International criminal justice and the protection of human rights in Africa

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Introduction

For many decades, Africa has been subjected to and ravaged by protracted intra- and interstate conflicts. It is, thus, a sad reality that Africa is home to many international human rights violations and atrocities, even in peacetime. The past and continuing cycles of inter-ethnic and civil wars on the continent have exposed millions of innocent civilians to egregious crimes such as genocide, war crimes, torture, sexual violence, and massive killings.

Against this grim picture, it is painful to remark that the African human rights system is still weak and, indeed, in its infancy. True, the enforcement mechanism of human rights protection in Africa is yet to be fully operational.[1] However, the African system of human rights does not address the more troubling issue of impunity and individual criminal responsibility for international crimes often committed on the African continent. Thus, victims of international crimes rely on national courts in their respective states. Not only are these national legal systems inherently weak, but – more importantly – they are not sufficiently balanced and impartial so as to adjudicate upon international crimes which are, more often than not, committed by ruling parties, members of armed forces or senior government officials.[2]

1 An African Court of Human and Peoples' Rights, which was adopted in 1998 in terms of the African Charter on Human and Peoples' Rights, entered into force in 2004; however, to date it is still not yet operational. This Court has now been merged with the African Court of Justice (which has not yet entered into force) to give birth to a single judicial body, that is, the African Court of Justice and Human Rights. The new court will have two chambers: one for general legal matters and disputes among member states of the African Union (AU) and/or its other institutions, and the other for the interpretation and application of the African Charter on Human and Peoples' Rights. For more on this, see http://www.rnw.nl/internationaljustice/courts/ACHPR/080613-africancourt; last accessed 25 March 2009.

2 In this regard, Prof. William A Schabas (2004:1) writes that national justice systems have often proven themselves to be incapable of being balanced and impartial in cases involving international crimes. It is worth noting that most national legal systems, even in the most developed states in the West, do not have penal codes which provide for the prosecution of international crimes.

Because the response of national courts to international crimes has long been disappointing, and because state courts have normally taken a 'nationalistic' or 'introverted' – as opposed to 'international' – view, it explains why international tribunals or courts or, in some instances, hybrid courts are better placed to deal with international crimes. In addition, international crimes are serious breaches of international law; thus, international courts are the most appropriate judicial fora to pronounce on them as they are in better position to know and apply international law.[3]

Since Africa does not have a continental criminal tribunal or court, and since domestic courts are neither well prepared nor willing to deal with individual criminal responsibility for international crimes, crimes of an international nature committed on African continent have been referred to either ad-hoc international criminal tribunals or the recently created (permanent) International Criminal Court. The purpose of this paper is, therefore, to examine the ongoing prosecutions of international crimes which have been or are being perpetrated in Africa. In this regard, three judicial institutions are explored, namely the United Nations (UN) ad-hoc International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the International Criminal Court (ICC). The author will look at the creation, mandate, legality and/or jurisdictions of these judicial bodies and, where necessary, their work and contribution to the protection of human rights and the fight against impunity in Africa. Ultimately, the purpose of the paper is to demonstrate that international prosecutions contribute to the protection and promotion of human rights in Africa.

The UN International Criminal Tribunal for Rwanda – ICTR

The creation, jurisdiction and legality of the ICTR

Rwanda went up in flames on the evening of 6 April 1994, when President Juvenal Habyarimana and his colleague, Cyprien Ntaryamira, the then President of Burundi, were killed in a mysterious plane crash while returning from neighbouring Tanzania, where the former was negotiating a settlement to his country's civil war.[4] Within hours of the plane crash, a mass murder of

[3] See Cassese (2004:182–183).

[4] To date, there has not been any formal inquiry or investigation into this terrorist act to identify the perpetrators and their possible motives. There is, however, a final report by a

unprecedented scope, conducted by thugs armed with machetes, spears, and homemade grenades, was unleashed. Targets included both Tutsi and Hutu believed to be supporters or accomplices of the Rwandese Patriotic Front (RPF). Although initially confined to the capital, the massacres soon spread to the countryside and lasted for three months, until 18 July 1994, when the RPF defeated the *Forces Armees Rwandaises* (FAR). Many experts and scholars on the Rwandan crisis believe that the assassination of President Habyarimana was a trigger that sparked the genocide of Tutsi and massacres of Hutu suspected of allying with the RPF.[5]

In the aftermath of the genocide, the UN and the international community – which had dismally failed to prevent or stop the massacres – thought that a creation of an ad-hoc criminal tribunal for Rwanda would restore peace and stability in the region, and contribute to national reconciliation in Rwanda.[6] In this context, through UN Security Council Resolution 955 (1994), the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) with the mandate to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring states between 1 January 1994 and 31 December 1994.[7]

French Investigating Terrorist Judge, J de Bruguiere, who was seized by the late President's widow and spouses of the crew members. Although early publications suspected Hutu extremists for shooting down Habyarimana's plane, recent publications and the French Judge's report implicate the former Commander of the then Tutsi rebel movement, General Paul Kagame, the incumbent President of Rwanda, of being the mastermind behind the assassination; see e.g. Onana (2005:88–115); Pean (2005:7–23); Ruzibiza (2005:237–251).

5 See e.g. UN Doc. S/1994/1405 (1994). *Final Report of the Commission of Experts*, p 55; *The 1995 Summary Report of the Special Rapporteur* [Dr R Degni-Segui] *on the Situation of Human Rights in Rwanda,* UN Doc. E/CN.4/1995/71 (1995), p 7 (hereinafter *1995 Summary Report*); Onana (2005:8–115); Ruzibiza (2005:237–258).

6 See e.g. Prof. A Cassese (2004:186–188), who argues that, when the Great Powers and the UN are unwilling or unable to put an end to atrocities and serious political crisis, they tend to fall back on the establishment of a tribunal.

7 The ICTR has been in operation since 1996, and it was due to close in 2008, but its life was extended by one year to finalise first instance cases and other related administrative matters. For further reading on the creation, mandate, jurisdiction and work of the ICTR, see Beresford (2000:99); Howland et al. (1998:135); Mettraux (2005:400–428); Morris et al. (1998); Schabas (2006a).

