



# Oxford Transitional Justice Research

Debating International Justice  
in Africa

OTJR Collected Essays, 2008–2010

The Foundation for Law, Justice and Society  
in collaboration with  
The Centre for Socio-Legal Studies,  
University of Oxford

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# Introduction

The June 2010 review conference of the International Criminal Court (ICC) in Kampala marks the end of the ICC's beginning and a critical time to evaluate the history and future of international justice in Africa. Since the ICC Prosecutor's request to indict Sudanese President Omar al-Bashir in July 2008, Oxford Transitional Justice Research (OTJR) has hosted four series of online essays and interviews, exploring various issues concerning Africa's encounters with international justice.<sup>1</sup> This collection assembles nearly 60 of those essays – arranged thematically rather than chronologically – to show the breadth and depth of the debates generated by the ICC and other international justice institutions in Africa, including the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

Drawing together academic and practitioner contributors from Africa and beyond, this collection highlights the challenges that international justice has faced in addressing atrocities in Africa. The ICC and other institutions have confronted numerous obstacles, including delivering justice in the midst of destabilising national elections and ongoing conflict; these institutions' reliance on cooperation with domestic governments which are themselves frequently responsible for crimes against civilians; and Africa's long history of colonisation and often fraught engagement with external actors. The purpose of this collection is to explore these issues in order to encourage grounded, nuanced and critical debates at the ICC review conference and thereafter.

The first section in this volume, entitled, "Looking to Kampala: The Challenges of International Justice in Africa", explores some of the most pressing issues that the authors believe must be debated during the review conference. In particular, several authors express concerns over the politics of international justice in Africa and the tendency of external judicial actors to pursue accountability for rebel leaders and other non-state actors while inadvertently propping up criminal governments. The authors in this section

also wrestle with questions of the impact of international justice institutions on domestic peace, stability, democracy and reconciliation – and diverge greatly in their analyses of these themes.

The second section, "Darfur, Bashir and the International Criminal Court", focuses on the ICC's highly charged operations in Sudan and principally the pursuit of Bashir, the Court's highest ranking suspect to date. The authors in this section concur that the Bashir indictment represents a watershed for the ICC in terms of refining interpretations of the Rome Statute and shaping the Court's relations with the UN Security Council and the African Union. However, several authors disagree on the legality and impact of the indictment and the specific charges brought against Bashir. There is also sharp divergence on the question of the ICC's impact on fragile peace processes in Darfur and Southern Sudan.

In the third section, "The Politics of Violence and Accountability in Kenya", the authors again use the ICC's engagement in a single situation country to explore wider questions regarding the Court and international justice generally. Especially pressing for these authors are the ICC's effects on Kenya's delicate coalition politics following the post-election violence in 2007; the question of whether proposed domestic accountability institutions should bar the ICC's involvement in Kenya on complementarity grounds; and the broader institutional reforms necessary to address Kenya's endemic corruption and deep societal inequalities.

Fourth, the "Justice and Reconciliation in Zimbabwe" section also addresses the tensions inherent in considering transitional justice in the midst of contested elections and subsequent power-sharing arrangements. The authors agree that the form of political transition enacted in any country inevitably shapes whether and how it decides to implement accountability and reconciliation measures. In the case of Zimbabwe, the authors agree that ZANU-PF's

dominance of the coalition government ensures that transitional justice processes will not be implemented any time soon. However, they disagree over whether, in the current climate, continued calls for accountability for human rights violators will destabilise an already volatile political arrangement or pave the way for meaningful societal transition in Zimbabwe.

The collection closes with a series of interviews with prominent academics and practitioners conducted by Julie Veroff and Zachary Manfredi, the coordinators of OTJR's "ICC Observers" project.<sup>2</sup> Like the previous sections, these interviews explore the legal, political and social impact of international justice institutions on Africa and Africa's impact on these institutions. Crucially, nearly all of the interviewees highlight the limitations of these international mechanisms and the need for more robust and credible home-grown processes to deliver long-term accountability, stability and political reform.

Assembling nearly two years of critical debates, this collection explores the work of the ICC and other judicial processes at a crucial stage in the development of international justice in Africa. The ICC review conference provides an opportunity to identify the successes and shortcomings of these processes

and to lay the foundation for more effective approaches in the future. The debates in this volume highlight that there is major disagreement over the performance and legacies of international justice institutions in Africa. They also underscore that many of the dichotomous debates of recent years – "international" versus "local" justice, justice versus peace, law versus politics – have shrouded the nuances of international attempts to address African crimes and conflicts. The purpose of this collection is to deepen discussions of these issues and to provoke new questions about the past and future directions of international justice in Africa.

#### **Phil Clark**

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1 All OTJR working papers can be found at: <http://www.csls.ox.ac.uk/otjr.php?show=workingpapers>. OTJR hosted a series of essays on "The Politics of Violence and Accountability in Kenya" in collaboration with Moi University (Eldoret) and Pambazuka News and a series on "International Justice in Africa" with the International Center for Transitional Justice-Africa and the Darfur Consortium. Both of these series were also published on the Royal African Society's and Social Science Research Council's "African Arguments" website: <http://africanarguments.org/>.

2 For full details of the "ICC Observers" project, see: <http://iccobservers.org/>.

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# Looking to Kampala: The Challenges of International Justice in Africa

## The Standoff between the ICC and African Leaders: The Debate Revisited

Emmanuel Saffa Abdulai

10 March 2010

On 3 July 2009, at the 13th African Union (AU) summit of Heads of State in Sirte, Libya, African leaders resolved to “denounce the International Criminal Court (ICC) and refuse to take action on the Court’s order that should Sudan’s President Omar al-Bashir land in their territories, he should be arrested, and extradited for prosecution by the ICC, for crimes against humanity, allegedly committed in the Darfur region of southern Sudan.”

This essay argues that despite the fact that African leaders have subscribed to the ICC Treaty, emerging developments show that African leaders have resorted to protecting themselves, implicitly sanctioning human rights violations. As a result, they continue to spread a protective umbrella over their peers such as Bashir, even when there exists strong evidence of genocide in the Darfur region, and mass displacements continue unabated.<sup>1</sup> It is important to note that in 2000 the leaders in the Organization of African Unity (OAU) created the African Union (AU) with the coming into effect of its Constitutive Act. The new institution showed determination to embark on reform. The Mechanism for Conflict Prevention, Management and Resolution under the OAU was changed to the Peace and Security Council (PSC), as a “standing decision-marking organ for the prevention, management and resolution of conflicts.”<sup>2</sup> The PSC enshrines “the rights...to intervene in a Member State pursuant to a decision of the Assembly”<sup>3</sup> in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 14 (h) of the Constitutive Act.”<sup>4</sup> The AU also established a standby force.<sup>5</sup> Among the functions of the Standby Force is to intervene in countries where there is a “grave circumstance”, at the request of a member

state, to restore peace and security.<sup>6</sup> Additionally, the force can provide humanitarian assistance to civilians suffering in conflict situations and in natural disasters.<sup>7</sup> Upon the coming into force of the ICC, African leaders endorsed it, ascribing in their majority by having thirty signatories, and by signing the Dakar Declaration.<sup>8</sup> These developments solidified the AU’s move away from the doctrine of non-intervention in the territorial integrity of each other’s countries. They were hailed by human rights activists all over Africa and seen as recognition of the real threat posed by inaction which creates regional insecurity in Africa.

