

INTERNATIONAL CONFERENCE

On “*The International Criminal Court (ICC), Peace and Reconciliation Processes and Human Rights in Africa*”

CODESRIA & SSRC

Dakar, Sénégal, 9-12 July 2014

Communication Title:

International Criminal Court, Justice, Peace and Reconciliation in Africa: an Overview

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1. Background to international criminal justice and conflicts in the late 1990s Africa

The 20th century was characterised by some of the most serious human rights violations in the history of mankind. These human rights violations that qualified as international crimes were committed in the aftermath of armed conflicts that challenged international peace and security as never before in human history.

The First World War (WWI) took place from 1914 to 1918 while the Second World War (WWII) was waged almost two decades later, between 1940 and 1945. These two wars brought “untold sorrow to humankind” (UN Charter 1945, Preamble). Several million people were left dead or injured. Nations were destroyed. Gross and unprecedented human rights violations were committed and these armed conflicts brought to an end the relative peace and security that previously existed at the international level. As compared to WWI, WWII even made things worse as many more people died as a result of the use of the most sophisticated weapons like the atomic bombs which also ironically helped end the war, especially after the bombing of Hiroshima and Nagasaki in Japan. In Europe, the Battle of Normandy that took place in 1944 was the turning point in WWII as Hitler’s Germany was defeated under the combined attacks of the Allies on the Western and the Russian army on the Eastern front.

The use of force against Germany and later Japan was the first international response to the nations that were held responsible for the launching or the continuation of the hostilities. However, individuals who were responsible of international crimes could no longer go unpunished as did Guillaume II of Hohenzollern, German Emperor, responsible for the death of 22 million civilians during WWI, and those responsible for the Turkish genocide of the Armenians in 1915 (Nyabirungu 2013: 8-13).

In 1944, the leaders of the victorious nations resolved to establish the “United Nations” (UN) to ensure that this never happened again to mankind, to reaffirm their faith in human rights and to promote peace and reconciliation. International protection and promotion of human rights, peace and reconciliation had to go together with justice since there is a close link between the protection of human rights, reconciliation, peace, and justice. There cannot be peace without reconciliation. On the other hand, peace and reconciliation provide a better environment for the protection of human rights and the promotion of justice. Furthermore, peace, reconciliation and human rights can only prosper with justice.

It is against this backdrop that the creation of the UN was shortly followed by the establishment of two international tribunals to prosecute and judge all those who were mainly responsible for war crimes, crimes against humanity and genocide during WWII. The Nuremberg and the Tokyo Tribunals were created in 1946 and 1946 respectively. However, war crimes, genocide and crimes against humanity, which usually come with armed conflicts, continued to be committed in several parts of the world.

Unfortunately, the 20th century was to end as it started with armed conflicts and subsequently, with wars crimes, genocide and crimes against humanity, particularly in Europe and Africa. In Europe, Yugoslavia collapsed and disintegrated due to ethnic conflicts which resulted into genocide. The international community reacted in almost the same way as it did after WWII when the Nuremberg Tribunal was established to prosecute and judge the Nazis. In 1993, the UN Security Council adopted a resolution establishing the International Criminal Tribunal for former Yugoslavia (ICTY) (UN SC 1993: Res 827). A few years after Yugoslavia, this time in Africa, genocide was also committed in Rwanda. The UN Security Council set up the International Criminal Tribunal for Rwanda (ICTR) (UN SC 1994: Res 955) that was modelled on the ICTY and mandated to prosecute and judge the authors of genocide and other serious violations of international humanitarian law committed in Rwanda and Rwandan citizens responsible for such violations committed in neighbouring states between 1st January and 31st December 1994. The response of the Security Council to serious violations of both international humanitarian law and Sierra Leonean law was the establishment of the Sierra Leone Special Court (SLSC) to prosecute and judge the authors of those violations (UN SC 2000: Res 1315; Tejan-Cole 2001: 107-126). The Security Council also adopted the Statute of the ICTR (ICTR Statute) and requested the UN Secretary General to make political arrangements for its practical functioning. The ICTR is based in Arusha, Tanzania, while the ICTY remains in The Hague.

To borrow words from Francis Fukujama, the world in general and Africa in particular had not come to “the end of the history” (Fukujama 1992) of wars, war crimes, genocide and crimes against humanity, which had been at the root of the development of international criminal law and necessitated the creation of international criminal tribunals to fight and punish impunity. The international community had to take more effective measures to promote justice, peace, reconciliation and human rights. Accordingly, instead of *ad hoc* international tribunals such as the ICTY, ICTR and SCSL with limited temporal, material, personal and territorial jurisdiction, a genuinely universal and permanent court was needed to deal with the most serious violations of international law occurring in the world. As the 20th century was drawing to an end, with the Yugoslav tragedy and the Rwandan genocide still fresh in mind, time was ripe for UN Member States as the primary subjects of international law to come together and agree on the establishment of an international criminal court.

On 17 July 1998, 120 states' representatives met during the UN Diplomatic Conference of the Plenipotentiaries on the establishment of an International Criminal Court (ICC) at the headquarters of the Food and Agriculture Organisation in Rome, Italy, and adopted the Statute establishing the ICC. Following the adoption of the Rome Statute, the UN convened the Preparatory Commission for the ICC, which adopted the Rules of Procedure and Evidence and the Elements of Crimes which, together with the Statute and the Regulations adopted by the judges, constitute the basic legal texts of the ICC setting out its structure, jurisdiction and functions. The Rome Statute came into force on 1st July 2002 after 60 signatory states had deposited their instruments of ratification with the UN Secretary General. On 1st May 2003, 122 States were parties to the treaty.

African States were therefore instrumental in bringing the Rome Statute into force as they constituted the majority of those that signed or ratified it. After decades of impunity and massive human rights violations that followed independence, the Rome Statute was expected to usher into a new era of peace, justice, and reconciliation.

The ICC raised high hopes for a better society among African civil society organisations (CSOs), leaders and mostly ordinary citizens who had been the main victims of war crimes, genocide, and crimes against humanity.

However, the year 2013 marked the golden jubilee or the 50th anniversary of the Organisation of African Unity (OAU), which was replaced with the African Union (AU) whose Constitutive Act was adopted in Lome, Togo, on 11 July 2000, and came into force on 26 May 2001 on ratification by the two-thirds of OPAU Member States. It also coincided with a great deal of criticism against the ICC, especially from African leaders who enthusiastically welcomed its creation and referred to it the overwhelming majority of its cases. Perceptions of the ICC among the African people and CSOs were also changing.

In this context of increasingly growing criticism and scepticism about the ICC in Africa, this paper will reflect on the ICC, its mandate, jurisdiction, prospects and challenges. It will assess the different perceptions of the ICC and examine whether criticism levelled against it is well-founded. It will also consider the alternatives, if any, or complementary measures to be taken in order to promote justice, peace, and reconciliation in war-torn countries more than a decade after the creation of the ICC.

The paper is divided into several sections. The first section that immediately follows the introduction looks into the Rome Statute and highlights the mandate, jurisdiction, and organisation and functioning of the Court. The second section reflects on justice, peace and reconciliation and examines whether they are reconcilable as objectives and can be achieved by international criminal tribunals, including the ICC. The third section focuses on the relationship between Africa and the ICC. The fourth section elaborates on criticism levelled against the CC by the AU, African States, CSOs and citizens. The fifth section critically assesses the ICC's response and African alternatives. The sixth section concludes the study.