The legality of the ICTR, which is exactly the same as its sister institution, the International Criminal Tribunal for the former Yugoslavia, was discussed in the Report submitted by the UN Secretary-General after the Tribunal's creation.[8] In brief, the Secretary-General stated that the Security Council was legally empowered to establish the ICTR under Chapter VII of the UN Charter since the latter had already determined and was convinced that the situation in Rwanda continued to constitute a threat to international peace and security.[9] In the opinion of the Secretary-General –[10]

> … [t]he establishment of the international tribunal under Chapter VII, notwithstanding the request from the government of Rwanda to create such a court, was necessary not only to ensure the cooperation of Rwanda [with the tribunal], but the cooperation of all states in whose territory persons alleged to have committed serious violations of international humanitarian law and acts of genocide might be situated.

Moreover, a tribunal based on the Chapter VII resolution was necessary to ensure a speedy and expeditious method of establishing the tribunal.[11] En passant, all Security Council resolutions taken under Chapter VII are binding on all member states of the United Nations.[12]

Article 5 of the ICTR Statute provides that the ICTR has jurisdiction over natural persons pursuant to the provisions of its statute.[13] The phrase *natural persons* excludes corporate bodies or organisations, something which is permitted under many national systems of criminal justice.[14] The personal jurisdiction of the ICTR was reiterated by one of its Trial Chambers in the *Kanyabashi* case, where it was held that –[15]

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8 See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134 (1995); for further reading on this, see also Morris et al. (1998:101–109, Vol. 1).

9 1994 Report of the Secretary-General (ibid.:para. 6).

10 (ibid.).

11 (ibid.).

12 Article 25, UN Charter.

13 Article 5, ICTR Statute.

14 Schabas (2006a:139).

15 See *Prosecutor v Kanyabashi*: ICTR Trial Chamber Decision on the Defence Motion on Jurisdiction (18 June 1997), ICTR–96–15–T.

> [p]ursuant to Article 1 of the ICTR Statute, **all persons** who are suspected of having committed crimes falling within the jurisdiction of the Tribunal are liable for prosecution. [Emphasis added]

Article 7 of the Statute defines the temporal jurisdiction of the ICTR. The temporal jurisdiction extends to a period beginning on 1 January 1994 and ending 31 December 1994. However, some indictments have referred to crimes committed prior to the starting point of the Tribunal's jurisdiction. It was stated that such prior events could provide a basis from which to draw inferences concerning intent and to establish a pattern, design or systematic course of conduct by the accused.[16] In regard to territorial jurisdiction, Article 7 of the ICTR Statute provides that the Tribunal has jurisdiction over crimes committed in the territory of Rwanda and other neighbouring states.[17]

The achievements and legacy of the ICTR

The work of the ICTR can be analysed in terms of its two main objectives, namely –

- the prosecution and bringing to justice of those responsible for acts of genocide and other violations of international humanitarian law, and
- the Tribunal's contribution towards the national reconciliation process within Rwanda.

With regard to prosecution, the first trial at the ICTR started in January 1997. As of March 2009, the Tribunal had arrested 79 suspects, 23 of whom are on trial, 8 are awaiting trial, 16 are serving their sentences in Italy and Mali, 6 have been acquitted, and 7 are awaiting the outcome of their appeals.[18]

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16 See the case of Ngeze et al. (ICTR–96–11 AR72–I) Decision on the Prosecutor's Request for Leave to Amend Indictment, 5 November 1999, at para. 3; and the Nahimana case (ICTR–96–11–T) Decision on the Prosecutor's Request for Leave to File and Amend the Indictment, 5 November 1999, at para. 28.

17 The subject-matter jurisdiction of the Rwanda Tribunal is provided in Articles 2, 3 and 4 of the Statute. The Tribunal has power to prosecute crimes of genocide, war crimes, and crimes against humanity.

18 See the ICTR website, http://69.94.11.53/default.htm; last accessed 27 March 2009. Note that, among the arrested persons, some have died in custody, others have been released for lack of evidence, and others are awaiting transfer to national jurisdictions.

On 18 December 2008, the ICTR handed down its judgement in the famous *Theoneste Bagosora* case,[19] also nicknamed the 'mastermind' of genocide in Rwanda. In this case, also known as the *Military I* trial, Bagosora and three other senior army officers were charged with conspiracy to commit genocide, genocide, crimes against humanity, and war crimes, based on direct or superior responsibility for crimes committed in Rwanda in 1994. After 409 trial days, the ICTR delivered its judgement in which it found Bagosora and two of the other accused guilty of genocide, war crimes, and crimes against humanity.[20] However, the Trial Chamber acquitted all four accused persons of the charge of conspiracy to commit genocide.[21] The acquittal of Bagosora and his co-accused of the latter charge has been interpreted by some legal experts to mean that there was no genocide in Rwanda.[22] Moreover, the defence counsel in casu suggested that there was an alternative explanation for the Rwandan genocide, and that the blame for the killings could be placed on the RPF – the then Tutsi-dominated rebel movement.[23] True, the conundrum here is this: can a court or tribunal convict an accused person of genocide in a case where the prosecution has failed to prove beyond reasonable doubt the existence of a plan to commit genocide or genocidal conspiracy? The reading of the ICTR judgement in the *Bagosora* case does not offer an answer to this lingering issue.[24] Be that as it may, it is worth noting that the ICTR Appeals Chamber has taken judicial notice of the fact that genocide took place in Rwanda in 1994; thus, this fact cannot be disputed.[25]

The national reconciliation within Rwanda and the ICTR

In addition to its prosecutorial duty, the ICTR is mandated to contribute to national reconciliation between the arch-rival ethnic groups in Rwanda. Many observers

19 *The Prosecutor v Theoneste Bagosora et al.*, ICTR–98–41–T.

20 The fourth accused, General G Kabirigi, was acquitted of all charges; the Prosecution Office has indicated that it will not appeal against the verdict.

21 See para. 18 of the Oral Summary of the Judgement, 18 December 1998.

22 See comments on the judgement by Schabas (2009).

23 (ibid.).

24 In very confusing and contradictory language, the Trial Chamber held at para. 2090 as follows: "… at the outset, the Chamber emphasizes that the question under consideration is not whether there was a plan or conspiracy to commit genocide in Rwanda. Rather it is whether the prosecution has proven beyond reasonable doubt that the four accused (including Bagosora who is considered [sic] the mastermind of genocide in Rwanda) committed genocide".

