range of mechanisms including truth commissions and other societal reconciliation institutions.

In both instances retributive and restorative justice have a central concern with preventing the impunity of perpetrators who have committed atrocities. Restorative justice however has a more direct impact on the condition of the perpetrators, because it summarily imposes a punitive sentence which is evident for all to witness. The impact of restorative justice is more elusive, as victims and perpetrators are often engaged in a series of face-to-face interactions designed to achieve the objectives highlighted above. The fact that the outcome of restorative justice processes are generally less dramatic than those of retributive justice means that their efficacy is generally more suspect and unquantifiable to external observers. However, we should not lose sight of the fact that both forms of justice address the issue of impunity. Impunity in this context is understood as the condition in which there has been no redress or reckoning of the past atrocities and injustices committed by a perpetrator. Retributive justice prevents the immediate impunity of the perpetrator of crime through punishment and serves as a warning for those who may be inclined to commit atrocities in the future. Restorative justice also addresses impunity by compelling the perpetrator to undergo a revelatory and confessional process of transformation, which means that he or she has not 'got away' with the crimes that they committed but rather atones for them.

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

The sequence in which either retributive and restorative justice processes are initiated is also not a precise science. In the majority of cases, retributive and restorative justice processes might be instituted and operationalised simultaneously. In some instances failure for a government or a society to embrace a restorative approach to justice and reconciliation can require the establishment of an international retributive/punitive justice process. In other instances the demands of a restorative justice process with its emphasis on truth telling and the collective psychological transformation of promoting forgiveness and reconciliation, means that efforts to administer punitive measures may need to be carefully sequenced so as not to disrupt these healing processes. As discussed earlier in this study, it is often the case that individuals and leaders who have been accused of planning, financing, instigating and executing atrocities against citizens of another group, all in the name of civil war, can be investigated by the ICC if the respective country is a State Party to the ICC or if the issue is referred to the Court by the UN Security Council. It is often the case that these individuals and leaders are the very same people that are called upon to engage in a peace process that will lead to the signing of an agreement and ensure its implementation. Characteristically, most peace agreements will have provisions for peacebuilding and within this process, a framework for promoting restorative justice through the form of truth commissions as a means for promoting national reconciliation.

A punitive approach to justice cannot deal with the grievances that often underpin structural violence, identity conflict and the economic marginalisation of the majority of people in war-

affected countries and thus establish a sustainable basis for peace (Meernik, 2005). It will however prosecute key individuals who had the greatest responsibility for committing atrocities. Therefore, there is a need to adopt a strategy to ensure sequencing how a punitive approach is instituted in the context of transitional justice.

Sequencing in transitional justice requires the deliberate operationalisation of a coordinated retributive or restorative justice process in order to ensure that stability and ultimately peace is achieved in a given country-context. In the international justice fora at least two camps have emerged those that adopt a fundamentalist approach to prosecution and those that advocate for a more gradual approach predicated on giving time to peacebuilding and reconciliation to take root. Prosecutorial fundamentalism is not a misguided school of thought and its intentions are noble as far as they attempt to ensure that those who bear the greatest responsibility for war crimes, crimes against humanity and genocide are summarily brought to book. However, prosecutorial fundamentalism, like all other fundamentalisms, can be blighted and become subsumed by a narrow, legalistic desire to bring the accused to justice. Lawyers and jurists can become so enamoured and ensnared by their sense of self-righteous and over-zealous supplication to judicial processes, that they can fail to see when these same processes are being abused and manipulated for political ends. A more nuanced approach would suggest that there is a time and a place for prosecution and, in the context of a civil war, it may not always be immediately after the cessation of hostilities between the belligerent parties. At this point in time the tension within the country tends to be uncharacteristically high and any attempt to prosecute individuals and leaders can often, and sometimes is, seen as an attempt to deliberately continue the 'war by other means' by targeting the main protagonists to a conflict. Effectively what is called for in these situations is a period of time in which the belligerents can pursue the promotion of peace. In such a situation the efforts to promote peace, including its restorative justice dimension, would have to be given precedence to the administration of punitive justice. This is with a view to laying the foundations for the stability of the society.