There was hope that African countries would take the lead in intervening to end brutal ethnic and political suppression and civil wars by African leaders. The AU resolved that it would “take rights seriously”, in line with the emerging norm of “humanity first”; and replacing “the culture of impunity with the culture of accountability....”<sup>9</sup> This transformation was supposed to send a strong signal that African leaders could no longer hide behind the principles of state sovereignty and non-intervention to oppress their own people.

So, why should the same leaders of Africa who only a few years earlier had shown such resolve to end mass murder, genocide, and heinous crimes within African countries now band together to defend one of their own kind? Is it because they see the ICC as a non-African institution designed to prosecute mainly Africans?

One reason may be that the prosecution of former Liberian President Charles Taylor and the indictment by the ICC of the Sudanese President illustrate the beginning of a trend against which they must unite. Consequently, African leaders have argued that the Sudanese indictment was mis-timed because the plight of the people of Darfur would worsen with reprisals from Bashir-supported militia. This argument acknowledges that crimes against humanity were

underway in Darfur, but those crimes against the hapless people are swept under the carpet, and rationalized according to the outdated doctrine of territorial integrity and sovereignty concerns. The argument does not hold water, of course. For if the Sudanese president were arrested and prosecuted, it would send a message to whoever would succeed him, and in turn that person would be unlikely to wreak vengeance on the Southern Sudanese people. For instance, lessons learned from the indictment of Charles Taylor have seen the West African sub region become relatively quiet in terms of heinous crimes committed by leaders against innocent civilians. Even as recent events in Guinea-Conakry raised concerns, reference to mechanisms that are geared to stamping out impunity such as the Special Court for Sierra Leone and the ICC quickly saw the quelling of what would have otherwise become a clampdown on civil society and a full blown crisis.

Now, African leaders are calling for a negotiated settlement to the almost endless conflict in Darfur. In doing so, they are displaying insensitivity to the enormous suffering of ordinary people who, even in the best of times, are periodically murdered, and frequently displaced into fetid refugee camps, with little or no access to health care, or food. Justice has been slaughtered on the altar of international diplomacy. In my view, African leaders refer to "negotiations" merely to buy themselves time, so that their fellow Head of State in Sudan will be strengthened. With time, they hope the ICC net will be broken, and they will thwart its wide sweep that might catch them when they suppress their own people and govern outside the dictates of the rule of law.

African leaders appear repulsed by what they perceive as the ICC treating them as if they were still colonies of Europe. They appear united against the ICC to protect their dignity as nations, and, with a not too subtle revulsion against what they consider to be a biased stance of the ICC. In taking up this position, African leaders have apparently forgotten that "individual state sovereignty can be overridden whenever the behaviour of the state even within its own territory threatens the existence of the

elementary human rights abroad and whenever the protection of the basic human rights of its citizens can be assured only from the outside."<sup>10</sup> The era of individual sovereign discretion on how to treat civilians in a given country is gone and what operates now in the international arena is an imperative to protect human rights. This imperative enshrines the responsibility of the international community to protect vulnerable groups in conflicts if the states in question fail to do so. Hence, African leaders have individual and collective responsibility to ensure that rules of *jus cogens*, especially the rule on the prevention of genocide, are upheld.<sup>11</sup>

If African leaders have legitimate concerns over an affront to the dignity of African nations, they have other options like the platform they created many years ago, namely the Ezulwini Consensus, which resolved that the United Nations Security Council should be reformed, including expanding its membership.<sup>12</sup> But one of those options must never be to undermine the international global justice mechanisms which stand on universal principles of justice and which cannot be particularized to one group of people. There is no "African Justice" or "European Justice" or "Asian Justice" – there is "Universal Justice" which must abhor not only international economic injustice, but must be uncompromising against all forms of crimes against humanity. What the leaders of the continent should do is to table an alternative mechanism to the ICC that will uphold the prevention of war crimes, crimes against humanity and genocide. Or if the AU can build up a case of injustice, even racism, against the ICC then they have the option of the platform of the Ezulwini Consensus. African representation in the Security Council could lay to rest some of the cries of injustice in the international justice system today, of which the ICC's indictment of the Sudanese president is seen as a manifestation.

With the present stance, indisputably, Africa is reverting to a past where African leaders have colluded to slaughter their kinsmen with impunity. The AU appeared to have escaped from its murky depths after former Tanzanian President Julius Nyerere

derided it as “a trade union of the current Heads of States and Governments, with solidarity reflected in silence if not in open support for each other”. Now, in its position on the ICC’s decision to indict the Sudanese President, the AU has regressed to a position that allows gross violations of human rights within each other’s countries.

1. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, The executive summary surmises that two elements of genocide can be deduced from the gross violation of human rights. See page 4.
2. Nsongurua J. Udombana, “When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan,” *Human Rights Quarterly* 27 (2005), pp.154-55. Also see Nsongurua Udombana, “Pay Back Time in Sudan? Darfur in the International Criminal Court,” *Tulsa Journal of Comparative & International Law* 13 no. 1 (2006), 2.
3. Nsongurua J. Udombana, *When Neutrality is a Sin The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan*, 1151, (2005).
4. The Assembly of Heads of States and Government of the African is called “The Assembly” and is the highest decision making body in the AU, which composed of heads of states or governments or representatives of governments.
5. PSC Protocol, art. 13 (1).
6. Udombana, quoting PSC Protocol 13 (2).
7. PSC Protocol, Article 13 (3) (c).
8. Ibid Art. 13 (3) (f).
9. The African Commission on Human and Peoples’ Rights (“the Commission”) in collaboration with the African Society of International and Comparative Law and Interights organised a seminar on the right to fair trial from 9-11 September 1999 in Dakar, Senegal.
10. Michael J. Smith, Humanitarian Intervention, An overview of the Ethical Issues (1998), *Ethics & International Affairs*, 12, p.77.
11. Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951. Article 1.
12. The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus” Ext/EX.CL/2 (VII)

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## Understanding Africa’s Position on the International Criminal Court

Comfort Ero

10 March 2010

### INTRODUCTION

Much of the debate around the International Criminal Court’s (ICC) relationship with Africa has tended to focus on the case of Sudan’s Darfur region and the Court’s decision to issue an arrest warrant for the country’s President, Omar al-Bashir. At the July 2009 African Union (AU) Assembly of Heads of States and Government summit in Libya, Libyan President Muammar al-Gaddafi rallied his counterparts to sign onto what became known as the “Sirte decision”, in which AU states resolved not to cooperate with the ICC.