25 See *Prosecutor v Karemera et al*., ICTR–98–44–AR 73(C), 16 June 2006.

submit that the ICTR has failed to fulfil this mandate. This is so because, to date, the ICTR's Prosecution Office has applied 'selective prosecutorial policy'. True, the Tribunal's work since 1996 has focused on the prosecution of one ethnic group (Hutu) to the civil war of 1990 which culminated in acts of genocide and grave breaches of international humanitarian law. Yet, there is a plethora of reports and documents evidencing the horrendous massive human rights abuses and serious violations of international humanitarian law by the Tutsi ex-rebel movement.[26] This policy of 'selective justice' has attracted many criticisms from Rwandans, particularly Hutus, who see the ICTR as a form of victor's justice.

Notwithstanding the above, there is another 'school of thought' which posits that the Rwanda Tribunal has succeeded in doing what it was set up to do, to wit, prosecuting many of the leaders of the 1994 genocide.[27] The conundrum here, however, is whether the ICTR was set up solely for prosecuting the crime of genocide. This could be addressed by looking at the intention of the drafters of the Tribunal's Statute and the proper reading thereof. The Tribunal's jurisdiction ratione materiae is provided for in Articles 2, 3, and 4 of the Statute. These provisions respectively deal with genocide, crimes against humanity, and violations of international humanitarian law applicable in internal armed conflicts. There is no doubt that genocide, the crime of crimes, is the first category of crimes over which the Rwanda Tribunal has jurisdiction by virtue of its Statute. In addition, it is not disputed that the UN set up the Rwanda Tribunal following corroborative reports that the crime of genocide had been committed in Rwanda between April and July 1994. Nonetheless, the UN Security Council could not accept Rwanda's proposal that the Rwanda Tribunal's jurisdiction should be limited to the genocide committed by the Hutu-dominated government, while excluding the atrocities committed by the Tutsi-dominated RPF.[28] In this regard, Virginia Morris and Michael P Scharf write as follows:[29]

> A tribunal established to prosecute atrocities committed by only one party to the armed conflict would not achieve the aims of the Security Council in terms of: (i) attaining a major of justice with respect to the atrocities committed by both parties to the internal

[26] See Bangamwabo (2008:258).

[27] See e.g. Schabas (2006a:31).

[28] See Shraga (1996:501,508). In refusing to vote for the ICTR Statute, the Rwandan Government argued that the subject-matter jurisdiction of the Tribunal should be limited to the crime of genocide; see UN Security Council Resolution, 49th Session, 3453rd Meeting, at 15; UN Doc.S/PV.3453 (1994).

[29] Morris & Scharf (1998:164–165).

> armed conflict; (ii) providing a deterrent to future atrocities by either party; (iii) promoting national reconciliation by ensuring independent and impartial justice; and (iv) alleviating the threat to international peace and security by ending the cycle of ethnic violence [in Rwanda].

Undoubtedly, the refusal or failure by the ICTR Chief Prosecutor to deal with crimes against humanity and other violations of international humanitarian law committed by the other party to the conflict, that is, the RPF, clearly violates the Tribunal's Statute. Certainly, this prosecutorial policy is at variance with the aims and the objectives of the Rwanda Tribunal, which include the fight against impunity and the promotion of national unity and reconciliation within Rwanda between Hutu and Tutsi. True, the priority of the Tribunal should be the prosecution of the crime of crimes, that is, genocide, but does this mean that other crimes as per Articles 3 and 4 of the Statute should be ignored in toto? Whether the RPF crimes will ever be prosecuted by the Rwanda Tribunal is doubtful, since the Tribunal's life is nearly coming to an end.

The Special Court for Sierra Leone – SCSL

Creation and mandate

The SCSL is different from the ICTR in that the former was created by an agreement between the UN and the Government of Sierra Leone.[30] However, like the ICTR, the SCSL applies international law, and both its Statute and Rules of Evidence and Procedure are the same as those of the ICTR. The jurisdictional scope of the SCSL is to try persons who bear the greatest responsibility of the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law in Sierra Leone that occurred after 30 November 1996.[31] In addition, the Court has the power to prosecute certain crimes under the national law of Sierra Leone. While some judges and prosecutors are appointed by the UN, others are designated by the Government of Sierra Leone. Thus, the SCSL constitutes a treaty with mixed jurisdiction and composition – a *hybrid* court. The first SCSL judges were sworn into office in December 2002, in which month the court became fully operational.

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30 See Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002. For further reading on the SCSL, its jurisdiction and creation, see Schabas (2006a:34–40).

31 UN Doc. S/RES/1315 (2000), para. 3; see also Article 1 of the SCSL Statute.

Work and achievements of the SCSL[32]

So far, the SCSL has indicted 13 people for war crimes, crimes against humanity and other violations of international humanitarian law. However, three indictments were later dropped because the indictees had died. Of the ten remaining indictees, nine are in the custody of the Special Court. If found guilty, convicts may be sentenced to prison or have their property confiscated. The Court, as with all other tribunals established by the UN, does not have the power to impose the death penalty.

Although the indictees are individually charged, the trials have been placed into three groups, namely Civil Defence Forces (CDF), the Revolutionary United Front (RUF), and Armed Forces Revolutionary Council (AFRC). Three of the defendants are CDF leaders, i.e. Allieu Kondewa, Moinina Fofana, and former Interior Minister Samuel Hinga Norman. Their trial started on 3 June 2004 and concluded with closing arguments in September 2006.

Five RUF leaders were indicted, namely Sam Bockarie, Augustine Gbao, Morris Kallon, Foday Sankoh and Issa Hassan Sesay. The charges against Bockarie and Sankoh were dropped after their deaths were officially ascertained. The trial of Gbao, Kallon and Sesay began on 5 July 2004 and was concluded on 24 June 2008. Final oral arguments were conducted on 4 and 5 August 2008.

Three of the detained indictees belonged to the AFRC, namely Alex Tamba Brima (also known as *Gullit*), Brima Bazzy Kamara and Santigie Borbor Kanu (also known as *Five-Five*). Their trial began on 7 March 2005.The only indicted person who is not detained and whose whereabouts remain uncertain is the former dictator and AFRC Chairman, Johnny Paul Koroma, who seized power in a military coup on 25 May 1997. He was widely reported to have been killed in June 2003, but as definitive evidence of his death has never been provided, his indictment has not been dropped.[33]

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32 For a detailed reading on the SCSL cases, see http://www.sc-sl.org/CASES/CivilDefenceForcesCDFCompleted/tabid/104/Default.aspx, http://www.sc-sl.org/CASES/RevolutionaryUnitedFrontRUF/tabid/105/Default.aspx, and http://www.sc-sl.org/CASES/ArmedForcesRevolutionaryCouncilAFCComplete/tabid/106/Default.aspx; all last accessed 20 March 2009.