Rome Statute Provisions that Enable the Sequencing of Punitive Justice to Enable Peacebuilding

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

Whilst the Preamble of the Rome Statute however also recognizes 'that such grave crimes threaten the *peace, security and well-being of the world*' (Rome Statute, 2002: preamble). The Statute does not further elaborate how the Court will contribute towards advancing 'peace' in the broader sense beyond ensuring that the perpetrators of these crimes are punished. In fact, the Rome Statute does not engage with the issue of peace beyond making this point in the Preamble. This explains why the activities of the ICC have focused on exercising its criminal jurisdiction without engaging in the wider issue of how its actions

contribute towards consolidating peace. In this regard, the first Prosecutor of the ICC, Ocampo, has on several occasions intimated that his interest is not in the political aspects of a crisis. He has remained emphatic in arguing that his sole interest is to prosecute those who bear the greatest responsibility for crimes under the jurisdiction of the Court.

Suffice to say that the ICC has no legal obligation whatsoever to sequence its actions in a way that complements efforts to promote restorative justice. Indeed, the Rome Statute does not directly engage with this issue of the complementarity of its actions to those of other peacebuilding process in the aftermath of a conflict. Furthermore, the Rome Statute does not explicitly articulate a definition of justice, but it does tacitly allude to need for international justice to ‘put an end to impunity’ and redress the effects of ‘unimaginable atrocities that deeply shock the conscience of humanity’ (Rome Statute, 2002: preamble). The Rome Statute does indicate that the ICC is ‘complementary to national criminal jurisdictions’ (Rome Statute, 2002: preamble). However, it does not refer explicitly to other quasi-judicial mechanisms such as truth commissions. Therefore, there is scant guidance within the Rome Statute as to whether the ICC can complement and enable national restorative justice processes. In effect, there are no explicit provisions within the Rome Statute to provide an insight as to whether there should be the sequencing of the ICC’s criminal jurisdiction with the domestic efforts of truth commissions and other restorative justice processes. In September 2007, the Office of the ICC Prosecutor issued a ‘Policy Paper on the Interests of Justice’ in which it acknowledged that ‘it fully endorses the *complementary role* that can be played by *domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of broader justice*’ (OTP, 2007: p.8). More specifically, the Office of the Prosecutor ‘notes the *valuable role* such measures may play in dealing with large numbers of offenders and in addressing the *impunity gap*’ (OTP, 2007: p.8). In addition, there are however a selection of stipulations within the Rome Statute which could provide a basis for enabling restorative justice processes to either take precedence or function in parallel with ICC interventions. A regrettable, aspect when this argument is repeated is the assumption that if alternative institutions of justice do not meet an arbitrary ‘international standard’ then they are not viable as frameworks for ending impunity and ensuring redress for victims.

Deferral of Investigation or Prosecution

Specifically, with reference to the deferral of investigation or prosecution, Article 16 states that ‘no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect’ (Rome Statute, 2002: article 16). Article 16 of the Rome Statute implies that the initiation, or the threat of the initiation, of an ICC prosecution is part and parcel of the range of provisional measures that the UN Security Council can call upon. The framers of Article 16 of the Rome Statute included the reference to Chapter VII of the UN Charter because it is traditionally associate with the body’s authority to impose punitive sanctions. The inclusion of a reference to Chapter VI of the UN Charter in Article 16 of the Rome Statute would not undermine the remit of the Court. It would in fact add value to efficacy of the ICC, as it would explicitly acknowledge the complementary role that the Court can play through its interventions in promoting peace processes. Such an amendment to the Rome Statute would still ensure that impunity is addressed albeit through other quasi-judicial restorative justice processes.

Sequencing and the Interests of Justice

Another stipulation within the Rome Statute which can provide a basis for sequencing retributive and restorative justice is outlined in Article 53-1(c) which states that the Prosecutor can decline to initiate a process if he or she determines that after ‘taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice’ (Rome Statute, 2002). As indicated earlier the Rome Statute does not proffer a definition of justice beyond making reference to what it should be seeking to redress namely impunity for serious crimes of international concern. Therefore, the reference to the ‘interests of justice’ in Article 53 of the Statute opens up the possibility for a broader interpretation of the notion of justice. Article 53 effectively gives the Prosecutor the discretion to decide on whether there are ‘substantial reasons’ not to initiate an investigation. No further information is provided as what would constitute the ‘interests of justice’. However, given the fact that the Rome Statute outlines a criminal jurisdiction, one could make a reasonable assumption that a reference is being made here to the interests of punitive or retributive justice. However, when we take into account the earlier part of the Article 53-1(c) and its reference to the ‘interests of victims’ then one could also make the case that other considerations to either protect victims or enable them to go through another quasi-judicial or reconciliation process such as a truth commission could equally inform the decision of the Prosecutor not to pursue a prosecution.