As a matter of international law, the Sirte decision was hollow. But as a political decision, it was clear: international justice on the continent is now at a major crossroads. This should not be misconstrued, however, as the continent being against the ICC. In fact, it is important to note at the outset that the tensions between the ICC and African governments often disguise an important underlying fact: Africa’s states are divided about the role that international justice should play in contributing to the continent’s fight against impunity for mass crimes.

Africa comprises fifty-three states whose views on the ICC’s role are more varied and complex than is often imagined. This was evident in Sirte where some states (e.g. Botswana) had a different view from others (e.g. Rwanda and Libya) on the ICC’s role in Sudan. African states, like others, approach international relations, including international justice, based on their individual interests. Their postures towards the ICC are not homogenous. Each African case before the ICC is premised on varying circumstances and reasons, and so the ICC’s relationships with individual African countries also vary. Yet, the Sirte decision also demonstrated that Africa’s leaders are becoming bolder and more vocal in their criticism and rejection of the ICC’s actions. What does this mean for the ICC’s role in Africa?

### AWKWARD BUT VARIED RELATIONSHIPS

If judging only by the Sudan case, one would be forgiven for believing that the AU backlash against the Court renders its fate in Africa precarious. One could also argue that the initial backlash at Sirte is blowing over in the absence of a unified position on how to respond to the Court. A fairer assessment of the continent's relationship with the ICC is that it is awkward.

On one hand, the relationship is based on the aspiration that Africa should never again witness the horrors of genocide or apartheid, and should therefore support the design of mechanisms to prevent such heinous crimes. On the other hand, states remain undecided about the types of interventions necessary to prevent such crimes, especially if such interventions originate externally. This ambivalence is shown by the fact that of Africa's fifty-three states, thirty have signed the Rome Statute – but only three (Senegal, South Africa and Kenya) have enacted legislation to incorporate the Statute's provisions into domestic law.

Further evidence of African governments' uneven posture is that three African states – Uganda, Democratic Republic of Congo (DRC) and the Central African Republic (CAR) – voluntarily referred their country situations to the ICC for investigation and prosecution. This point is often used by those who argue that the Court is not out to target Africa's leaders. The important fact here is not that three African countries referred cases to the Court, but rather leaders in two countries, Uganda and DRC, used it as an additional tool against their adversaries. Another important issue is that leaders are far less willing to cooperate with the Court if the spotlight is turned on them or their acts.

### WORSENING DIFFICULTIES: THE AU'S SUDAN CONCERNS

Some African state parties to the ICC have become sceptical of the ICC because of the arrest warrant against al-Bashir. While they have not openly supported some of the vociferous attacks against the ICC, states considered ICC proponents such as South Africa and

Senegal have expressed reservations about the arrest warrant, arguing that it shows the Court's lack of political insensitivity and poor judgement. President Abdoulaye Wade of Senegal, head of the first African state to ratify the Rome Statute, voiced his frustration by saying that the Court "only tries Africans".<sup>1</sup>

The AU says it remains committed to the fight against impunity and cites its Constitutive Act – which gives the AU the right to intervene to protect citizens against genocide, war crimes, and crimes against humanity – as evidence. It also states that its frustration is limited only to the Sudanese case and not to ICC interventions in Uganda, the DRC and CAR (situations of State referral), and Kenya, where the Prosecutor has applied on his own initiative to open an investigation against the alleged perpetrators of post-election violence.<sup>2</sup> So what are the AU's objections to the ICC in Sudan?

First, it is concerned about the timing of the ICC's arrest warrant against a sitting head of state in a conflict country.<sup>3</sup> It argues that securing peace should be the first priority and that with time justice will always reach those who have committed crimes. One cannot dismiss the AU's concern that the execution of an arrest warrant without a carefully managed transition could lead to further instability in Sudan and its nine neighbouring countries. But this argument is a variation of the numerous excuses for inaction that inevitably accompany justice measures against a head of state.

Second, the AU questions whether the Rome Statute should be binding on non-State parties (the contentious Article 98 on cooperation with respect to waiver of immunity and consent to surrender).<sup>4</sup> The question is a complex one and as yet, there remain some doubts among States as to whether the arrest warrant against President al-Bashir can be enforced in either State Parties or non-State Parties.

Third, the AU is disappointed with the UN Security Council's "refusal" to acknowledge its request for a deferral under Article 16 of the Statute which grants power to the Council to defer cases for one year.<sup>5</sup> Related to this is the fact that only two of the

permanent five members of the Security Council – Britain and France – are signatories to the Statute, while the United States, Russia and Africa's newest friend China have yet to ratify the Statute.

Finally, the AU criticises the major imbalance in the international arena in responding to justice. One cannot dismiss the AU's criticism about Western hypocrisy and double standards especially in the aftermath of the Iraq and Afghanistan wars, as well as the serious violations of international law by the United States – particularly the universal prohibition against torture – in the context of the post 9/11 war on terror.

The fact that international justice is powerless to bring action against powerful nations like the United States strengthens perceptions that international justice is selectively pursued against weak states such as in Africa – and feeds accusations that the Court represents a new form of neo-colonialism or judicial imperialism.

#### **AVOIDING AFRICAN EXCEPTIONALISM**

The AU's concerns should not be dismissed, but the decision of member states in July not to cooperate with the ICC sent the wrong message to perpetrator governments and their allies. The South African government's decision to distance itself from this position, after the urging of South African civil society organisations and prominent dignitaries, was a welcome move. The impact of the Sirte decision on the future of international justice remains to be seen, but it is part of a trend by African leaders to seek ways to avoid accountability. Instead, they assert that Africa has its own brand of justice that espouses reconciliation over sanctions or punishment. It is unmeritorious and discriminatory to claim that African victims do not deserve to seek criminal accountability for serious international crimes with standing equal to those of other victims of grave abuse.

#### **WELCOME RELIEF: THE WORK OF THE AFRICAN UNION PANEL ON DARFUR**

The report of the AU High-Level Panel on Darfur, however, is a welcome relief because a group of

African leaders have not shied away from recommending accountability measures. Headed by former South African President Thabo Mbeki, the Panel was mandated by the AU Peace and Security Council (PSC) in July 2008 to examine the situation in Sudan and submit recommendations on an effective and comprehensive means to address accountability, reconciliation and healing. It began its work in March 2009 and submitted its report to the PSC in October 2009. It recommends balancing the need for justice, peace and reconciliation by establishing a hybrid court composed of Sudanese and non-Sudanese judges and legal experts; the introduction of legislation to remove all immunities of state actors suspected of committing crimes in Darfur; and a 'Truth, Justice and Reconciliation Commission'.