33 (ibid.).

On 20 June 2007, the three suspects in the AFRC trial – Brima, Kamara and Kanu – were each convicted of 11 of 14 counts. These were –

- acts of terrorism
- collective punishments
- extermination
- murder – a crime against humanity
- murder – a war crime
- rape
- outrages upon personal dignity
- physical violence – a war crime
- conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities
- enslavement, and
- pillage.

They were found not guilty of three counts:[34]

- sexual slavery and any other form of sexual violence
- other inhumane acts – forced marriages, and
- other inhumane acts – crimes against humanity.

These were the first judgements from the SCSL. It was also the first time ever that an international court had ruled on charges relating to child soldiers or forced marriages, and that an international court had delivered a guilty verdict for the military conscription of children. This was a landmark decision, therefore, and the SCSL has created a major legal precedent in international criminal law by means of it.

On 19 July 2007, Brima and Kanu were sentenced to 50 years in jail, while Kamara was sentenced to 45 years' imprisonment. The three are likely to serve their sentences in Europe rather than Sierra Leone due to security concerns. On 22 February 2008, the Appeals Chamber denied their appeal and reaffirmed the verdicts.

On 2 August, 2007, the two surviving CDF defendants, Fofana and Kondewa, were convicted of murder, cruel treatment, pillage and collective punishments. Furthermore, Kondewa was found guilty of the use of child soldiers. The CDF

34 (ibid.).

trial was perhaps the most controversial, as many Sierra Leoneans considered the CDF to be protecting them from the depredations of the RUF. On 9 October 2007, the Court decided on the punishment. Kondewa was sentenced to eight years' imprisonment, while Fofana got six. These sentences were considered a success for the defence as the prosecutors had asked for 30 years' imprisonment for both. The Court imposed a lesser sentence because it saw some mitigating factors. These included the CDF's efforts to restore Sierra Leone's democratically elected government, which, the Trial Chamber noted, –

> … [c]ontributed immensely to re-establishing the rule of law in this Country where criminality, anarchy and lawlessness ... had become the order of the day.

On 28 May 2008, the Appeals Chamber overturned the convictions of both defendants on the collective punishments charge as well as Kondewa's conviction for the use of child soldiers. However, the Appeals Chamber also entered new convictions against both for murder and inhumane acts as crimes against humanity. Furthermore, the Appeals Chamber enhanced the sentences against the two, with the result that Fofana will serve 15 years and Kondewa 20.[35]

On 25 February 2009, convictions of each of the three RUF defendants were handed down. Kallon and Sesay were each found guilty on 16 of the 18 counts with which they had been charged. Gbao was found guilty of 14 of the 18 charges. Convictions were entered on charges including murder, enlistment of child soldiers, amputation, sexual slavery, and forced marriage. The three were all convicted on charges of forced marriage – the first such convictions ever handed down in an international criminal court. On 23 March 2009, the RUF sentencing effectively ended the three concurrent trials handled by the SCSL in Sierra Leone, although the convicted still have the right to appeal. Only the trial of Charles Taylor in The Hague remains under the authority of the SCSL.

The trial of Charles Taylor[36]

In a category on his own is the former President of Liberia, Charles Taylor, who was heavily involved with the civil war in neighbouring Sierra Leone. Taylor was originally indicted in 2003, but he was given asylum in Nigeria after fleeing

35 (ibid.).

36 http://www.sc-sl.org/CASES/CharlesTaylor/tabid/107/Default.aspx; last accessed 22 March 2009.

Liberia. In March 2006, Taylor fled from house arrest in Nigeria and was arrested at the Liberian border in a car full of cash. Taylor was extradited to the Special Court following a request to this effect by the Liberian Government. He was immediately turned over to the SCSL for trial.

Because Taylor still enjoyed considerable support in Liberia at the time of his arrest, and since the region was not entirely stable, his trial in Freetown was deemed undesirable for security reasons since the UN Mission to Sierra Leone (UNAMSIL) had considerably reduced its presence there. By virtue of UN Security Council Resolution 1688 of 17 June 2006, the SCSL was allowed to transfer Taylor's case to The Hague, Netherlands, where the physical premises of the International Criminal Court would be used, but with the trial still being conducted under SCSL auspices. Taylor's trial started on 4 June 2007, with the first witness appearing on 7 January 2008.

The prosecutor originally indicted Taylor on 3 March 2003 on a 654-count indictment for war crimes and crimes against humanity committed during the conflict in Sierra Leone. But, on 16 March 2006, an SCSL judge gave leave to amend this indictment. Under the amended indictment, Taylor is charged with 650 counts. At Taylor's initial appearance before the Court on 3 April 2006, he entered a plea of not guilty.[37] On 15 June 2006, the British Government agreed to jail Taylor in the event that the SCSL convicted him. This removed the obstacle of the Dutch Government having stated they would host the trial, but would not jail him if convicted, while a number of other European countries had also refused to host him.[38]

When Taylor's trial on 11 counts of war crimes and crimes against humanity opened on 4 June 2007, Taylor boycotted the proceeding and was not present. Through a letter which was read by his lawyer to the Court, he justified his absence by alleging that at that moment he was not ensured a fair and impartial trial.[39] On 20 August 2007, Taylor's defence obtained a postponement of the trial until 7 January 2008.[40]

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37 SCSL press release: "Chief Prosecutor announces the arrival of Charles Taylor at the SCSL"; http://www.sc-sl.org/PRESSROOM/tabid/73/Default.aspx; last accessed 20 March 2009.

38 BBC News, 15 June 2006: "UK agrees to jail Charles Taylor".

39 *New Africa* (Sierra Leone), February 2007: "Will Taylor get a fair trial?".

40 See Footnote 36.

At the time of writing, Taylor's trial is under way in The Hague, and the prosecution has closed its case. Charles Taylor may be the first African head of State to be dragged before court for his grave violations of international humanitarian law, and for inciting violence in a neighbouring state, but he will probably not be the last. It is no secret that many wars waged on African continent are proxy wars which are remote-controlled by either neighbouring states or by Western powers.