2. The ICC: Mandate, Jurisdiction, Organisation and Functioning

According to the Rome Statute, the ICC has the “power to exercise its jurisdiction over persons for the most serious crimes of international concern” and this jurisdiction is “complementary to national criminal jurisdictions” in the sense that a case would be admissible before the ICC only when a State Party to the Statute is not willing or able to independently and effectively prosecute and judge the authors of the crimes (Rome Statute 1998, Preamble). The ICC has an agreement with the UN and its seat is established at The Hague, The Netherlands, despite the fact that it may sit elsewhere whenever it considers desirable (Articles 2 & 9). The ICC enjoys international legal personality (Article 4). The jurisdiction of the ICC is material, personal, territorial and temporal.

The material or *ratione materiae* jurisdiction of the ICC covers “the most serious crimes of concern to the international community as a whole”. These crimes are the crime of genocide, crimes against humanity, war crimes and the crime of aggression, which is still to be defined (Articles 4-10).

As far as its personal or *ratione personae* jurisdiction is concerned, the ICC is competent to prosecute and judge the suspected authors or co-authors of these crimes and their accomplices or those persons who individually encouraged or assisted them and contributed in one way or another to their commission. The jurisdiction of the Court is limited to natural and excludes juristic or legal persons and minors or persons under 18 years. Criminal responsibility is individual and not a collective one.

The jurisdiction of the ICC is limited *ratione temporis*. The Court has jurisdiction only with respect to crimes committed after the entry in force of the Statute (as of 1st July 2002) or after a State has become a party to the Statute unless it has made a declaration whereby it accepts the competence of the Court since the coming into force of its Statute (Articles 11-12).

The exercise of the jurisdiction of the ICC is subject to some preconditions. The State, which refers the case to the ICC, the State in which an investigation has to be conducted by the ICC or the State of which a national is to be prosecuted and judged by the ICC should be a party to the Rome Statute or should have accepted the jurisdiction of the ICC with respect to the crimes referred to in Article 5 of the Statute (Article 12).

The ICC only deals with the cases that have been referred before it by a State Party to the Rome Statute, by the UN Security Council acting under Chapter VII of the UN Charter, or by the Prosecutor acting *proprio motu* with the authorisation of the Court or one of its pre-trial chambers or on the basis of information on crimes within the jurisdiction of the Court received from individuals or organisations (“communications”) (Articles 13-15).

Accordingly, States Parties, the Security Council and the Prosecutor enjoy *locus standi* or the right to bring cases before the ICC. The Security Council may also, by a resolution adopted under Chapter VII of the UN Charter, request a deferral of investigation or prosecution by the ICC for a period of 12 months. Such a request may be renewed (Article 16). One of the problems with the Rome Statute is the authority granted to the UN Security Council to refer cases before the ICC or request a deferral of an investigation or an execution while permanent members with veto right like the US, China and Russia have so far refused to ratify the Statute. They are not States Parties but may use their veto right to direct the Court in one way or another against other States, parties or not. In addition, the UN Security Council is not legitimate as important parts of the world like South America, South Asia and the entire African continent are not represented.

The ICC first deals with and rule on the admissibility (Articles 17, 18) of the case before moving to the trial stage. The suspects or accused persons enjoy all the rights related to fair trial (Articles 55 & 67). The jurisdiction of the ICC may also be challenged by an accused or a State Party (Article 19).

An important principle governing investigations and the prosecution by the ICC is *Ne bis in idem*. No person can be tried before the Court or any other court with respect to conduct which formed the basis of crimes for which the person has already been convicted or acquitted by the ICC. However, a person who has been tried by another court may only be tried by the ICC if the proceedings were for the purpose of shielding a person from criminal responsibility for crimes within the jurisdiction of the ICC or were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice (Article 20). Other general principles of law that apply are *nullum crimen sine lege* (Article 22) *nulla poena sine lege* (Article 23) and non-retroactivity *ratione personae* (Article 24). *Nullum crimen sine lege* entails that no person can be criminally responsible under the Statute unless his/her conduct constitutes a crime within the jurisdiction of the Court at the times it takes place. According to *nulla poena sine lege* principle, the ICC has no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime. The Rome Statute does not retroact. No person can be criminally responsible for conduct prior to the entry into force of the Statute and before his/her State has become a party to the Statute or accepted its jurisdiction.

The official capacity of a person as Head of State or Government, a member of a Government or parliament, an elected representative or a government official cannot exempt a person from criminal responsibility before the ICC or constitutes a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, cannot bar the Court from exercising its jurisdiction over such a person (Article 27). Furthermore, a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with its Statute (Article 25.2). However, military or civilian commanders and other superiors are also responsible for crimes committed by their subordinates as a result of their failure to exercise control properly over them or to take all necessary and reasonable measures when they either knew, or owing to the circumstances at the time, should have known that they were committing or about to commit such crimes (Article 28).

The ICC consists of the presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor, and the Registrar (Article 34). All the judges in the presidency or in the divisions, but no two nationals of the same State (Article 35), and prosecutors are nominated by the States Parties and elected for nine years by the Assembly of States Parties. The ICC consists of 18 independent judges but their number may be increased by States Parties under a motivated proposition of the presidency (Article 36, 1& 2). They are not eligible for re-election. The Deputy Prosecutors are elected in the same way from a list of candidates provided by the Prosecutor. The President, the First and the Second Vice-Presidents and the Registrar are elected by an absolute majority of the judges. The Registrar and the Deputy Registrar are elected for five years (Articles 35-43). The current President is Justice Sang-Hyun Song from South Korea. He succeeded Philippe Kirsch from Canada. Mr Moreno Campo from Argentina was elected the first ICC Prosecutor. At the end of his term of office, he was replaced with Ms Fatou Bensouda from Gambia. Mr Herman von Hebel from The Netherlands is the current Registrar of the ICC. He took over from Ms Silvana Arbia from Italy.

The ICC has an internal staff of around 800 individuals appointed by the Prosecutor and the Registrar (Article 44). They are from different nationalities and work at the ICC headquarters in The Hague, The Netherlands, or in the field offices that are currently established in Abidjan (Cote d'Ivoire), Bangui (CAR), Kampala (Uganda), Nairobi (Kenya), Kinshasa and Bunia (DRC).

The work of the ICC is divided into Appeals, Trial and Pre-Trial Divisions, which are each divided into Chambers. Five judges, including the President, constitute the Appeals Division or chamber. The Trial and Pre-Trial Divisions consist of six judges each. The functions of a pre-trial chamber are carried out by three judges or even a single judge while three judges are needed for a trial chamber. The competence of the pre-trial chambers is to deal with preliminary cases or investigations as well as the confirmation of the charges. They may authorise the Prosecutor to undertake an investigation and issue warrants of arrest. Once the suspect has been identified and the charges presented, the pre-trial chamber must confirm or infirm them totally or partially. If there is not enough evidence and the charges are not confirmed, the suspect may be released conditionally or not. Otherwise, the case is submitted to the trial chamber which is composed of three judges. The accused may be released or convicted if there is not or if there is sufficient evidence of the commission of the crime. A convicted person may appeal against the sentence before the Appeals Division or chamber. If the Appeals chamber finds in favour of the accused, the judgement is reviewed and the convicted person released. Otherwise, the first judgement is confirmed and the person maintained in prison. The sentence is to be served in a State Party to the ICC that gives its consent to receive the prisoner,

The Rome Statute provides for the Assembly of States Parties, which is the management oversight and legislative body of the ICC. It decides the budget and the number of the judges. It elects the judges and prosecutors, adopts the Statute and other regulations and rules of the Court and is also competent to amend them (Articles 112-123).

It is worth stressing that the Rome Statute is a treaty under international law and therefore subject to the 1969 Vienna Convention on the Law of Treaties. As such, only states can become parties to the Statute by signing and ratifying it and by depositing their instrument of ratification with the UN Secretary-General. The constitutions of many countries provide that a treaty that has been regularly signed and ratified prevail over any other law except for the Constitution. It is also directly enforceable in the domestic law of countries that adopted the monist system and were inspired by Roman-Dutch law.