On the ICC, the Panel diplomatically avoids taking a position. Rather, it provides carefully crafted language by drawing attention to the fact that the ICC can deal with only a limited caseload. It appears to offer an avenue to seek an Article 16 referral from the Security Council if a credible hybrid court is established. At the same time, it asserts the Court's independence on the question of complementarity by making it clear that it is for the Court's judges to decide whether the Sudanese government has made genuine efforts to deal with crimes in Darfur (Articles 17 and 19 on admissibility).<sup>6</sup> President Mbeki's recommendations may reach farther than the ICC if they are allowed to work, but there is a real possibility that they will be blocked by the Sudanese government.

#### **THE ICC REVIEW MEETING: A MEANS TO ADDRESS CONCERNS?**

I began this essay by stating that, while the relations between the AU and ICC were more polarised over the question of President al-Bashir, this should not be misconstrued as a continental backlash against the Court. Despite some real tensions and differences in approach between the AU and the ICC, they do not hold competing views on dealing with impunity. Indeed, as noted, the AU's Constitutive Act still remains a vital document that binds, if sometimes loosely, its member states to the need to deal with mass violations of human rights similar to the ICC.

I also noted at the outset that there is no overriding consensus among African states on how to relate to the ICC except in the case of al-Bashir. But even in the al-Bashir case, African states have not taken unified action. At the meeting of the Assembly of State Parties (ASP) to the Rome Statute in November 2009, there was no concerted African effort to address the recommendations emanating from the AU ministerial meeting held shortly beforehand in Addis Ababa.<sup>7</sup> (notably the amendment to Article 16 to grant the UN General Assembly power to defer cases if the Security Council fails to take a decision within a specified time frame and clarity on whether immunities enjoyed by officials of non State Parties under international law have been removed by the Rome Statute or not). Indeed, the AU Assembly of Heads of State expressed frustration that, with the exception of South Africa, none of the other African state parties to the Rome Statute supported the AU position.<sup>8</sup>

These AU recommendations were not approved for consideration at the ICC's upcoming 2010 Review Conference. It was agreed by ASP members that the AU's concerns should be considered at the working group level.<sup>9</sup> An important decision, however, was the ASP's approval of an ICC Liaison office in Addis Ababa. The decision not to give way on Articles 16, 27 and 98 might be perceived as a loss for Africa's continental organisation. The ASP's decision, however, to dedicate two days to substantive discussions to a "stocktaking exercise" at the Kampala Review Conference does give African governments an opportunity to address a range of issues to enhance the Court. The two days will focus on a range of issues of concern to the continent. They include four themes: complementarity between the ICC and domestic judicial systems, cooperation, the impact on affected communities, and the interaction between peace and positive justice. South Africa is working jointly with the Danish Government on a paper on complementarity. It is important in the lead up to the Review Meeting that African state parties and the AU consider how to usefully ensure that their various concerns and views are also tabled at the stocktaking exercise.

## CONCLUSION

The standoff by the ICC and the AU often overshadows one fundamental fact: that the continent is home to landmark efforts to address impunity. Several African states have been at the forefront in dealing with impunity. But while we can cite many good examples, we cannot continue to defend states who fail to protect citizens. Instead, the AU must work more effectively to enforce accountability; it should translate its declarations on the fight against impunity into concrete actions that result in the protection of Africa's citizens. The Court's strongest supporters are in Africa for good reason – they lack confidence in domestic institutions to deliver justice. This fact must never be lost in the heat of the debate about the ICC's role in Africa.

1. Cited in Reed Brody, *"Playing it firm, fair and smart: the EU and the ICC's indictment of Bashir"*, European Union Institute for Security Studies Opinion Piece, March 2009, p. 1.
2. The Prosecutor is waiting for the Court's Pre-Trial Chamber to authorise his request before he can commence investigations.
3. See the *Communiqué of the 142nd meeting of the African Union Peace and Security Council, 21 July 2008*, psc/min/comm(xlii). The AU has continued to maintain this line.
4. At the AU ministerial meeting in November 2009, Africa State parties agreed that "there is need for clarity as to whether immunities enjoyed by officials of non state parties under international law have been removed by the Rome Statute or not". *Recommendations of the Ministerial Meeting on the Rome Statute of the International Criminal Court*, 6 November 2009, Min/ICC/Legal/Rpt.
5. See *Decision of the Second Meeting of State Parties to the Rome Statute of the International Criminal Court*, Assembly/AU/Draft/3 Dec (XIV). para. 8, p. 2. I
6. The Report of the African Union High-Level Panel on Darfur, Peace and Security Council, 207th Meeting at the Level of the Heads of State and Government, 29 October 2009, p. xvi, para. 249, p. 64 and para. 255, p.69.
7. Aside from recommendations on Article 16, 27 and 98, another relates to procedural issues, namely guidelines for the exercise of prosecutorial discretion by the ICC Prosecutor. See *Recommendations of the Ministerial Meeting on the Rome Statute of the International Criminal Court*.
8. *Second Meeting of State Parties to the Rome Statute of the International Criminal Court*, para. 4, p. 1.
9. The AU recommendation that the Prosecutor be asked to review its policies to consider promoting peace in deciding whether to open investigations and report to the ASP was agreed upon; however the wording was revised

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*This paper is adapted from a presentation made at the Wople Open Dialogue in Cape Town on 17 November 2009. I would like to thank my ICTJ colleagues for their comments: Mirna Adjami, Suliman Baldo, Olivier Kambala, Miranda Sissons and Marieke Wierda.*

## **Saving International Justice in Africa**

**Chidi Anselm Odinkalu**

*5 August 2009*

At the conclusion of its Summit in Sirte, Libya, on July 1, 2009, the Assembly of Heads of State and Governments of the African Union (AU) decided that "AU Member States shall not cooperate ... in the arrest and surrender of President Omar al-Bashir of The Sudan". In a press release issued two weeks later, on July 14, the organisation explained that this decision "bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to an harmonised approach to justice and peace, neither of which should be pursued at the expense of the other".

This AU resolution responds to the decision of the judges of the International Criminal Court (ICC) in March 2009 to issue a warrant for the arrest of Sudan's President, al-Bashir, in connection with alleged war crimes and crimes against humanity in Darfur, Western Sudan. The AU's decision has rightly been criticised on legal and policy grounds. The AU Summit is not the place to decide issues about the ICC because 23 of the 53 members of the AU have not yet accepted the ICC and this decision is capable of giving the unintended impression that the AU tolerates impunity for mass atrocities in Africa. What it does, however, is provide an opportunity to acknowledge and confront the many challenges currently facing international justice in Africa.

The greatest fears about the role that international justice is playing in Africa arise not from crimes behind us but in connection with a mass atrocity that some informed people foresee and all must work to prevent – a disintegration of Sudan into a regional killing field.