The International Criminal Court – ICC

Creation and jurisdiction

The Rome Statute of the International Criminal Court (hereinafter *the Rome Statute*) was adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) on 17 July 1998.[41] The Rome Statute creating the ICC entered into force on 1 July 2002 after the magic number of 60 ratifications was reached on 11 April 2002. Following this entry into force, the first Session of the Assembly of States Parties was held from 3 to 10 September 2002. On this occasion, both the Elements of Crimes over which the Court has jurisdiction and the Rules of Procedure and Evidence were formally adopted.[42] It is worth noting that the ICC is already operational and there are now four situations (cases) referred to it for prosecution.[43] However, considering its tender age, we are yet to benefit from its jurisprudence.

The ICC is considered the court of last resort in that it will investigate and/or prosecute the most serious crimes perpetrated by individuals (not corporate entities or organisations) only when national jurisdictions are unwilling and/or unable to do so.[44] This represents the principle of complementarity, which reaffirms the argument that the prosecution of international crimes rests squarely on domestic legal frameworks. This principle also reflects the widely shared

41 As corrected by the procés-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002.

42 See Schabas (2006b:26).

43 See *The Situation in Uganda* (ICC–02/04), *The Situation in the Democratic Republic of Congo* (ICC–01/04), and *Prosecutor v Lubanga* (ICC–01/04–01), *The Situation in Darfur referred to the ICC by the UN Security Council in terms of Article 13 of the Rome Statute*; and *The Situation in the Central African Republic*.

44 See para. 10 of the Preamble to the Rome Statute; see also Article 17, Rome Statute.

view that systems of national justice should remain the front-line defence against serious human rights abuses, with the ICC only serving as a backstop.

The ICC can only adjudicate upon the most serious international crimes of concern to the international community as a whole. These are genocide, war crimes, crimes against humanity, and the crime of aggression as defined in the Statute, and as committed on or after 1 July 2002.[45] Article 12 of the Rome Statute sets up preconditions before the ICC can exercise jurisdiction. The Article provides that the Court may exercise jurisdiction only if –

- the state where the alleged crime (as per Article 5) was committed is a party to the Statute (territoriality principle), or
- the state of which the accused is a national is a party to the Statute (nationality principle).

Article 13 of the Rome Statute defines the three ways in which the ICC can exercise its jurisdiction, as follows:

- Acting under Chapter VI of the UN Charter: The UN Security Council may refer a situation in which crimes within the Court's jurisdiction appear to have been committed[46]
- A state party may refer a situation to the Court, requesting the Prosecutor to investigate such situation for the purpose of determining whether one or more specific persons should be charged with the commission of crimes within the Court's jurisdiction,[47] and
- The Prosecutor may investigate proprio motu on the basis of information on crimes within the jurisdiction of the Court.[48]

After nearly seven years of its entry into force, four situations have been referred to the ICC. One of these was referred to the Court by the UN Security Council under Chapter VII of the UN Charter. This is the situation in Darfur (in western Sudan). Three other situations are self-referrals by member states to the Rome Statute: the conflict in northern Uganda, the situation in eastern Democratic

45 See Article 5, Rome Statute, for the subject-matter jurisdiction. For detailed definitions of the three crimes, see Articles 6, 7, 8, Rome Statute. There is not yet a common definition of *aggression* in international law. Thus, the Court will be able to hear cases involving aggression once member states have agreed on the definition of such crime.

46 See Article 13(b).

47 Articles 13(a) and 14(1).

48 Articles 13(c) and 15(1).

Republic of Congo (DRC), and the situation in the Central African Republic.[49] The proprio motu powers by the Prosecutor are yet to be invoked. It is worth mentioning that all cases pending before the ICC are from Africa. These four situations (or referrals) are discussed hereunder.

The ICC and the situation in Darfur – Sudan

On 4 March 2009, the Pre-trial Chamber of the ICC issued an arrest warrant against the incumbent Sudanese President, Omar Hassan Ahmad Al Bashir, for war crimes and crimes against humanity. He is suspected of being criminally responsible, as an indirect (co-)perpetrator, for intentionally directing attacks against the civilian population of Darfur in Sudan. This is the first warrant of arrest ever issued against a sitting head of State by the ICC.[50] In the following lines, the author discusses the ICC's involvement in Sudan, the issue of immunity, and the likely repercussions of the indictment on the African continent.

The UN Security Council referral of the situation in Darfur[51]

Sudan signed the Rome Statute on 8 September 2000, but has not yet deposited its ratification. Thus, the ICC can only exercise its jurisdiction over acts committed on Sudanese territory pursuant to a referral by the UN Security Council acting under Chapter VII of the UN Charter, and in accordance with Article 13 of the Rome Statute.

In September 2004, the UN Security Council established an International Commission of Inquiry (hereinafter *the Commission*) on Darfur under Resolution 1564. The mandate and terms of reference of the Commission were to investigate reports of violations of international humanitarian law and human rights by all belligerent parties. In addition, the Commission was mandated to determine whether or not acts of genocide had been committed in Darfur, and identify the alleged perpetrators of such violations and acts with a view to ensuring that those responsible were held accountable.[52] In January 2005, after its investigation, the Commission reported back to the UN Secretary-General. Briefly, the Commission

49 See Schabas (2006b:28–29).

50 See ICC press release, 4 March 2009: "ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan", ICC–CPI–20090304–PR394.

51 For a much more detailed reading on this, see Schabas (2006b:37–38).

52 UN Doc. S/RES/1564 (2004), para. 12.

concluded that the atrocities committed in Darfur were not acts of genocide but rather crimes against humanity and war crimes. The Commission called for prosecution by the ICC.[53] In March 2005, responding to the Commission's report and recommendations, the UN Security Council, through Resolution 1593, referred the situation in Darfur to the ICC Prosecutor. Following this referral, the ICC Prosecutor received the document archive of the Commission of Inquiry, and in June 2005, the court initiated its own investigation in Darfur. Two years later, the ICC issued arrest warrants for a former Sudanese Government minister and a former leader of the Janjaweed militia in Darfur. The Sudanese Government has refused to comply with or enforce the Court's warrants, and both suspects are still at large.[54] On 14 July 2008, the ICC Prosecutor applied for a warrant of arrest for the Sudanese President Omar Hassan Al Bashir for genocide, crimes against humanity, and war crimes.[55] On 4 March 2009, the Pre-trial Chamber I of the ICC issued the arrest warrant, but only for crimes against humanity and war crimes.[56] There are many legal implications and challenges pertaining to the Darfur situation, one of which is the sovereign immunity of President Bashir. This issue forms part of our discussion in the ensuing paragraphs.