On the other hand, Anglophone countries or those that were inspired by Anglo-American law adopted the dualist system. In terms of the dualist theory, international law and domestic law are different laws. Accordingly, as a primary source of international law, a treaty that has been signed and ratified is not directly enforceable in domestic law. It needs to be incorporated into domestic law by an Act of Parliament. Even in this case, it will never prevail over domestic legislation and will only have the same status.

Being governed by the Law of Treaties (Article 26), the Rome Statute obeys the rule dealing with the obligations of States Parties, namely *pacta sunt servanda*, meaning that States Parties should comply with the Statute in good faith. They should cooperate with the ICC. Moreover, States Parties cannot invoke the provisions of their domestic law to defeat or not abide by the relevant provisions of the Statute (Article 27).

Finally, States Parties may always withdraw from the Rome Statute by notifying to the UN Secretary-General. The withdrawal will be effective a year after notification and meantime, they will be bound to cooperate (Rome Statute, Article 127). The Rome Statute expands on international cooperation and judicial assistance (Articles 86-102) from States Parties in order to administer justice, contribute to peace and national reconciliation in the countries where the crimes were committed.

3. Justice, Peace, and Reconciliation as Objectives of International Criminal: Are They Reconcilable and Can They be Achieved by the ICC?

The Rome Statute provides that the ICC's mandate is to prosecute and judge the authors of the most serious crimes under international law with the aim to achieving justice, peace, and national reconciliation while ending impunity in societies confronted with violence. This also transpired from the Security Council Resolutions establishing the ICTY, ICTR of the SCSL. However, neither the Rome Statute nor the resolutions and other documents related to these courts do not define justice, peace, and reconciliation, which therefore remain contentious concepts.

3.1 Justice and the fight against impunity

The work of international criminal courts focuses on justice "in its legal sense". Justice is equated with retribution that is the punishment of wrongdoers in direct proportion to the harm inflicted. However, justice should also be understood in its substantive sense to refer to reparation and restitution (Mutabazi 2014: 152). It is contentious what the term 'justice' means.

Classical criminal law targets prevention, deterrence, retribution, protection of the public interest, rehabilitation, and social reconstruction in a large sense (Gaparay 2001: 99-100). Traditional objectives of criminal prosecution include crime deterrence, fight against impunity, retribution and incapacitation (Mutabazi 2014: 159). Prosecuting international crimes "can serve to deter the commission of future atrocities" or as a means for their prevention (Wippman 1999-2000: 473-488; Mutabazi 2014: 161). Deterrence is also the main argument invoked for the establishment of the *ad hoc* international tribunals and the ICC. The fight against impunity as opposed to accountability for international crimes also features amongst the objectives of international tribunals, including the ICC. Together with deterrence and the fight against impunity, retribution and incapacitation are related to justice.

Retributive justice entails the proportional punishment of criminals according to the seriousness and gravity of their crimes. Justice entails that everyone receives what he deserves (Mutabazi 2014: 167). Criminal punishment must neutralize dangerous deviant individuals and also incapacitate them as a means of social protection by not only punishing the wrongdoer but also removing him or confining the offender. Punishment is one of the purposes of incapacitation.

A number of arguments have been advanced in favour of prosecuting past violators of human rights. First, it is often argued that violations must be prosecuted in order to bring them to justice for the commission of terrible offences. There is clearly a delicate balance between seeking vengeance and desiring suitable punishment. However, some argue that punishment of some sort is a component of justice. Second, prosecutions are considered to be supporting the rule of law. This view asserts that failure to prosecute past human rights violations will not provide a firm basis for building the rule of law in future. The rule of law requires that all persons and institutions are equal before and under the law. No one is above the law. Therefore, when grave crimes are not prosecuted, the rule of law will be disregarded. Third, support for prosecutions is based on the need to protect society. As long as perpetrators remain at large, they continue to be a threat to the society in which they reside. This argument, however, may not be very strong if one considers that once the perpetrators of human rights are no longer in power, their capacity to perpetuate the violations with impunity is greatly curtailed. Fourth, past perpetrators of human rights abuses have to be prosecuted to deter further abuses (Kindiki 2001: 71). International criminal justice through international courts was expected to bring about domestic and peace and reconciliation.

3.2 Peace and Security

According to Gaparay, “the ultimate goal of justice should be building or rebuilding of a peaceful society” (Gaparay 2001: 106). The restoration and maintenance of peace and security as aims of international criminal justice feature prominently in international law but what they mean is also contentious. . They are the opposite of war and hostilities or insecurity. However, they are more than the absence of war or armed conflicts and entail a state of harmony between people or groups within a society or between several societies which were previously in a conflict.

Peace and security can be domestic or international. The primary aim to establish international criminal tribunals was to contribute to peace and security at the domestic level in the States where the most serious crimes of concern to the international community had been committed.

3.3 National Reconciliation

Another important aim of international criminal justice is to contribute to national reconciliation. Reconciliation relates to the process of re-establishing peaceful relationships between parties after they were disrupted by quarrels, misunderstanding, insults, injuries and other negative situations. The belief that international justice serves national reconciliation is replete in the constitutive documents of the *ad hoc* tribunals (Mutabazi 2014: 183).

A response in the affirmative can be given to the question whether justice, peace and reconciliation are reconcilable. One strong view contends that there cannot be peace without justice and *vice versa*. On the other hand, national reconciliation cannot be achieved without justice and peace. The attainment of justice or the acknowledgement of the truth serves to help the process of reconciliation (Gaparay 2001: 106). Put otherwise, justice, peace and national reconciliation are closely interrelated despite the tension that may exist between them. The

question is, however, what should precede the other. Criminal lawyers and advocates of international criminal justice argue that justice should come first.

The authors of serious human rights violations should be prosecuted judged and sentenced according to the harm they inflicted to the society. This would bring about peace and national reconciliation. The opposite view is that peace and reconciliation should be preferred in countries that have just emerged from wars or armed conflicts. Those who share this view argue that African societies in conflicts need peace and national reconciliation first and not justice or revenge. According to them, international justice will jeopardise peace and national reconciliation (Nyabirungu 2013: 34). This is the why countries such as South Africa adopted the Truth and Reconciliation Commission model while Rwanda also established the *Gacaca* Tribunals (Gaparay 2001: 104-106) to deal with the cases of numerous individuals who were involved in genocide.

However, whether international criminal tribunals like the ICTY, ICTR, SCSL, and the ICC are well-suited and can deliver in terms of justice, peace and reconciliation is a more complex question that also received different answers between the proponents and critics of international justice. The first are of the view that international criminal courts are the best way to administer justice in countries where the most serious crimes of international law took place. Scharf, Schabas (2002: 101) and Mutabazi (2014: 155) cite the case of the ICTY which did not take sides between the Muslims, Croats as well as the Serbs and was therefore impartial. However, the same is not said about the ICTR. Mutabazi and Eltringham hold that the ICTR delivered a partial justice because it failed to investigate and prosecute the crimes committed by the Rwandan Patriotic Front (RPF) despite admission by the Rwandan government that their soldiers also committed serious human rights abuses in 1994 (Mutabazi 2014: 155; Eltringham 2004: 144). Amnesty International also expressed concern that no crimes committed by the members of the RPF in 1994 had not been adequately investigated and prosecuted and therefore demanded justice for all parties (Amnesty International 2007). Amnesty International observed that for any justice system to operate effectively, it had to be impartial, independent and investigate crimes promptly (Amnesty International 2007). Failure to do it made the ICTR ineffective in delivering justice (Mutabazi 2014: 159).