There is a fail-safe mechanism in Article 53 because if the Prosecutor determines that he would not proceed with an investigation or prosecution in the interests of justice, he or she has to inform the Pre-Trial Chamber. Through Article 53-3(b) the Pre-Trial Chamber can on its own initiative review the decision of the Prosecutor if he or she decided that there was no reasonable basis to initiate an investigation or prosecution because it would not ‘serve the interests of justice’. Furthermore, according to Article 53-4 the Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts and information, so this does not preclude the ICC from subsequently taking action at a later stage.

The Statute of Limitations and the Sequencing of Justice

As far as the non-applicability of the statute of limitations is concerned, Article 29 states that ‘the crimes within the jurisdiction of the Court shall not be subject to any Statute of Limitations’ (Rome Statute, 2002: article 29). In effect, as far as the ICC is concerned there is no time limit imposed upon the prosecution of individuals who commit atrocities and the most serious crimes of concern to the international community. This therefore provides an opening as to how ICC prosecutorial interventions can be sequenced with national efforts to promote restorative justice. Specifically, given the fact that there is in effect no time constraint on when the ICC can initiate, implement and conclude the prosecution of perpetrators, then there is thus scope for the Court to sequence its interventions in ways that enable other peacebuilding process such as the establishment and operationalisation of restorative justice processes to take precedence. This would of course have to proceed on the assumption that there will be a national peacebuilding process in the aftermath of a conflict in which serious crimes of international concern were committed. The ICC would have to make an assessment and a judgment as to whether a particular country is genuinely engaged in a process geared towards national reconciliation. It is not beyond the realm of imagination for a country’s political and business elite to institute what appears on the surface as a restorative justice process, replete with truth commissions and other healing paraphernalia, as a delaying tactic or a manoeuvre designed to perpetuate impunity and evade their responsibility for committing atrocities.

The issue of how long the ICC should wait before instituting its own proceedings will always depend on the specific domestic and national context of the crisis it is addressing. In some cases, national reconciliation processes could be initiated immediately after a conflict or following the change of an authoritarian regime and the Court would need to take into account the need to allow for the consolidation of these processes. If the Court was to institute an investigation into a particular case which targeted key individuals that were integral to a national reconciliation process then these actions could easily undermine any efforts to lay the foundations for sustainable peace in the short to medium-term. In some instances, the potential intervention by the ICC could paradoxically trigger the operationalisation of a restorative justice process. However, such a sequence of events would expose the political elite as only having been motivated by a desire not to see some of their own colleagues end up at the docks of the ICC. Such situations would have to be closely monitored by the Court for attempts to sabotage or undermine genuine national reconciliation efforts.

The ICC and Africa: Beyond the Impasse

The need to address impunity is not in question. The question arises as to whether any trust can be ascribed to an international criminal justice system that seems to have created a two-tiered framework, one for the weak and non-for the powerful. Specifically, if selective justice is applied what will be done about the impunity of the powerful countries, notably the P5, who are paradoxically amongst the leading purveyors of violence on the planet. In addition, it is important not to adopt a position of prosecutorial fundamentalism and a blind adherence to the principle of pursuing impunity when the trade-off is on going violent conflict and the potential death of thousands of people, notably African citizens. So when impunity is to be pursued is a question which both legal, political and reconciliation practitioners need to take into account seriously.

As to concrete initiatives to repair the relationship between the African Union and the International Criminal Court, the Court needs to reconsider its attitude towards the African Union. In particular, the ICC system, including the Office of the Prosecutor, Registrar and Assembly of States Parties, ought to improve its outreach to and active engagement with African civil society. This could be achieved through meetings across the African continent as well as by adopting a more welcoming and accommodative approach to AU representatives when they come to engage with the International Criminal Court at The Hague. The Court's Chief Prosecutor, Fatou Bensouda, needs to appoint a senior political adviser to act as a liaison with political organizations such as the African Union. This might assist with efforts to accredit the International Criminal Court to the AU headquarters in Addis Ababa. Also, Bensouda should issue a series of OTP Policy Papers on sequencing the administration of justice to enable the promotion of peacebuilding, particularly in countries that still are affected by war.