The ICC and the doctrine of sovereign immunity

One of the more difficult questions faced by international lawyers in recent times has been the question of sovereign immunity from criminal jurisdiction. This doctrine is based on the argument that all states are equal, and no one of them can be subjected to the jurisdiction of another without surrendering its fundamental rights. Thus, *sovereign immunity* means that heads of foreign states or government officials or departments of foreign states cannot be brought before courts of other states against their will.[57] The conundrum, therefore, is this: Can an indicted incumbent head of State such as the Sudanese President be arrested and prosecuted for the alleged international crimes? This issue was addressed by both national and international courts. In the famous *Pinochet* cases, the House of Lords in England denied immunity to Pinochet in his capacity as a former head of State of Chile. However, their Lordships made it clear that if he had still

53 Schabas (2005:871).
54 See Alexis (2008:25–27).
55 (ibid.).
56 See Footnote 51.
57 Dugard (2005:238).

been an acting head of State, he would have enjoyed immunity from prosecution as per international law. In this regard, Lord Nicholls held as follows:[58]

> There can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity.

Lord Millet in the third *Pinochet* case confirmed the above findings, when he held that –[59]

> … Senator Pinochet is not a serving head of state. If he were, he could not be extradited … .

The dicta in the *Pinochet* cases were echoed and confirmed by the International Court of Justice (ICJ) in the *Arrest Warrant* case.[60] In the latter, the ICJ held that Belgium had violated international law by issuing a warrant of arrest against the DRC Foreign Minister (Mr Yerodia) on charges of crimes against humanity and war crimes committed in the DRC in that it (Belgium) had failed to respect immunity from criminal jurisdiction which the Minister enjoyed under international law before national courts. The relevance and meaning of the above jurisprudence is that the recently indicted Sudanese President cannot be arrested and/or prosecuted by Sudanese national courts, even for the most serious international crimes he is now facing. Having said that, it is worth noting that the warrant of arrest against Bashir was issued pursuant to the UN Security Council acting under Chapter VII of the UN Charter. All member states of the UN are, therefore, expected to comply with any action taken by the ICC in this regard.[61] Thus, in the event that Bashir travels to any country (including African and Arab countries which are close friends with the current regime in Sudan), such countries are obliged to arrest him and surrender him to the ICC. However, this is not to suggest that the domestic courts of such countries would have the jurisdiction to prosecute the indicted President: indeed, not even those that have internalised the Rome Statute within their domestic legal frameworks have such jurisdiction.[62]

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58 *R v Bow St. Magistrate*, *Ex Parte Pinochet Ugarte*, 1998 4 ALL ER (Pinochet 1), at 938.

59 *Pinochet Case* (No. 3), [1999] 2 WLR 824, at 905.

60 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium*) 2000 ICJ Rep. 3.

61 Article 25 of the UN Charter provides that UN Security Council Resolutions taken under Chapter VII are binding on all UN member states.

62 See, however, the position in South Africa as per section 4(2)(a) of Implementation of the

In sharp contradiction to the rulings in the *Arrest Warrant* and *Pinochet* cases, international courts do not recognise sovereign immunity from criminal prosecution. For instance, both the ICTR Statute and that for the International Criminal Tribunal for the former Yugoslavia provide that neither former nor sitting heads of State or senior government officials are immune from prosecution for international crimes. The same applies with the ICC Statute, in which Article 27 provides as follows:

> Official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.

Therefore, an individual indicted by the ICC is stripped of immunity: his or her official status is no longer allowed to lead to impunity in respect of alleged crimes.

The ICC can, thus, be seen as a mechanism put in place to cure the defects of both national and international criminal systems. The act of punishing particular individuals – be they leaders, star generals, or foot soldiers of Africa – becomes an instrument through which individual accountability for massive human rights violations is part and parcel of African society.[63] Through this system of individual criminal responsibility, the culture of impunity on the African continent may be eradicated. Whether President Bashir will be arrested and surrendered into the custody of the ICC will depend on the cooperation of states across the globe. This is because the ICC has no police force or agency to enforce and/or execute its judicial decisions.

The situation in Uganda

Unlike Sudan, Uganda is a state party to the Rome Statute, which it ratified in June 2002. Therefore, the ICC has the jurisdiction to adjudicate upon crimes committed on Ugandan territory in terms of Articles 5 and 13 of the Rome Statute. The Government of Uganda referred the situation in northern Uganda to the ICC

International Criminal Court Act, 2002 (No. 27 of 2002).

63 Du Plessis (2005:11).

in December 2003.[64] The letter of referral noted the "Situation Concerning the Lord's Resistance Army (LRA) in northern and western Uganda".[65]

The situation in Uganda is a self-referral by a state party to the Rome Statute in accordance with Article 14. In terms of Article 53 of the ICC Statute, when a case is referred, the Prosecutor is required to initiate an investigation unless s/he determines, after evaluation of information made available to him/her, that there is no reasonable basis to proceed under the Statute. In June 2004, the ICC Prosecutor made public his conclusion that there was "a reasonable basis" to proceed with an investigation. In the following weeks, at the Third Session of the Assembly of States Parties, the Prosecutor revealed that there was credible evidence of widespread and systematic attacks committed by the LRA against civilian populations since July 2002. Some of the horrendous crimes included rape, abductions of thousands of girls and boys, sexual violence, torture, and forced displacements. Subsequently, in May 2005, the ICC Prosecution Office submitted applications for five arrest warrants. On 8 July 2005, the Pre-trial Chamber II of the ICC issued five sealed warrants of arrest against five leaders of the LRA: Joseph Kony, Rasa Lukiwaya, Okot Odhiambo, Dominic Ongwen, and Vincent Otti.[66] To date, none of the accused has been apprehended yet. In February 2006, a number of UN peacekeepers in the DRC were killed while attempting to arrest one of the suspects who was believed to be in the eastern part of that country.[67] Lukiwaya and Otti have reportedly been killed since the warrants were issued, while the three others are allegedly still hiding in the dense forests in the eastern DRC.

Despite widespread documentation of LRA abuses and atrocities, the ICC actions in Uganda have met with some strong domestic and international opposition and criticism. The main debate centres on what would constitute justice for the war-torn communities of northern Uganda, and whether the ICC involvement has helped or hindered the pursuit of a peace agreement between the LRA and Museveni's government.[68] Some observers argue that ICC arrest warrants were

64 Press release, Office of the Prosecutor, ICC, 29 January 2004: "The President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC".