The fight against impunity as opposed to accountability for international crimes and a component of justice also features amongst the objectives of international tribunals, including the ICC. Zolo argues that “international criminal justice has not yet proven to be capable of remedying widespread impunity, except to a minor degree and with normative ambiguities”(Zolo 2004: 730). This is a more balanced view as compared to Mutabazi’s assertion that *ad hoc* tribunals have been at odds to combat impunity in their areas of jurisdiction. Territorially, materially, personally and temporarily, the tribunals have failed” (Mutabazi 2014: 144, 166). The design and practice of *ad hoc* tribunals are imperfectly suited to retributive ends (Mutabazi 2014: 169).

According to Haque, “international criminal prosecution seems too selective to satisfy the demands of retributive justice. Too many wrongdoers go unpunished; too many victims are forgotten or simply ignored” (Haque 2005-2006: 275). The ICTY and the ICTR did not totally succeeded in deterring criminals, fighting against impunity, delivering retributive justice and incapacitating the criminals. However, this does not imply that they were useless and did not contribute to retribution or incapacitation of the criminals.

As far as the restoration and maintenance of peace and security is concerned, Mutabazi argues that the ICTY and ICTR did not succeed in this regard (Mutabazi 2014: 171-175). However, even in its understanding as the absence of war or armed conflicts, what brought

“peace and security” to former Yugoslavia and Rwanda and ended genocide was less the action of the ICTY and ICTR than the use of force in these countries.

On the other hand, can international tribunals contribute to national reconciliation? There are pros and cons. Whether the model of international tribunals is the best to achieve peace and national reconciliation is a question that can be answered depending on the context of each country. In any case, the primary objective of a court or a tribunal, either a domestic or an international one, is not and has never been to achieve national reconciliation, but justice or retribution. Even though it is not its primary objective, an international criminal tribunal can attain the aim of creating an historical account record and thereby contribute to the process of reconciliation. Mutabazi argues that this can only happen if the tribunal responds to challenges of impartiality and judicial consistency and when everyone finds their place in the tribunal’s process (Mutabazi 2014: 196). Unfortunately, this is not what he saw with the ICTY and ICTR.

Tribunals’ officials and criminal law experts tend to argue even unconvincingly that international justice contributes to national reconciliation. The prosecution’s position is that targeting people to arrest and prosecute may contribute to national reconciliation. According to Kingsley, an ICTR official, “the judgments of the ICTR have contributed to the individualization of guilt, a necessary element in reconciliation processes as opposed to collective guilt that blocks avenues for reconciling fractured societies” (Kingsley 2002). Unfortunately, this view was opposed by others. At an international symposium held in July 2009, Bernard Muna, a former Deputy Prosecutor at the ICTR was even doubtful about the ICTR achieving national reconciliation (Mutabazi 2014: 196).

Reconciliation is not a function of a criminal tribunal, whether domestic or international. It is a political and not a judicial objective that therefore improperly befalls on the criminal courts (Mutabazi 2014: 194-197). As a transitional process that brings together former antagonists, it better fits in the work of truth-telling commissions. These commissions facilitate people to share the blame of the past and offer them the opportunity to design the future together (Mutabazi 2014: 196-197).

The ICTY failed in this regard. So did the ICTR that unfortunately closed its eyes on genocide committed by some Tutsis and RPF elements to focus on that committed by the Hutus and elements of the former Rwandan government only. Haskell and Waldorf (2011: 78; Mutabazi 2014: 194-195) also argue that “the ICTR’s failure to prosecute RPF crimes has not promoted reconciliation in Rwanda, as impunity for these crimes remains a divisive issue”. Judge Brown, a former ICTR President admitted that “the tribunal is not an enquiry commission. Judges are not historians. The purpose of a criminal tribunal is to establish individual guilt, not to establish the political truth about the conflict” (Mutabazi 2014: 195). Antonio Cassese, a former President of the ICTY earlier stated the same when he argued that “criminal trials...do not reconcile people. On the contrary, they may act as powerful incentives to rekindle past animosities and hatred”. (Mutabazi 2014: 194; Cassese 2007-2008: 8). To end up, reconciliation requires more than prosecution.

Most of the objectives of the ad hoc tribunals are also part of the objectives of the ICC. Despite a permanent and universal tribunal opened to all the States of the world, the ICC entertains particular relationship with Africa.

To sum up: justice through *ad hoc* international justice such as the ICTR, ICTY, SCSL or the ICC is compatible with peace, national reconciliation and human rights. More than a decade after their establishment, people are still in great need of justice. Peace remains volatile and national reconciliation a dream.

The ICTY, the ICTR, the SCSL and the ICC might not have been successful in bringing about justice, peace and national reconciliation. However, one should admit that they were necessary and have somehow contributed to justice, peace and to a little extent to national reconciliation even though the expectations were high about the first two objectives. Africans expect more from the ICC as a permanent court with close ties with the continent, its governments and its peoples.

4. Relationships between the ICC and Africa

The ICC owes a great deal to Africa, its governments and its people. According to Bakum, two realities gave impetus to Africa's strong support for the establishment of the ICC, namely the Rwandan genocide that could not be repeated and its authors who had to be prosecuted and judged on the one hand and the need to prevent powerful countries from preying on the weaker ones and aggressing them (Bakum 2014: 9). First, the 1994 genocide in Rwanda and recurrent armed conflicts that had the potential of resulting in genocide, war crimes and crimes against humanity are some of the factors that contributed to the creation of the ICC. African leaders and CSOs had no reservations and thought this was the right way to go to combat international crimes and impunity globally to avoid their general rehearsal. African civil society organisations therefore campaigned strongly for the ICC.

African States' contribution to the ICC can also be demonstrated by their participation in its making. They massively participated in the Conference during which the Rome Statute was adopted. On 1st May 2002, the 122 States Parties to the Statute included 43 African States. More than a decade after the ICC was established, African States are still the ones that keep it working as almost all its investigations and prosecutions have been conducted on the continent. All the cases brought before the ICC and the warrants of arrest issued by the Court have targeted Africans. All the suspects, in custody or at large have been Africans. All the individuals under trial and sentenced as well as those who were summonsed and voluntarily appeared are African citizens. States Parties that have referred cases before the ICC have been African States, namely Central African Republic (CAR),¹ Mali,² and Uganda³.

¹ See *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/04-01/07). Mr. Jean-Pierre Bemba is tried before Trial Chamber III for two charges of crimes against humanity and three charges of war crimes, and committed the accused to trial. The submission of evidence in the case is now closed.

On 20 November 2013, a warrant of arrest for *Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido* was issued by the ICC for offences against the administration of justice allegedly committed in connection with the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*. On 25 November 2013, Fidèle Babala Wandu and Aimé Kilolo Musamba were transferred to the ICC Detention centre. On 27 November 2013, Aimé Kilolo Musamba, Fidèle Babala Wandu, and Jean-Pierre Bemba Gombo made their initial appearance before the ICC. Jean-Pierre Bemba Gombo appeared with them as well. Following his arrest, Jean-Jacques Mangenda Kabongo was transferred to the ICC detention centre on 4 December 2013 and he made his first appearance before the ICC on 5 December 2013. Narcisse Arido was transferred to the ICC detention centre on 18 March 2014 and he made his first appearance before the ICC on 20 March 2014. The decision on the confirmation of the charges is still to be made in their case.

² On 16 January 2013, the Office of the Prosecutor opened an investigation into alleged crimes committed on the territory of Mali since January 2012. The situation in Mali was referred to the Court by the Government of Mali on 13 July 2012. After conducting a preliminary examination of the situation, including

Cases also referred by the Prosecutor have been from African countries, namely Kenya,⁴ and Sudan (Darfur).⁵ The same goes for the Security Council that referred the situation in Cote d'Ivoire⁶ and Libya.⁷

an assessment of admissibility of potential cases, the OTP determined that there was a reasonable basis to proceed with an investigation. The situation in Mali is assigned to Pre-Trial Chamber II.

³ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* is currently being heard before Pre-Trial Chamber II. In this case, five warrants of arrest have been issued against [the] five top members of the Lords Resistance Army (LRA). Following the confirmation of the death of Mr Raska Lukwiya, the proceedings against him were terminated. The four remaining suspects are still at large.

⁴ The Kenyan cases (see *the Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Ali; The Prosecutor v. William Samoei Ruto, Joshua Arap Sang and Kosgey*) were referred by the Prosecutor who opened an investigation *proprio motu* with the authorisation of Pre-Trial Chamber II on 11 March 2010. The six Kenyan citizens who were summonsed appeared voluntarily on 7 and 8 April 2011. On 23 January 2012, Pre-Trial Chamber II confirmed the charges against MM. Ruto and Sang while discharging M. Kosgey. The first two appealed against the ruling. The same day, in the second case, it confirmed the charges against MM. Muthaura and Kenyatta but not against Mr. Ali.

⁵ The situation in Darfur (Sudan) (*The Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb); The Prosecutor v. Omar Hassan Ahmad Al Bashir; The prosecutor v. Bashr Idriss Abu Garda*) was also referred before the ICC by the Prosecutor. Mr. Bashr Idriss Abu Garda appeared voluntarily before Pre-Trial Chamber I on 18 May 2009 and is not in custody. The other three are at large. On 2 December 2011, the Prosecutor requested a warrant for arrest against the Sudanese Minister of Defense, Mr. Hussein Mohamed Addelrahim, for crimes against humanity and war crimes committed in Darfur from August 2003 to March 2004. He is also at large.

⁶ The situation in Cote d'Ivoire was referred before the ICC by the Security Council by Resolution 1593. Côte d'Ivoire that was not party to the Rome Statute at the time, accepted the jurisdiction of the ICC on 18 April 2003. On both 14 December 2010 and 3 May 2011, the Presidency of Côte d'Ivoire reconfirmed the country's acceptance of this jurisdiction. On 15 February 2013, Côte d'Ivoire ratified the Rome Statute. On 3 October 2011, Pre-Trial Chamber III of ranted the Prosecutor's request for authorisation to open investigations *proprio motu* into the situation in Côte d'Ivoire with respect to alleged crimes within the jurisdiction of the Court, committed since 28 November 2010, as well as with regard to crimes that may be committed in the future in the context of this situation. On 22 February 2012, Pre-Trial Chamber III decided to expand its authorisation for the investigation in Côte d'Ivoire to include crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010.

On 23 November 2011, Pre-Trial Chamber III issued a warrant of arrest under seal in the case *The Prosecutor v. Laurent Gbagbo* for four counts of crimes against humanity. The arrest warrant against Mr Gbagbo was unsealed on 30 November 2011, when the suspect was transferred to the ICC detention centre at The Hague, by the Ivorian authorities. On 5 December 2011, Pre-Trial Chamber III held an initial appearance hearing. The confirmation of charges hearing took place between 19 and 28 February 2013. On 12 June 2014, Pre-Trial Chamber I confirmed by majority four charges of crimes against humanity (murder, rape, other inhumane acts or – in the alternative – attempted murder, and persecution) against Laurent Gbagbo and committed him for trial before a Trial Chamber.

On 22 November 2012, Pre-Trial Chamber I decided to unseal a warrant of arrest issued initially on 29 February 2012 against Simone Gbagbo for four counts of crimes against humanity allegedly committed in the territory of Côte d'Ivoire between 16 December 2010 and 12 April 2011. Mrs. Gbagbo is not in the custody of the Court.

On 30 September 2013, Pre-Trial Chamber I unsealed an arrest warrant against Charles Blé Goudé initially issued on 21 December 2011 for four counts of crimes against humanity allegedly committed in the territory of Côte d'Ivoire between 16 December 2010 and 12 April 2011. On 22 March 2014, Charles Blé Goudé was surrendered to the ICC by the national authorities of Côte d'Ivoire and he made his first appearance before the ICC on 27 March 2014. The opening of the confirmation of charges hearing in the case was scheduled for 18 August 2014. Mr Blé Goudé is in the Court's custody.

⁷ On 26 February 2011, the Security Council referred the situation in Libya (*The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*) before the ICC. On 27 June 2011, Pre-Trial Chamber I issued warrants for arrest against the three suspects for crimes against humanity (murders and persecution) committed by the Libyan security forces in Libya from 15 to 28 February 2011. On 22 November 2011, Pre-Trial Chamber I closed the case against Muammar Gaddafi following his death. The two other suspects

The table below clearly illustrates Africa's contribution to the work of the ICC.

Field Offices (City, Country)	Cases referred by the Security Council	Cases referred by States Parties	Investigations opened by the Prosecutor (Country)	Prisoners (Names and country)	Voluntarily appeared (not in custody)
Kinshasa, DRC	Libya	DRC		Thomas Lubanga Dyilo (sentenced), DRC	Uhuru Kenyatta, Kenya
	Cote d'Ivoire			Mathieu Ngudiolo Chui, DRC (released)	William Ruto, Kenya
				Callixte Mbarushimana (released), Rwanda	
				Silvestre Mudacumura (at large), Rwanda	
				Germain Katanga (sentenced but appealed), DRC	
				Bosco Ntaganda (on trial), DRC	
Bunia, DRC		CAR		Jean-Pierre Bemba Gombo (on trial), DRC	
Kampala, Uganda		Mali	Darfur (Sudan)	Aimé Kilolo Musamba (waiting trial), DRC	
Bangui, CAR		Uganda		Fidèle Babala Wandu (waiting trial), DRC	
Nairobi, Kenya			Kenya	Jean-Jacques Mangenda Kabongo (waiting trial), DRC	
Abidjan, Cote d'Ivoire				Narcisse Arido, CAR	
				Laurent Gbagbo, Cote d'Ivoire	
				Charles Blé Goudé, Cote d'Ivoire	

It appears from the account of cases brought before the ICC, the number of warrants of arrest, sentenced individuals and those still at large, the number of field offices and the number of investigations held that Africa has been the first ground and target of the ICC. While the ICC can be seen as an "International Criminal Court for Africa" (ICCA) or an "African Criminal Court" (ACC), no African country has interested the Court as the Democratic Republic of Congo. The ICC can also be seen as the Congolese International Court (CIC) or the International Criminal Court for the DRC. This may be justified by a number of facts.

First, a Congolese citizen, namely Jean-Pierre Bemba, was the first individual to be referred to the ICC. He was referred by the government of the CAR. The three other suspects arrested in connection with this case are Congolese, namely Aime Kilolo Musamba, Fidele Babala wandu, and Jean Jacques Mangenda Kabongo. Fidele Babala was even arrested in the DRC with the cooperation of the DRC government.

are currently in custody in Libya where the government has so far refused to surrender them to the ICC, alleging that the Libyan judicial system had the ability to independently judge them, which the ICC has contested.

Second, the DRC has referred cases before the ICC more than any other State Party in Africa or in the rest of the world. Five cases were brought in relation to the situation in the DRC and referred by the Government. The persons referred before the ICC were Thomas Lubanga Dyilo (Brown 2007: 413),⁸ Germain Katanga,⁹ Mathieu Ngudjolo Chui,¹⁰ Bosco Ntaganda,¹¹ Callixte Mbarushimana,¹² et Sylvester Mudacumura¹³. Three, the first person convicted by the ICC, namely Thomas Lubanga Dyilo, is also a Congolese national. Four, the overwhelming majority of the suspects in custody at the ICC are from the DRC. Five, two of the field offices of the ICC are located in the DRC, one in Kinshasa and another in Bunia. The ICC has not opened so many field offices in any other country. Six, the only case on appeal before the ICC is from the DRC. Seven, even cases referred by Uganda related to the situation in the DRC.