I was born a refugee into the Nigerian civil war in which an estimated two million were killed in 30 months. Most people in our continent are, like me, children of war, want, and deprivation caused mostly by bad government. Like the rest of the world, our

needs are basic. We desire a world in which our people, families and ourselves can harness our abilities in dignity, peace and justice under government that is for us not against us.

In most of our countries, these basic expectations of citizenship are illusory. This is why most of us supported the establishment of the International Criminal Court (ICC). For us, justice for mass atrocities is intimately personal. We believed the Court would help to end high level impunity for mass atrocities, enabling us to attain the best we are capable of. Yet a little over five years since the Court received its first case from Uganda in 2003, the initial optimism from Africa that greeted it has been replaced by hardened skepticism from traditional opponents and, most worryingly, by fear among victims and host communities uncertain whether the Court can help them.

The establishment of the ICC represented a major breakthrough in international diplomacy: the creation of a mutually respectful consensus around the compelling idea of bringing to account those who bear the greatest responsibility for the worst crimes known to humanity. But today mutual recrimination has replaced respectful dialogue, debates on the ICC often degenerate into epithets and supportive diplomacy is absent. Criticism of the Court, no matter how constructive, risks being denounced as endorsing impunity; support for it, no matter how reasonable, is easily branded imperialism or its agent.

Undoubtedly, the ICC has implacable enemies driven by desire for unaccountable power but there are also reasonable fears about how the Court's work could affect a precarious regional situation.

In authorising the arrest of Sudan's President al-Bashir, ICC judges agreed that he had a case to answer for his alleged role in war crimes and crimes against humanity committed in Darfur. But the execution of the warrant without an adequately managed transition could create a power vacuum in Khartoum, unleashing destabilising tremors beyond Sudan's borders.

Consequently, all nine countries that share a border with Sudan are on a war footing. Without a government for two decades, nearby Somalia is already a major destabilising factor in the region. Uganda's murderous Lord's Resistance Army, long supported by Khartoum and whose leaders are also wanted by the ICC, is re-grouping in vast ungoverned border territory between Sudan, Uganda and DRC. The 2005 'comprehensive' peace agreement (CPA) that ended Sudan's half century-long north-south war risks breakdown, while the Darfur crisis in western Sudan remains active.

These uncertainties drive an undisguised arms race in the region. If the CPA collapses, many fear a transnational atrocity site like none this region has known.

I recognise most of those who harbour these fears. They are neither pillaging presidents nor ravaging rebels. Like the child refugee I was a few decades ago, they are victims driven by neither Dollar nor Dinar; widowed refugees from their homesteads, unsure whether the next meal will come or whether they will be alive at the next dawn.

Victims now seem to be the people paying the highest cost for international justice. They suffer threats of death, exile, and other forms of persecution for their commitment to justice with little protection, assistance or acknowledgement from governments or international institutions. I have heard claims that those who express uncertainties about the work of the ICC in Africa may have been purchased by powerful enemies of justice. This makes victims seem expendable and discredits their well-founded fears as dubious. They are neither.

Most victims need reassurance that when the neighbourhood mass murderer arrives their only defence is not the promise of a warrant from a distant tribunal on thin resources. They are right in asking that the promise of justice should be accompanied by credible protection from reprisals. The ICC's friends must address this.



While the misbegotten duel between supposed imperialists and alleged impunity apologists persists, the deadly business of mass atrocities continues unchecked, its victims in Africa fret, and the credibility of the ICC suffers.

To overcome these difficulties, four things are needed. First, the ICC's resources must be improved to focus more on winning back the trust of victims through better outreach and effective protection. Thus, better co-ordination is needed between African governments, the ICC, the UN at its highest levels, governments and philanthropies. Next, the African Union must translate its rhetoric against impunity into a programme of action, showing that African lives matter and it will not issue a free pass to those – big or small – that violate Africans.

Third, principled multilateral diplomacy is needed to reassure both governments and victims that the Great Lakes countries will not be allowed to become a level killing field. In particular, the five permanent members of the Security Council should use their strategic heft to engage intensively with this looming crisis. Finally, we must re-establish mutual respect among people in the advocacy communities who sometimes disagree as to means but mostly agree as to ends.

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## **International Criminal Justice and Non-Western Cultures**

**Tim Kelsall**

*12 April 2010*

When signatories to the Rome Statute meet in Uganda later this year, one of the tasks confronting them will be to take stock of progress in international criminal justice (ICJ). ICJ has advanced in leaps and bounds over the past ten years, and yet a significant number of voices – activists, academics, statesmen – continue to debate its relevance to African conflict contexts. To date much of the discussion, emanating in particular from Uganda and the Sudan, has centred on the trade-offs between peace and justice, and on the distinction between restorative and retributive justice (see for example Allen 2006, 2008; Branch 2004; Huyse and Salter 2007; Baines 2007; Otim and Wierda 2008; Edozie 2009; Johnson 2009; Mamdani 2008). In this, my own brief contribution, I want to pick up this debate, but provide a different angle, drawing on research conducted at the Special Court for Sierra Leone. That Court, now entering its final stages, raised a number of questions about criminal justice and cultural dissonance, questions of a jurisprudential, procedural, and normative kind.

I turn first to jurisprudential matters. Although international criminal law strives to borrow from and legitimate itself via a plurality of legal systems, the fact remains that its basic doctrines are Western in origin. This can cause problems when the jurisprudence has a poor sociological fit with the non-Western societies to which it is applied. Take for instance the doctrine of 'superior responsibility', one of the modes of liability under which international criminal suspects are commonly tried. Although the case law on superior responsibility is increasingly sophisticated, and the doctrine has been applied with sensitivity and intelligence by some judges, it remains the case that it evolved in the context of well-drilled Western-style bureaucratic and military organisations, in which it made sense to think that a superior could be held responsible for the actions of his subordinates, no matter how far physically removed (Knoops 2007).

In Africa, however, well-drilled hierarchies of this nature are a rarity. Over the past forty years many African governments, armies and guerilla movements have found it tremendously difficult to create stable organisations, and authority relations tend to be informal and fluid instead (for introductions to a vast literature see Chabal and Daloz 1999; Clapham 1985; Jackson and Rosberg 1982; Médard 1982; Migdal 1988; Murphy 2007). This was certainly the case in Sierra Leone, where authority in at least one of the fighting factions – the Civil Defence Forces – was based on patron-client or neo-patrimonial ties, and was more akin to a ‘militarised social movement’ than a conventional army (Hoffman 2007; Kelsall 2009).