65 The LRA is a rebel group that has been fighting in northern Uganda for over two decades.

66 *The Situation in Uganda* (ICC–02/04–84), Decision on the Prosecutor's Application for Warrants of Arrest under Article 59, July 2005.

67 See Schabas (2006:30).

68 See e.g. Allen (2009).

a crucial factor in bringing the LRA to the negotiating table in 2006 for peace talks with the Ugandan Government, brokered by the Government of South Sudan. In fact, in August 2006, rebel and government representatives signed a landmark cessation of hostilities agreement. In February 2008, the government and LRA reached several other significant agreements, including a ceasefire. However, threats of ICC prosecutions are considered by some to render a final peace deal elusive.[69] The LRA has reportedly demanded that the ICC arrest warrants be annulled as a prerequisite to a final agreement. On the other hand, the Ugandan Government has offered a combination of amnesty and domestic prosecutions for low- and mid-ranking LRA fighters, and is reportedly willing to prosecute LRA leaders in domestic courts on condition that the rebels accept a peace accord. This development could entail challenging the admissibility of LRA's cases before the ICC under the principle of complementarity. However, the Prosecutor has reportedly stated that he will fight any move to drop the LRA prosecutions.[70]

Finally, the ICC Prosecution Office has been accused of bias in regard to the situation in Uganda as it has allegedly failed or neglected to investigate crimes and atrocities committed by the Ugandan armed forces.[71]

The self-referral by the Democratic Republic of Congo[72]

The DRC ratified the Rome Statute on 11 April 2002. As a result, the ICC has jurisdiction over the territory of the DRC as from the beginning of its operation, that is, over any act that took place after 1 July 2002. Thus, as early as July 2003, the ICC Prosecutor demonstrated his willingness to use his proprio motu powers in terms of Article 15 of the Statute to investigate atrocities committed in the Ituri Region of the DRC. However, in March 2004, the DRC followed Uganda's example and referred the situation in Ituri to the ICC. In its letter of referral, the DRC Government explained that it did not have the capacity to investigate and/or prosecute the alleged serious crimes in the Ituri Region without the ICC's assistance.

69 See Alexis (2008:33).
70 (ibid.).
71 See Schabas (2006b:30–32).
72 For a detailed reading on this, see Schabas (ibid.:32–37).

In June 2004, the Prosecutor announced that between 5,000 and 8,000 unlawful killings had been committed in Ituri since 1 July 2002, and opened a formal investigation. In January 2006, the Prosecutor filed an application for an arrest warrant against a certain Thomas Lubanga Dyilo, the alleged founder and leader of *Union des Patriotes Congolais* (UPC) in Ituri and its military wing, *Les Forces Patriotiques pour la Liberation du Congo* (FPLC). At the time, Lubanga had been in Congolese custody for nearly a year awaiting trial by domestic courts in the DRC. He was apparently arrested by the Congolese authorities after the killing of nine UN peacekeepers in Ituri in February 2005.[73]

On 10 February 2006, the Prosecutor's application for a warrant to arrest Lubanga was granted by the Pre-trial Chamber I. The warrant concerned the recruitment and use of child soldiers by the FPLC, of which Lubanga was the leader. It is worth noting that, under the Rome Statute, in particular in its Articles 8(2)(b)(xxiv) and 8(2)(e)(vii), enlistment and conscription of child soldiers is war crime prosecutable in terms of Article. Thus, Lubanga was charged as a co-perpetrator, with three counts of war crimes pursuant to Article 35(3)(a) of the Rome Statute.[74] After a determination of admission by Pre-trial Chamber I, Lubanga was transferred to ICC custody in March 2006. Despite anticipation that the case would lead to a straightforward conviction, in June 2008, and prior to trial, the Pre-trial Chamber I stayed the proceedings against the accused because the Prosecutor had allegedly failed to disclose exculpatory evidence. On 2 July 2008, the ICC ordered Lubanga's release. A preliminary application by the Prosecutor to lift the stay of proceedings was rejected by the ICC Trial Chamber in early September 2008.[75] The trial in the *Lubanga* case commenced on 26 January 2009.[76]

Thus, the first trial ever at the ICC was marred by many procedural irregularities, especially on the part of the Prosecution Office. However, while it would be tragic to release a suspected war criminal like Lubanga because of a procedural error, it would represent a resounding declaration that the ICC was committed to

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73 Human Rights Watch (2006).

74 *ICC, The Prosecutor v Thomas Lubanga Dyilo, Documents Containing the Charges, Article 61(3)(a), (Public Redacted Version),* 28 August 2006.

75 ICC press release, 4 September 2008: "Trial Chamber I maintains stay of proceedings in the *Thomas Lubanga Dyilo* case".

76 ICC press release, 13 January 2009: "Confirmation of the beginning of the Lubanga Dyilo trial".

justice at all costs. Both the rights of the accused person and those of the victims and prosecution ought to be respected.

Besides Lubanga, there are other three Congolese indictees, namely Mathieu Ngudjolo Chui, Germain Katanga, and Bosco Ntaganda. The first two are now in ICC custody and are being prosecuted for allegedly directing attacks against 'Hema civilians' in Ituri in 2003. The ICC issued arrest warrants against Katanga and Ngudjolo in July 2007, and they are jointly facing four counts of crimes against humanity and nine counts of war crimes related to murder, sexual crimes, the use of child soldiers, rape, and other abuses. The case is still at pre-trial stage.[77] However, on 27 March 2009, Trial Chamber II set the commencement of the trial for 29 September 2009.[78]

With regard to Bosco Ntaganda, an unsealed arrest warrant was issued against him in April 2008. Ntaganda is facing three counts of war crimes related to the alleged recruitment and use of child soldiers in 2002 and 2003. Bosco Ntaganda was the former Deputy Chief of General Staff for Military Operations in Lubanga's FPLC, but he is currently the leader of the infamous *Congres National pour la Defence du Peuple* (CNDP).[79] Ntaganda remains at large and attempts to arrest him have been complicated by his involvement in peace negotiations with the DRC Government.

The Central Africa Republic situation: *The Prosecutor v Jean Pierre Bemba Gombo*[80]

The Government of the Central African Republic (CAR), a state party to the Rome Statute, referred the "situation of crimes within the jurisdiction of the ICC

77 *ICC, Combined Facts Sheets: Situation in DRC, Germain Katanga and Mathieu N Chui*, 27 June 2008.