As far as the African Union is concerned, it can also adopt a range of initiatives to contribute towards repairing the inter-organizational relationship. In particular, the African Union needs to assess how and when the International Criminal Court can function as its partner in terms of addressing the violation of human rights on the continent. The African Union can engage in a dialogue with the Court and utilize the presence of African countries in the ICC Assembly of States Parties to communicate its views to the Court system. Further, the African Union can work more closely with civil society in relation to policy analysis, victim support, documentation, awareness raising, advocacy and lobbying on issues pertaining to international criminal justice. African civil society should adopt a balanced view when

analyzing the impact of the Court's interventions on peace and reconciliation processes on the continent. This will require a posture of constructive criticism towards the International Criminal Court, rather than the blind and uncritical support that some civil society actors are displaying towards the Court.

Global Power and the Corruption of International Justice

William Schabas has argued that the ICC has 'moved into dangerous political territory by jeopardizing its base of support among the African States' in the specific case of the arrest warrants issued with reference to Darfur (Schabas, 2010: 149). Schabas is identifying a key concern that has begun to taint the supposedly well-intentioned interventions by the ICC, namely the notion that the Court is somehow politically motivated. The cases with respect to Darfur were referred to the ICC by the UN Security Council, which is effectively dominated both diplomatically and financially by its Permanent Five (P5) – the China, France, Russia, United Kingdom and United States (Happold, 2006). Given the historical fact of the politicisation of the actions of the Security Council, not least its failure to act during the April 1994 Rwandese Genocide, international observers and other countries have intimated that even this deferral was tainted by political imperatives. This would expose the ICC, which is supposed to be an independent Court, as a useful tool to achieve the Security Council's objectives if it cannot fulfill them by other means. The UN Secretary-General, Ban Ki-Moon, speaking at the sidelines of the Fourteenth AU Summit convened in Addis Ababa, on 31 January 2010, stated that 'the prosecutions of the ICC are not dictated by political considerations. The Court is composed of independent jurists who do not receive orders from any government'. The fact that Ki-Moon had to issue such a statement is evidence of the fact that there is a perceived politicisation of the actions and interventions of the ICC. This perception has to be addressed because it will not go away on its own volition. The failure of UNSC to refer Syria to ICC between 2013 and 2014, despite the commission of specific war crimes, such as a chemical weapon attack in September 2013, in Damascus, exposes the fact that when it comes to international criminal justice the legal criteria for criminal liability is not sufficient for a case to become before the ICC for prosecution. As far as the innocent civilians, notably war-affected children in Syria are concerned, international criminal justice was sacrificed at the altar of geo-political expediency by the very same P5 member of the UNSC who proselytize to other nations. In May 2014, the US Ambassador to the UNSC, Samantha Power lamented before the Council that 'our grandchildren will ask us years from now how we could have failed to bring justice to people living in hell on earth'. This was in the context of an argument in favour of referring to the situation in Syria to the ICC. Yet US congressional records reveal that the US has actively campaigned against the ICC all along. The US instrumentalizes the ICC in the worst way possible and according to Somini Sengupta 'it is seen as supporting the body only when it suits the administration's foreign policy agenda, using the threat of prosecution to skewer its foes while protecting its friends from its reach' (Sengupta, 2014: 1). This suggests that in the eyes of the US administration the ICC is a useful tool to advance its imperial agenda. This fact alone should raise serious alarm about the ICC which was established to confront impunity. In addition, to this is another fact that the US has not ratified the Rome Statute, which reveals the hypocrisy of on the one hand talking up the merits of international law, while surreptitiously undermining. The ICC is now an extension of global politicking and a terrain of power contestation. International law is only a secondary after thought, this is in line with the US predisposition to global rules which it has always believed were a ploy utilized by weaker nations to constrain its actions and full spectrum dominance of the planet. As the international lawyer,

Philippe Sands has also argued the US' "approach to the ICC is symptomatic of a more generalized opposition to international rules and to multilateralism" (Sands, 2005: 48).