While it is not impossible that superiors in such networks should have the ‘material ability to prevent or punish’ the crimes of their subordinates, as the superior responsibility doctrine demands, it is much less likely than in a Western context. Nevertheless, some international prosecutors have sought, rather unthinkingly, to gain convictions under this doctrine even when the evidence for it was flimsy. This, in my opinion, has led to a waste of time and resources and, in the worst cases, some highly questionable judicial decisions (Kelsall 2009, 71-104). A related problem, although I lack space to address it here, is that the superior responsibility doctrine as currently conceived is ill-equipped to deal with the exercise of charismatic authority, which is rather more common in Africa than it is in the West (see for example Ellis 1995, 2001; Ellis and ter Haar 2004, 90-113). In Sierra Leone it played a part in the trial of Allieu Kondewa, alleged by the Prosecution to have authority over his subordinates by virtue of the ‘mystical powers’ he possessed, and it is arguable that it would also be significant were Joseph Kony ever brought to trial (Kelsall 2009, 105-145). The next issue I would like to raise is procedural. Just as most of the jurisprudence used in international criminal trials is Western in origin, so is the procedure. Legal anthropologists have long pointed to the more informal and inquisitorial style of African customary courts as compared with Western ones, especially in adversarial, common law contexts (Gibbs 1963; Gluckman 1964). It is difficult for most of us to

imagine how unnerving international trials must be for many African witnesses, who find themselves miles from home, in a courtroom of extraordinary grandeur, confronted with robed judges and lawyers who speak a foreign language, and who subject them to highly unusual communicative practices including frequently hostile cross-examination. It is no wonder that getting clear testimony in such circumstances has often proved difficult (Cryer 2007), a problem compounded in contexts, not uncommon in Africa, where secrecy is prized as a high social ideal, and in which there have developed a repertoire of dissembling rhetorical techniques (Ellis and ter Haar 2004, 70-89; Ferme 2001; Murphy 1980; Shaw 2000).

Things are made worse where local conceptions of space and time are at variance with Western coordinates, as they are in many rural African contexts, such as in Sierra Leone. Existing attempts to put witnesses at ease by concealing their identities, paying them allowances, and proofing them before testifying, create their own problems. In my analysis these communicative troubles, in addition to making trials slow, laborious, and expensive, can seriously call into question the quality of the evidence on which judicial decisions are based (Kelsall 2009, 171-224).

Finally, I turn to normative issues. While some of the crimes adumbrated under the Rome Statute are doubtless regarded abhorrent by all but the most deviant sub-cultural groups or individuals, the same cannot be said for all of them. The issue here turns on the relation between the international ‘community’ that makes international law – comprising activists, academics, statesmen and lawyers, at the pinnacle of which are the States Parties themselves – and the less cosmopolitan communities existing on their periphery. Take for instance the crime of enlisting children under a certain age (the age has varied over time) into an armed force. Anthropologists and historians have shown that the very conception of what it is to be a child varies cross-culturally, as do the expectations of what a ‘child’ can legitimately be expected or forced to do (Archard 1993; Boli-Bennett and Meyer 1978;

Hoffman 2003; James and James 2005; Rosen 2007). Such appeared to be the case in rural Sierra Leone where, in the case of the Civil Defence Forces, commanders enlisted and communities volunteered young fighters, apparently not knowing that this was a morally or legally wrong act. By prosecuting individuals for this crime, the Special Court arguably held those concerned to an alien standard of justice of which they knew nothing, *imposing* international norms and law on people, raised in a different culture, with contrasting moral ideas. Rather similar points could be made in respect of the crime of 'forced marriage' (Kelsall 2009, 146-170, 243-254).

To conclude, at the same time as the States Parties reflect on some of ICJ's recent achievements, they might also consider some of its difficulties, including those problems that are not prominent on the agenda but become apparent when we dig deep into international trials. These difficulties concern the appropriateness of international criminal jurisprudence, procedure, and norms to African and other non-Western contexts. Is it within the power of the States Parties to recommend a more sociologically attuned use of the existing jurisprudence? Can they, by addressing the entire ecology of the courtroom, make international criminal procedure as friendly and productive as possible for witnesses unfamiliar with a Western courtroom setting? And can they advise a more sensitive enforcement of those laws which, although regarded as universally abhorrent by the 'international community', have yet to penetrate the consciousness of communities on its fringe? In short, is a more genuinely international, multicultural type of justice attainable than the kind we have now?

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## The Limits of Prosecutions

Okechukwu Oko

10 March 2010

There exists in Africa a general agreement about the need for accountability, but a divergence exists as to how this could be pursued. Some countries use criminal prosecutions to address the aftermath of mass violence. Others prefer non-punitive mechanisms, like truth commissions and amnesty, as alternatives to criminal prosecutions. Some countries use truth commissions in combination with criminal trials to address the aftermath of human rights violations. Most recently, traditional methods of conflict resolution feature prominently in the anti-impunity arsenal of some African countries. It appears, however, that the preferred mechanism adopted by the international community to address impunity is criminal prosecution. Currently, investigations and prosecutions of serious crimes are taking place in post-conflict African societies before the ad hoc international tribunals in Rwanda, the Special Court for Sierra Leone and the International Criminal Court at The Hague.

I concede that prosecuting perpetrators of human rights violations is definitively a viable mechanism for combating impunity. In appropriate cases, the criminal process can be deployed to engineer compliance with the law and to deter would-be perpetrators of human rights violations. In this essay, however, I argue that the objectives of using criminal prosecution to reestablish social equilibrium and promote reconciliation, though laudable and rhetorically inspiring, are simply unattainable. The hope that international criminal prosecutions will reconcile mutually distrustful ethnic groups with a long history of reciprocal antagonism is quaint, perhaps even naive. International criminal prosecutions launched in Africa amid much publicity and high expectations are on the verge of irrelevance. After more than ten years of international criminal prosecutions in Africa, it is becoming increasingly obvious that criminal prosecution is a weak reed on which to hoist the strategy of reestablishing social equilibrium and

reconciling intergroup hostilities in post-conflict African societies. A confluence of systemic and environmental factors has whittled down the influence of international criminal prosecutions in Africa.

First, efforts to use criminal prosecution to modify behaviour and contribute to social equilibrium rest on a failure to appreciate that causes of conflict in Africa cannot be resolved through the criminal process. The overarching goal of criminal prosecution is to apportion blame and punish the guilty. Criminal prosecutions are not designed to address or alleviate the underlying social problems that lead to and perpetuate violence. Violence may be more pronounced in some parts of Africa, but its causes remain mostly the same in virtually every African country: ethnic distrust, corruption, marginalization of ethnic groups and inequitable allocation of a nation's resources. The frequency, resilience and indeed the incentive to resort to violence will shrink by addressing the underlying causes of violence. These problems cannot be addressed comprehensively through the prosecution of selected perpetrators of human rights violations. The underlying culture that sustains social disequilibrium must be counteracted if accountability is to take roots in Africa.