78 ICC press release, 27 March 2009: "Situation: Democratic Republic of the Congo (DRC), Case: The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui", ICC–CPI–20090327–PR402.

79 The CNDP is a Tutsi-dominated rebel movement fighting in the eastern region of the DRC. It was founded and led by Laurent Nkunda, who was later toppled by Bosco Ntaganda. There are reports that the CNDP is remote-controlled, financed, equipped, and trained in and from Rwanda where Laurent Nkunda is currently held under house arrest. For some unknown reason, Rwanda has refused to extradite Nkunda to the DRC for possible prosecution.

80 ICC–01/05–01/08.

committed anywhere on CAR territory" to the Court's Prosecutor in January 2005.[81] The CAR situation concerns Jean-Pierre Bemba Gombo, a DRC national, and President and Commander-in-Chief of the *Mouvement de Libération du Congo* (MLC), who was arrested on 24 May 2008 by the Belgian authorities following the Court's warrant of arrest. He was surrendered and transferred to the ICC on 3 July 2008.

According to the Prosecution, Jean-Pierre Bemba Gombo is allegedly criminally responsible – jointly with another person or through other persons – for five counts of war crimes (rape, torture, committing outrages upon personal dignity, in particular humiliating and degrading treatment, pillaging a town or place, and murder) and three counts of crimes against humanity (rape, torture and murder), committed on the territory of the CAR from 25 October 2002 to 15 March 2003.[82] On 5 March 2009, Pre-trial Chamber III of the ICC adjourned the confirmation of charges against Bemba Gombo to allow the prosecution to amend the indictment.[83]

Bemba Gombo's prosecution by the ICC has been controversial in the DRC, where the MLC is now the largest opposition party. After the end of the Congolese civil war in 2003, the rebel movement transformed itself into a political party. In the 2006 presidential elections, Bemba Gombo came in second – with 42% of the vote – behind the incumbent President, Joseph Kabila. The MLC has rejected the outcome of the elections and accused President Kabila of electoral fraud. Bemba Gombo won a Senate seat in January 2007, but was forced into exile abroad in April after his relations with the President deteriorated. Thus, some observers see the prosecution of Bemba Gombo by the ICC as politically expeditious for President Kabila. The Prosecutor has vigorously denied that any political consideration played a role in the decision to pursue Bemba Gombo.[84]

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81 ICC Office of the Prosecutor, press release, 7 January 2005: "Prosecutor receives referral concerning Central Africa Republic".

82 Bemba Gombo's MLC, based in northern DRC, was invited into the CAR by the then President Ange-Felix Patasse to help quell a rebellion led by Francois Bozize. Bozize took power in a military coup in 2003 and is the current president of CAR.

83 ICC press release, ICC–CPI–20090305–PR 395, 5 March 2009.

84 Alexis (2008:27).

Conclusion

This paper has attempted to examine the role of international criminal justice in the protection of human rights on the African continent. In this regard, the ongoing and possible prosecutions of international crimes committed in Africa have been examined. There is no doubt that African national legal systems are inherently weak and, thus, not well-balanced enough to prosecute serious international crimes and grave breaches of international humanitarian law. To bridge this gap, and to fight the culture of impunity on the continent, ad-hoc international criminal tribunals were created by the UN, either through a treaty or by the UN Security Council acting under Chapter VII of the UN Charter.

This paper has looked at the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, their respective mandates, jurisdictions, and achievements. Since these two judicial institutions are ad hoc and will, therefore, soon close their doors, the creation of a permanent ICC came at the right time.

The paper also discussed all African cases pending and/or likely to be brought before the ICC.

True, the contributions by the two ad-hoc international criminal tribunals vis-à-vis the development of international criminal law have been tangible and significant. Through their jurisprudence, the SCSL and the ICTR (and, of course, its sister institution, the International Criminal Tribunal for the former Yugoslavia) have developed a very sophisticated body of law in which the definitions and scope of war crimes, crimes against humanity and genocide have been explored, as have the various forms of participation and liability, the available excuses and defences, procedural matters, issues pertaining to the rights of the accused, and relevant considerations in regard to sentencing. There can be no doubt that the case law developed by these tribunals will serve as a guide to the newly established permanent ICC. Already, the legal principles and norms developed by the UN ad-hoc criminal tribunals are very influential in the work of the so-called hybrid courts established by the UN in Cambodia, East Timor and Kosovo. More importantly, there is increasing evidence that national courts, including those in Africa, are relying on the case law of the international tribunals.[85]

[85] On the legacy of ad-hoc international criminal tribunals, see Schabas (2006a:44–46).

In regard to the ongoing and/or likely prosecutions at the ICC, it is clear that the African continent has been given the lion's share. Many observers have praised the ICC's investigations and prosecutions in Africa as a crucial step against widespread impunity on the continent. Nevertheless, the Court's actions have provoked debates and criticism over its potential impact, its perceived prioritisation of Africa over other regions, its selection of cases, and the effect of international prosecutions on peace processes. Thus, critics have accused the ICC of jeopardising the settlement of long-running civil wars in the pursuit of an often 'abstract justice'. In the same context, the ICC's investigations in sub-Saharan Africa have stirred concerns over African sovereignty. For instance, some commentators have alleged that the ICC Prosecutor has limited his investigations and prosecutions to Africa because of geopolitical pressure, or as a tool of Western foreign policy. Particularly, the issuance of arrest warrant against Sudanese President Bashir has drawn rebuke from both African governments and regional organisations.

On the other hand, supporters of the Court's actions have pointed out that domestic legal systems in Africa are not sufficiently balanced or prepared to deal with the prosecution of international crimes, i.e. they are either unable or unwilling to do so. It follows, therefore, that the ICC needs to step in under the principle of complementarity.[86]

Undoubtedly, the prosecution of the most serious crimes committed in Africa contributes to the protection and promotion of human rights on the continent. African leaders (political or military) who commit massive violations of human rights and grave breaches of international humanitarian law are no longer immune from prosecution as international criminal law has done away with the principle of sovereign immunity in respect of international crimes. International prosecutions will serve as a deterrent element, and thus contribute to the eradication of the rampant culture of impunity in Africa.

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[86] Alexis (2008:27).

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SECTION III

The African Union
and the regional protection of human rights