Schabas argues that 'it is fine for the Court to provide a service to the Security Council, but it must understand that when it does so, it becomes necessarily subservient to political imperatives' (Schabas, 2010: 147). Sengupta argues that in light of the ICC's evident instrumentalization 'such actions have also politicized the notion of international criminal justice and in turn undermined its credibility' (Sengupta, 2014: 2). Sengupta argues that this 'perception could not come at a worse time for a court whose biggest challenge is to convince the world that its investigations are not directed by politics' (Sengupta, 2014: 2). Fanon warned following the UN debacle in the Katanga region of the DRC, that 'in reality the UN is the legal card used by the imperialist interests when the card of brute force has failed' (Fanon, 1964: 195).

The issue is no longer whether international criminal justice and the ICC is beholden to global power, the issue is now whether the ICC is subservient to global power. The secondary question is whether it is effectively being utilized as a form of legalized coercion of African countries. Niall Ferguson the controversial British historian made the argument that 'the experiment with political independence, especially in Africa, has been a disaster for most poor countries ... might it not be that for some countries some form of imperial governance ... might be better than full independence, not just for a few months or years but for decades?' (Ferguson, 2004: 46). The actions of the P5 on the African continent suggest that these sentiments find resonance in the policy and decision-making capitals of Washington, Paris and London, and perhaps in Beijing and Moscow as well.

The Dilemma for International Civil Servants at the ICC

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

Conclusion

The International Criminal Court is a court of last resort and not a court of first instance. Ideally, national criminal jurisdiction should take precedence in efforts to address impunity. While the Preamble to the Rome Statute recognizes "that such grave crimes threaten the peace, security and well-being of the world" (Rome Statute, 2002). It does not elaborate how the Court will contribute towards advancing "peace" in the broader sense, beyond ensuring that the perpetrators of these crimes are punished. The Rome Statute does not make any special provisions for restorative justice, peace and reconciliation processes. This is clearly an

omission that needs to be rectified given the highly volatile and politicised situations that the ICC has become involved in and may engage in the future. The merits for sequencing should be informed by an understanding that there can be a constructive relationship between administering punitive sanctions and pursuing inclusive peace.

In Africa, the activities of the ICC have focused on exercising its criminal jurisdiction without engaging in the wider issue of how its actions contribute towards consolidating peace. The Court's relationship with Africa and, in particular, with the African Union deteriorated following the arrest warrant issued for President Al Bashir of Sudan, and worsened with the summons to President Kenyatta. The AU's policy of non-cooperation with the International Criminal Court is undermining the prospects for the development of international justice, particularly on the African continent. The refusal by some countries to place themselves under the jurisdiction of the Rome Statute means, according to African governments, that the ICC will fall short of being a genuinely international court. Some African governments view this limited and restricted mandate as undermining the principles of international justice. The former ICC Prosecutor Ocampo, indicated to interlocutors that he could apply the same remit of justice to cases in Chechnya, Iraq and Afghanistan because this would be difficult politically. Both Al Bashir of Sudan and Kenyatta of Kenya, as well as the African Union were able to politicize and Pan-Africanize their criticisms of the ICC, to the extent that the dominant view with the policy making circles in governments is that the reality of the ICC's interventions, amount to there being one law for the powerful and another law for the weak, and selectivity in the administration of international justice. In the face of illegitimate global power, international criminal law becomes a legalized form of coercion, control and dominion, which some would consider to be a form of judicial imperialism. The international criminal court is neither international, in terms of its scope, nor has it upheld the basic tenets of impartial legal criteria in its summons and prosecutions. As such it does not live up to the nomenclature of "court" the only word left in its appellations is the word "criminal". There is an element of "criminal" failure of the ICC system, to the extent that there is criminal negligence of the needs of victims, due to its inability to serve as a truly international system for all victims.

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

There is an urgent need to chart a different way forward for the relationship between the African Union and the ICC, if both institutions are to achieve the goal of holding leaders accountable for mass atrocities. Both organizations need to recognize that while they are fulfilling different functions – delivering justice in the case of the ICC, and looking out for the interests of African governments in case of the African Union – they need to find a way

to ensure that the administration of justice complements efforts to promote political reconciliation.

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

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Notes

¹ Off-the-record discussions conducted with African Union officials at the headquarters in Addis Ababa, Ethiopia, March 2013.