Second, criminal prosecution is a poor vehicle for restoring social equilibrium in increasingly fragmented societies where violence is viewed as a legitimate means to attain desired objectives. In a fledgling democracy fractured along ethnic lines with a history of mutual ethnic hostilities, international criminal prosecutions may end up becoming an impetus for, not a deterrent to, extra-legal violent conduct. Some warlords have apocalyptic goals and readily resort to violence to mould the society according to their image. Faced with the threat of prosecution, and sensing their inability to negotiate with a determined world community, warlords with everything to lose may decide that it is in their best interest to fight till the end. Also, criminal trials can have adverse impacts on relationships. They can often involve accusations and counter accusations, rehashing of facts that

rekindle old hostilities and reigniting passions that ultimately make reconciliation difficult.

Third, the causes of violence in Africa are considerably different from causes of deviant behaviour elsewhere, and are therefore more difficult to address via criminal trials. The dynamics of violence in Africa challenge the expectations of a Western-type criminal justice system and raise serious questions about the assumptions that undergird criminal prosecution. Violence in Africa is the product of a different phenomenon; Rwanda, Sudan and Sierra Leone result not from deviant behaviour of citizens but from tensions at the armature of the society: ethnic distrust. Its dynamism is sustained by the belief that violence in defense of ethnic interests is a moral imperative, even a legal obligation. Decades of ethnic distrust and rivalries coupled with the central government's inability to deal fairly with the ethnic groups provide further impetus for the apocalyptic dynamism of violence. The traditional criminal process fails to address the broad range of ways in which situational cultural pressures exacerbate violence. Violence created by underlying social problems and perpetrated by several citizens with varying degrees of culpability cannot be addressed by criminal prosecution designed to address individual misconduct, especially in cases where the causes of deviant conduct reside not at the individual level but at the communal level. Moreover, whether international criminal prosecution actually serves as deterrence is unclear because its effect cannot be empirically verified.

Fourth, the effectiveness of international criminal prosecutions depends on support both from the public and state governments. In Africa, public support has been low because of negative attitudes of African leaders towards the West shaped by historical circumstances, especially the adverse effects of colonialism. Public support continues to dwindle because of prevailing attitudes which view international criminal tribunals as agents and symptoms of imperialism, and as attempts by the West to reestablish influence over Africa. The effectiveness of international criminal prosecutions

also depends on support from African governments which has been less than enthusiastic. African leaders are reluctant to support the prosecution of their benefactors, tribesmen or warlords who have the capacity to cause troubles for the fledgling government. Whether ad hoc or permanent, international criminal tribunals based on Western notions of justice, can do very little to reestablish social equilibrium and arrest the advancing decrepitude threatening to engulf Africa.

I acknowledge that international criminal prosecution can play significant roles in promoting accountability in Africa, so long as it is properly structured and undertaken with some sensitivity to the sentiments and feelings of Africans who live with the painful realities of violence. But, for all the above reasons, international criminal prosecutions have neither delivered on the promise of social equilibrium nor served as a chastening influence on impunity in Africa. Wholesale adoption of Western models of justice may not work in Africa given the prevailing social, political and cultural realities. Concerns for accountability offer no license for the international community to arrogate to itself the right to determine what is best for Africa. Imposing the preferences of the international community without due consultations with affected African nations will revive poignant painful memories of colonialism and reignite negative sentiments that will ultimately undermine efforts to promote accountability. I urge all those involved in the fight against impunity in Africa to rethink the deeply flawed assumptions about the capacity of international law to bring about transformative changes in the conduct of citizen and group relations in Africa. Violence is so interwoven with the maladies in the continent – corruption, poverty, ethnic tensions – that it is doubtful that criminal prosecutions alone can serve as a chastening influence on the behaviour of the leaders or the citizens trapped within the society. Building an effective strategy to reestablish social order in post-conflict African societies requires an understanding of the idiosyncratic environmental factors that animate violence, as well as recognition that criminal prosecutions cannot address the social pathologies

that have disfigured Africa. It is these pathologies that will define and shape Africa's future, not the legacy of criminal prosecutions.

It is my submission that a single-minded pursuit of criminal prosecutions as the panacea to impunity in Africa, regardless of the anguishing realities, carries the dangerous and unacceptably high risk of further deterioration, anarchy and bloodshed in Africa. It is important, therefore, to construct a strategy that can simultaneously promote accountability and address the social pathologies that undermine efforts to reestablish social equilibrium and reconciliation.

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## Note on State Policy and Crimes against Humanity

Larry May

10 March 2010

On 18 February 2010, the International Criminal Court's (ICC) Pre-Trial Chamber II issued a Decision Requesting Clarification and Additional Information in the *Situation in the Republic of Kenya*. Paragraph 12 states: "the Chamber notes that to meet the requirements of a crime against humanity under the Statute, the acts committed must, *inter alia*, be carried out 'pursuant to or in furtherance of a State or organizational policy' within the meaning of article 7(2)(a) of the Statute."

There is an ambiguity in article 7 of the ICC's Statute that is glossed over by the Pre-Trial Chamber II. Article 7(1) states:

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against a population...  
And then 7(2) states:

For the purpose of paragraph 1:

a) "Attack directed against a population" means a course of conduct involving the multiple commissions of acts referred to in paragraph 1 against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such an attack.

The ambiguity concerns whether the State policy requirement means the same thing for both the condition of "widespreadness" as well as for "systematicity," or whether different things are meant. An attack can be widespread without being based in a State or organizational policy, whereas it is very difficult to conceive an attack being systematic that was not based in a State or organizational policy.

For an attack on a population to be widespread it is conceptually sufficient that many people be affected.



In the pre-ICC debates about crimes against humanity it seemed that the “or” in “widespread or systematic” could be interpreted to mean that State policy was not required to prove a crime against humanity, since only in a systematic attack on a population was the State policy required, not in widespread attacks. The wording of the ICC Statute takes away that ambiguity. But it is replaced with a concern about what the “or” now means. If the Statute drafters wanted to eliminate the distinction between widespreadness due to State policy and systematicity due to State policy it would have been easy to do by substituting “and” for the “or” that was used in “widespread or systematic.”

The kind of State policy that is widespread but not systematic is not easy to conceptualize, but the language of the Statute as well as the history of how crimes against humanity have been defined calls for such a conceptualization. And this in turn suggests that there could be two different understandings of the requirement of State policy: one for widespread attacks and one for systematic attacks.

It might be that the State policy requirement of crimes against humanity that is associated with widespreadness is considerably easier to meet than that for systematicity. If there is police involvement or the involvement of various politicians, this might be sufficient in and of itself to establish the weak State involvement associated with widespread attacks, whereas such involvement by police or politicians would have to be linked to a specific policy of the State to satisfy the more stringent State involvement associated with systematic attacks. Yet, the Pre-Trial Chamber II Decision seems not to accept the weaker State policy requirement since it appears that evidence supporting this has already been offered by the Prosecutor and acknowledged but rejected as insufficient by the Chamber in paragraph 13 of the Decision.