5. African Union, African States, Civil society organisations and the ICC

As Nyabirungu (2013: 34-36) pointed out, Africa does not speak with one voice about the ICC. There is an “institutional” and a “popular” voice.

5.1 AU, individual African States and the ICC

A lot of criticism has been levelled at the ICC and the work it has undertaken since its creation. At the beginning, there was a love story between African States and the ICC.

As stressed earlier, African States were instrumental in bringing the Rome Statute into force. Out of the 120 states that signed the Statute in Rome were African. The majority of the 60 ratifications needed came from Africa. All the first cases the ICC had to deal with were referred to it by African countries. All the individuals in custody, on trial or at large are African and almost all cases investigated by the ICC Prosecutor take place on the African continent.

⁸ Trial Chamber I convicted Mr Thomas Lubanga Dyilo on 14 March 2012. The trial in this case, *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06 OA 13) had started on 26 January 2009. On 10 July 2012, he was sentenced to a total period of 14 years of imprisonment. The time he spent in the ICC’s custody will be deducted from this total sentence. On 7 August 2012, Trial Chamber I issued a decision on the principles and the process to be implemented for reparations to victims in the case. All three decisions are currently subject to appeal.

⁹ On 7 March 2014, Trial Chamber II found Germain Katanga guilty, as an accessory, within the meaning of article 25(3)(d) of the Rome Statute, of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC. The Chamber acquitted Germain Katanga of the other charges that he was facing. The Prosecutor and the Defence have appealed the judgement. Trial Chamber II will deliver the sentence on 23 May 2014. Decision on victim reparations will be rendered later.

¹⁰ On 21 November 2012, Trial Chamber II decided to sever the charges against Mathieu Ngudjolo Chui and Germain Katanga. On 18 December 2012, Trial Chamber II acquitted Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity and ordered his immediate release. On 21 December 2012, Mathieu Ngudjolo Chui was released from custody. The Office of the Prosecutor has appealed the verdict.

¹¹ On 22 March 2013, Bosco Ntaganda surrendered himself voluntarily and is now in the ICC’s custody. His initial appearance hearing took place before Pre-Trial Chamber II on 26 March 2013. The confirmation of charges hearing in the case took place on 10-14 February 2014.

¹² The confirmation of charges hearing in the case *The Prosecutor v. Callixte Mbarushimana* took place from 16 to 21 September 2011. On 16 December 2011, Pre-Trial Chamber I decided by Majority to decline to confirm the charges against Mr Mbarushimana. Mr Mbarushimana was released from the ICC’s custody on 23 December 2011, upon the completion of the necessary arrangements, as ordered by Pre-Trial Chamber I.

¹³ The Prosecutor v. Sylvester Mudacumura.

Civil society organisations also worked a lot and contributed to the coming into operation of the ICC. Arguably, without African States, the ICC could not have been established and the Rome Statute could not have come into operation, at least at the time it did. Nor did have the ICC performed the work it has done thus far. However, the love story between the ICC and Africa did not last more than a decade as many African countries have come to be critical of the ICC and the relations between Africa and the Court are currently severely strained (Bakum 2014 : 9).

On 4 March 2009, a pre-trial chamber of the ICC issued a warrant for the arrest of Sudanese President Omar Hassan Ahmed Al Bashir to stand trial in the ICC on several charges based on crimes against humanity (murder, extermination, rape, torture and forcible transfer) and war crimes (intentionally directing attacks against the civilian population or individual civilians) and pillage s committed in Darfur. Charges based on the crime of genocide were subsequently included in the warrant for his arrest. The situation in Darfur was referred to the ICC by the UN Security Council (Van der Vywer 2011: 684). The indictment and issuing of a warrant of arrest to President Omar al Bashir of Sudan was a turning point in the relationship between the ICC and Africa.

At a meeting held in July 2009, the AU endorsed a decision of its Members States parties to the Rome Statute not to cooperate with the ICC for the arrest based on Article 98 of the Statute. At the Review Conference of the ICC held in Kampala, Uganda, from 31 May to 11 June 2010, speaking in in capacity as the chair of the AU, Malawi argued that the indictment of sitting heads of states and governments could jeopardise the relationship between the ICC and Africa (Van der Vywer 2011: 684).

The tension increased with the arrest and detention of former President Laurent Gbagbo of Cote d'Ivoire. African States got the impression that the ICC was biased against Africa; the Prosecutor was arrogantly targeting African leaders and Africa while no investigation was opened in other parts of the world nor has any warrant arrest been issued against a seating or former head of state or government outside Africa where genocide, war crimes and crimes against humanity were also reportedly committed. The last straw was the indictment of Uhuru Kenyatta and William Ruto before their election as President and Deputy President of Kenya respectively. President Kenyatta earlier confirmed he would appear before the Court but worked a lot to get his colleagues in the AU request the UN Security Council and the Prosecutor to withdraw charges against them as arresting the elected President and Vice-President of Kenya could not serve the cause of peace and national reconciliation which should come first. The AU asked its members to implement a policy of non-compliance and non-cooperation with the ICC (Bakum 2014: 9). The ICC appeared manifestly against Africa and following the agenda of the big powers in the Security Council while some of them were not States Parties to the Rome Statute and Africa continued to be denied any permanent membership of the Security Council.

Both the Security Council and the Prosecutor declined the request despite the fact that situations involving the big powers and close allies in countries like Iraq, Palestine, and Syria were never reported or referred to the ICC because of their threat to use the veto power.

President Omar al Bashir, President Uhuru Kenyatta and Vice-President William Ruto were therefore able to travel safely to several other African countries that were States Parties to the Rome Statute without being arrested. President Bashir travelled to Chad, Kenya, and the DRC.

The AU decision was not followed unanimously as Uganda, Botswana, Malawi and South Africa threatened to cooperate with the ICC. Malawi that was due to hold an AU Summit even failed to host it because Malawian President Joyce Banda had declared that her government would not comply with the Summit decision to no longer cooperate with the ICC and would arrest President Omar al Bashir if he travelled to Malawi to attend the summit.

The AU urged its members to withdraw from the ICC. Moreover, to avoid criticism for favouring impunity of African Heads of State and Government, AU Member states even envisaged in February 2009 to amend the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights by replacing it with an African Court of Justice and Human Rights with jurisdiction extended to crimes under the material jurisdiction of the ICC, namely genocide, war crimes and crimes against humanity. The African Court of Justice and Human Rights has not been established and the draft protocol amending it is still under consideration by AU Policy Organs. On the other hand, no African country has so far withdrawn from the Rome Statute establishing the ICC.

Anyway, the crisis of confidence remains between African States and the ICC. Uganda, for instance, that earlier referred cases before the ICC later requested the Court to defer them in order to preserve peace and national reconciliation. The suspects remain at large. The discourse change but it is not clear whether Uganda could have surrendered them to the ICC in case the country arrested them.

On the other hand, the DRC government that was the most cooperative with the ICC also claimed that it was putting peace and national reconciliation ahead for not arresting and surrendering rebel leader General Bosco Ntangana indicted by the ICC but who had signed a deal with President Kabila. There was a double standard as the same government that refused to arrest and surrender Bosco Ntangana but promoted him in the ranks was quick to arrest and surrender other individuals who were opposed to the government. More recently, the Prosecutor travelled to the DRC to seek clarity for non-cooperation of the government that failed to arrest President Bashir. The Government hid behind the Rome Statute and alleged opposed demands for not arresting President Bashir.

5.2 African citizens, CSOs and the ICC

Apart from some individuals that came in support of the AU and its Members States to criticise the ICC, in the main, the relationship has not been as bad between the ICC and civil society organisations.

African CSOs played a major role and put pressure on their governments that signed and ratified the Rome Statute. They never supported their governments in their refusal to cooperate with the ICC and withdraw from the Rome Statute. However, CSOs do not speak the same voice with the governments with regard to the ICC. They need more and effective actions from the ICC while some governments are now reluctant and refuse to cooperate. They have their own criticism against the ICC. The first is that the ICC seems to apply a double standard policy by siding with governments against the opposition. It is quick to open cases and prosecute the opponents and not those in power or associated with them. Requests from governments receive better treatment than communications from CSOs. In the DRC, it was felt that the ICC was assisting the DRC government to get him out of politics since he had been the main contender to President Kabila.

The Prosecutor was also acting as an agent of the big powers that wanted Joseph Kabila in power despite the massive electoral frauds orchestrated during the 2006 presidential elections. In Central Africa, the ICC was also assisting the government of this country as Jean-Pierre Bemba was said to be an ally to former President Ange Patasse who was no longer in power.

The ICC was blamed for delivering a victors' justice and to side with the governments. This was also demonstrated during the 2011 presidential election in the DRC as the Prosecutor kept on threatening those who could derail the electoral process and recruited themselves among the opponents.

CSOs and African people were also disappointed about international justice delivered by the ICC. As a saying, justice delayed is justice denied. The first judgment of the ICC in the Thomas Lubanga Dyilo case in 2012 came almost a decade after the Rome Statute came into force and the ICC was established. To date, the ICC has handed down two sentences only. Jean-Pierre Bemba has been in the custody of the ICC for almost 5 years and the trial is dragging on. If the ICC was to deliver one judgment per decade or every five years, it could take up to 50 years to judge 10 suspects. On the other hand, while many peoples have suffered genocide, war crimes and crimes against humanity, only 10 have been brought before the ICC. These persons are not even the main authors of the crimes. The ICC seems to content itself with subordinates while the donors of orders are left free. Moreover, the victims have lost hope as there is no compensation. Without calling for the withdrawal of their countries from the Rome Statute and without supporting the governments in their refusal to cooperate with the ICC, the people of the DRC, for instance, have been calling for the establishment of an international tribunal for the DRC. However, contrary to the governments, they still support the work of the ICC. CSOs maintain confidence in international justice as they cannot get impartial and fair justice from domestic courts.

6. ICC's response to Africa

Arguably, in the light of the cases opened, the situations being investigated, the citizenship and even the race of all the individuals in custody, convicted, at large, or on trial at the ICC, the Court has so far served as an African Court, a Court against Africa, established by the big powers to ridicule and judge Africans. The ICC has somehow responded to criticism from African States and from African civil society organisations and citizens.

The ICC has somehow arrogantly dismissed all criticism levelled against it by African governments while condemning them for non-cooperation. The ICC has reaffirmed its independence and denied being manipulated or working to serve the interests of the big powers.

The ICC also denied being biased against Africa and applying double standards for prosecution and investigations. The request by the AU to have the case of President Bashir and President Uhuru Kenyatta and his Vice-President William Ruto deferred was rejected by the Security Council and the ICC.

Responding to criticism according to which the ICC had turned out to be an African Court for having more cases from Africa and opening more investigations in Africa and against Africans than any other part of the world and non-Africans, the ICC blamed African governments and African people themselves.

They held that most African cases had been referred by African governments themselves and the ICC was forced to intervene in Africa because of the crimes under its jurisdiction being committed in Africa. Moreover, the ICC held that it had a complementary jurisdiction and was intervening because the judicial system in most African countries was unable to deal independently with these crimes. Accordingly, the Security Council and the ICC dismissed all criticism from the AU and its member states and reaffirmed that they should comply with their obligations under the Rome Statute.

The ICC's response to criticism from the AU and its Member States could only be partially convincing. Criticism against the relative dependence of the ICC on the Security Council and the big powers cannot be totally dismissed. This dependence is even structural since the Rome Statute provides for some role to be played by the Security Council. The Council may refer cases before the ICC. It may also order a deferral of prosecution or investigations for a period of 12 months which can be indefinitely renewed. One may even wonder what happened for the Security Council to be recognised such a major role in the Statute. The reason may be that the Conference of the Plenipotentiaries of the States that adopted the Rome Statute was convened and organised by the UN. The second reason for dependence derives from the funding. The ICC is mainly funded by the big powers and is therefore depending on them.

The ICC may also be right that most cases before it were referred to by African Governments and it is obliged to intervene because of genocide, war crimes and crimes against humanity occurring in Africa. However, Africa is not the only continent where the crimes under the jurisdiction of the ICC have been committed. Iraq, Palestine, Syria, and Ukraine where big powers like the US, UK and Russia were involved are cases in point. The Security Council and the Prosecutor have not referred cases or opened investigations in these countries by fear of the use of the veto right in the Security Council. The main reason why they are not investigated is political own. The ICC has practicing selective justice and carefully avoiding to clash with the big powers by prosecuting their citizens and their allies as they are the ones that fund the ICC and may also threaten its existence. It cannot be denied that given the dependence on the Security Council and the big powers that fund it, the ICC is used as an instrument of domination, investigating where they think it should investigate, prosecuting and judging those they think they should be prosecuted or judged while keeping a blind eye on situations and individuals they do not want before the Court. The ICC should take this criticism seriously and respond in order to build confidence. Since it delivers a complementary justice, the ICC needs the cooperation of the AU and African States to remain relevant. African States also need the ICC as their domestic systems cannot always satisfactorily deal with genocide, war crimes and crimes against humanity.

The ICC, the Office of the Prosecutor and the ICC have been partial and too selective in referring cases, opening investigations, or issuing warrants of arrest as they only targeted Africans. As stressed earlier, this is not to suggest that the AU and African States are right to withdraw and refuse to cooperate with the ICC. The Rome Statute is a treaty and according to the *pacta sunt servanda* rule, States Parties should comply with their obligations under the Statute. The fact that the ICC may be acting against Africa is not a ground for withdrawal from the treaty under international law. Nor is it an excuse for non-compliance with the Statute. On the other hand, the Rome Statute is a treaty open to States only.

The AU is not a State, but an African regional organisation. Accordingly, it is not a party to the Rome Statute and is not founded to order the withdrawal of African States from the Treaty. The argument of the ICC having complementary jurisdiction is correct. African States should organise their judicial system and make it independent and effective with regard to crimes under the jurisdiction of the ICC. They would not then have to refer cases to the ICC and later blame the Court. African States have also been unable to find alternatives to the ICC. The amended Protocol to the African Charter establishing an African Court of Justice and Human Rights with competence to prosecute and judge the authors and accomplices of genocide, war crimes and crimes against humanity has been under consideration since 2010. Anyway, with the AU acting as a “Club of Heads of State and Government” supporting one another as in the case of President Bashir or President Kenyatta, it is doubtful that even if the Protocol came into operation and the Court was given that jurisdiction, it would be independent enough to prosecute and judge an African Head of State and Government accused of genocide, war crimes and crimes against humanity and it would receive any single case deferred by the AU.

The ICC’s response to African civil society organisations and citizens was also not convincing. The ICC has given the impression of siding with the incumbent Heads of State and Government. More importantly, the small number of the cases investigated and the delay in prosecuting the suspects already in custody has not been justified. The victims have not been compensated. The achievements of the ICC do not match African expectations.

7. Conclusion

The ICC was established to prosecute and judge all those responsible for genocide, war crimes and crimes against humanity after the Rome Statute came into operation. Cases may be referred before the Court by the Security Council, States Parties or the Prosecutor. Coming after genocide, war crimes and crimes against humanity that were committed in former Yugoslavia and in Rwanda, the ICC raised hopes that these crimes would be prevented, impunity combated, justice delivered and reconciliation achieved. From the outset, justice, peace and national reconciliation were considered related objectives of the ICC.

A decade since its establishment, around 10 cases have been brought before the ICC by the Security Council, the States Parties or the Prosecutor. Almost all the work of the ICC has been undertaken in Africa and all the people investigated or under custody are Africans, giving the impression that the ICC was established to prosecute and judge Africans despite the fact that the crimes under its jurisdiction are also committed elsewhere by non-Africans. Even in Africa, international crimes continue unabated and the ICC has convicted two suspects only. Justice seems to have been delayed. So are peace and national reconciliation in regions where justice was expected to result in national reconciliation. This has given rise to a great deal of criticism against the ICC, especially from the AU and its Member States which resolved to no longer cooperate and even withdraw from the Rome Statute as well as from African citizens and CSOs.

The ICC has been dismissive of any kind of criticism, explaining that most of its cases were referred by African States themselves and Africa was still a field for international crimes, ignoring, however, that the same were committed elsewhere, and denying its dependence on the Security Council that may order deferral of prosecution and investigation and somehow directs the Court which besides receive much of its funding from the big powers.

Be it as it may, the jurisdiction of the ICC is complementary to that of domestic courts as it can only intervene when States are unwilling or unable to prosecute and judge those crimes independently. On the other hand, the ICC was established by States that signed and ratified the Rome Statute and African States were instrumental in its creation. The ICC needs the cooperation of African States to administer justice. In Africa, it also needs the support of African citizens and their CSOs.

It must be recognised that there is a crisis of confidence between the ICC and African States and civil society organisations that applauded its creation. The ICC still remains a necessary instrument in the fight against international crimes, an instrument of justice, peace and ultimately of national reconciliation in countries ravaged by wars and other armed conflicts. However, much of the criticism against the ICC is well-founded and should not be dismissed altogether. Not just a judicial instrument, the ICC is also a political one.

As Bakum stressed, to remain a credible institution of international justice in the eyes of Africans, there is need for reforms on how the ICC operates (Bakum 2014: 9). One of the problems relates to the power granted to the Security Council to refer cases before the ICC and even dictate the ICC by ordering deferral of prosecution or investigations by the Prosecutor when some of its permanent members have so far refused to be parties to the Rome Statute. These members may and have used their veto right to oppose referral of cases involving their allies or their own forces as seen in the cases of Iraq, Syria, Palestine, Israel and Ukraine where international crimes were reportedly committed. This can only be unfair to Africa that has no State as a permanent member of the Security Council. However, getting the Rome Statute amended would give rise to the same problem as for the UN Charter that can be amended to make the Security Council more democratic without the positive vote of the same permanent members of the same Security Council. Meantime, the Security Council and the Prosecutor should change their ways of dealing with Africa through the ICC. The ICC should become more impartial and independent. It should also strive to administer a speedy justice and provide reparations to the victims of the crimes while punishing the authors and not just the subordinates while impunity would be granted to the donors of orders.

African States that freely become parties to the Rome Statute should comply with their obligations under this treaty and fully cooperate with the ICC. On the other hand, instead of complaining about the ICC when African Heads of State and Government have being investigated, African States should understand that the jurisdiction of the ICC is complementary and they need to clean their houses and strengthen their judicial systems to avoid the intervention of the ICC and big powers (Bakum 2014: 9). The best way to avoid the ICC is to embark on the promotion of constitutionalism, the rule of law, democracy and human rights that will create an environment which leaves little room for genocide, war crimes and crimes against humanity.

As far as the relationship between justice and national reconciliation is concerned, the aim of justice is first to punish the authors of crimes and not to achieve reconciliation. Justice may contribute to reconciliation, but that is not its ultimate aim. Africans should understand that justice must be delivered at home first. It should come from an effective and independent domestic judicial system and they should therefore work to get it established.

Criminal lawyers have excessive faith in criminal law and criminal justice. Prior to recent developments in international criminal law, they uncritically trust the domestic system to deliver justice, fight crime and impunity, and bring about peace and reconciliation.

One of the best representatives of this trend is Congolese criminal scholar Professor Nyabirungu, the Dean of the Faculty of Law of the University of Kinshasa who recently devoted a 1054-page on International Criminal Law. The leading Congolese criminal law scholar still believes that the ICC will help establish a new world where justice and peace will prevail and thanks to the Court, governments will become more accountable, promote good governance and human rights and the victims of abuses protected and compensated (Nyabirungu 2013: 36). This is too an optimistic view about international justice in general and the ICC in particular. In a doctoral thesis recently submitted at the University of South Africa, Etienne Mutabazi demonstrates that the ICC is confronted to the same problems as *ad hoc* international tribunals such as the ICTY and the ICTR that has failed to achieve its objectives because of its dependence on big powers in the Security Council, its partiality, and lack of professionalism in the prosecution (Mutabazi 2014: 365-371).

Even then, justice alone cannot suffice to bring about sustainable peace and reconciliation. This is why Rwanda where genocide was committed had to devise its own mechanisms, namely the *Gacaca* courts (Gaparay 2001: 105) to complement the work of the ICTR and its criminal courts. This is why South Africa earlier established the Truth and Reconciliation Commission at the end of apartheid, which was considered a crime against humanity. Many other countries were inspired by the Truth and Reconciliation Commission. This is also why amnesty laws are generally adopted in countries that were ravaged by armed conflicts. In the DRC, for instance, the Framework Agreement prepared by the UN and the AU for sustainable peace and reconciliation in the Great Lakes Region was adopted on 24 February 2013 in Addis Ababa, Ethiopia. This Agreement provided for an amnesty law that had to be adopted while excluding the authors of international crimes who should be prosecuted and judges.

Finally, the ICC remains an important mechanism for justice, peace and reconciliation. However, it has not delivered on its mandate and called for a great deal of criticism in the world in general and in Africa in particular. The first decade of the ICC constitutes a golden opportunity to take stock and assess critically its organisation, functioning, and its work. Arguably, not all criticism levelled against it should be dismissed because it would be coming from Africa. The ICC needs to be reformed to improve its work in line with its mandate. Reforming the ICC should go together with the strengthening of judicial domestic system and the promotion of constitutionalism, the rule of law, democracy and human rights in African States. Since a judicial system will never be enough to administer impartial and fair justice and achieve peace and reconciliation at the same time, African cultures are immensely rich for African peoples and their governments to devise other mechanisms and partly judicial and partly political home-grown solutions for substantive justice that should be seen to be done, long-term peace and reconciliation at both the domestic and regional levels.

Notes : Legal Documents and Cases

UN Charter of 1945.

UN Security Council Resolution 827 of 25 May 1993 establishing the ICTY to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1st January 1991.

UN Security Council Resolution 955 of 8 November 1994 establishing the ICTR to prosecute persons responsible for genocide in Rwanda from 1st January to 31 December 1994.

UN Security Council Resolution 1315 of 14 August 2000 establishing the SCSL to prosecute persons responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

UN Security Council Res 1593 (2005) of 31 March 2005, UN Doc S/RES/1593 (2005).

The Rome Statute of 17 July 1998 establishing the ICC (A/CONF 183/9).

The Vienna Convention on the Law of Treaties, 1969.

The Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/04-01/07)

The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido

The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen .

The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Ali.

The Prosecutor v. William Samoei Ruto, Joshua Arap Sang and Kosgey.

The Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)

The Prosecutor v. Omar Hassan Ahmad Al Bashir; The prosecutor v. Bashr Idriss Abu Garda.

The Prosecutor v. Laurent Gbagbo , 2011.

The Prosecutor v. Charles Blé Goudé, 2011.

The Prosecutor v. Muammar Mohammed Abu Minyar Gaddhafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 2011.

The Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06 OA 13).

The Prosecutor v. German Katanga.

The Prosecutor v. Mathieu Ngudjolo Chui.

The Prosecutor v. Bosco Ntaganda, 2013.

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