There is a considerable amount at stake here since State policies do not often manifest themselves in ways other than the behaviour of politicians and police. Similar worries can be expressed about this issue as have been expressed about the debate about whether “or” or “and” should occur in the crimes

against humanity definition. As I have argued in my book, *Crimes Against Humanity: A Normative Account* (Cambridge University Press, 2005), it is generally preferable that the attack be shown to be both widespread and systematic, but such a requirement is extremely hard to meet, and so it might be advisable to allow some cases to go forward where only one of the conditions is proven.

It might be thought that this issue can be resolved by looking to Article 17 of the Statute of the ICC that has been interpreted to require an addition element, gravity. On 10 February 2006 the ICC’s Pre-Trial Chamber I issued a Decision on the Prosecutor’s Application for Warrants of Arrest in the *Situation in the Democratic Republic of Congo*. Paragraph 51 of that Decision states:

The Chamber considers that the additional gravity threshold provided for in Article 17(1)(d) of the Statute is intended to ensure that the Court initiates cases only against the most senior leaders suspected of being responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation. And paragraph 51 suggests that this heightened gravity standard applies to both systematic and widespread crimes.

Yet, the issue that remains unresolved is whether the State policy requirement is always strong or sometimes weak. The gravity threshold concerns who should be prosecuted not the character of the larger crime that the defendant participated in. State leaders can participate in, and be prosecuted for, crimes that have both a strong and a weak State policy. Gravity seems to go to the type of defendant, not the type of crime.

Regardless of how one comes down on the interpretive questions addressed above, defendants and prosecutors are owed some clarity on exactly what the Pre-Trial Chambers will expect concerning the stringency of the State policy requirement for establishing crimes against humanity. It remains unclear how to understand the State policy



requirement given paragraphs 12 and 13 of the 2010 Pre-Trial Chamber II Decision.

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## **Inside the Minds of the ICC Judges: Will They Give Ocampo the Benefit of the Doubt in Kenya?**

**Lionel Nichols**

10 March 2010

On 26 November 2009, the International Criminal Court (ICC) Prosecutor, Luis Moreno-Ocampo, requested permission from Pre-Trial Chamber II to conduct formal investigations in Kenya, the first time he has sought to use his *proprio motu* powers to initiate an investigation. When the Pre-Trial Chamber reconvenes this week to consider the Prosecutor's request to conduct formal investigations in Kenya, it will have the opportunity to clarify a number of contentious issues of international criminal law, including the principle of complementarity, the gravity threshold, the meaning of "interests of justice" and the definition of "crimes against humanity." The Pre-Trial Chamber's forthcoming decision is likely to be one of the most significant in the Court's short history. After providing a brief background on the conflict in Kenya and describing the applicable procedure from the Rome Statute, this essay considers some of the issues likely to be occupying the minds of the three judges of the Pre-Trial Chamber.

### **BACKGROUND**

Following the disputed presidential and parliamentary elections in Kenya in 2007, the country experienced two months of brutal violence. According to the Commission of Inquiry on Post Election Violence (Waki Commission), 1,113 people were killed, many hundreds were raped, and 650,000 were left homeless. On 28 February 2008, a power-sharing government was formed; and on October 15, 2008, the Waki Commission report recommended that a Special Tribunal for Kenya be established to try those responsible for the post-electoral violence. It further stated that if the Grand Coalition Government failed to establish a Special Tribunal, a list of the names of suspected perpetrators would be forwarded to the ICC Prosecutor. Since no Special Tribunal was established, on 9 July 2009, Ocampo received the list. Four months later, Ocampo for the first time elected to use

his own powers under Article 15 of the Rome Statute to initiate proceedings *proprio motu*. On 18 February 2010, however, the Pre-Trial Chamber used its powers under Rule 50(4) and Regulation 28(1) to request clarification and additional information from the Prosecutor. The Prosecutor submitted the requested information on 3 March 2010, thereby inviting the Pre-Trial Chamber to provide some important guidance on the most fundamental aspects of the Rome Statute.

#### APPLICABLE PROCEDURE

Article 15(1) provides that the Prosecutor may initiate investigations *proprio motu* on crimes that fall within the jurisdiction of the Court. Article 15(3) provides that “if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected.” Once such a request has been made, the Pre-Trial Chamber shall, in accordance with Article 15(4), authorise the investigation if it is satisfied that there is a “reasonable basis to proceed with an investigation” and that the case “appears to fall within the jurisdiction of the Court.” Rule 48 of the Rules of Procedure and Evidence provides that in determining whether there is a reasonable basis to proceed with an investigation under Article 15(3), the Prosecutor is required to consider the matters set out in Article 53(1), namely:

- (a) Whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed;
- (b) Whether the case would be admissible under Article 17; and
- (c) Whether, taking into account the interests of victims and the gravity of the crime, it would be in the interests of justice to proceed with an investigation.

#### WITHIN THE JURISDICTION OF THE COURT

As the alleged crimes were committed on Kenyan territory more than two years after Kenya ratified the Rome Statute, the only issue to be determined in order to satisfy Article 12 is whether the alleged

crimes amounted to crimes against humanity. Article 7 defines “crimes against humanity” to mean the commission of one of the acts in the Article “when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.”

In *Bemba*, Pre-Trial Chamber III held that “widespread” referred to the “large-scale nature of the attack and the numbers of targeted persons.” According to the Waki Commission, the post-electoral violence lasted two months, occurred in six of Kenya’s eight provinces and resulted in deaths, displacement and rapes and sexual assaults. The Pre-Trial Chamber should therefore be satisfied that there was a “widespread” attack against a “civilian population.” The same Pre-Trial Chamber stated that “systematic” referred to the “organised nature of the acts of violence and the improbability of their random occurrence.” The Waki Commission identified several factors indicating that at least some of the post-electoral violence in Kenya was planned, including incitement to violence by politicians and business leaders, warnings sent to victims of the impending attacks, and the organised and orchestrated nature of the violence itself. It was therefore possible for the Pre-Trial Chamber to also conclude that the attacks were “systematic.”

In his initial Request for Authorisation, however, the Prosecutor elected not to name individual suspects or groups. This exemplified a divergence of interpretation between the Prosecutor and the Pre-Trial Chamber. The difference of opinion concerned the *mens rea* requirement for crimes against humanity. Article 7(2)(a) requires that the attack against a civilian population be “pursuant to or in furtherance of a State or organisational policy to commit such an attack.” The Prosecutor argues that the authorisation of an investigation pursuant to Article 15 “is not the opportunity to proceed with the identification of individual criminal liability.” (Request for Authorisation, para 102) Instead, the Prosecutor is asking the Pre-Trial Chamber to find that there is a reasonable basis for believing that *some* persons in Kenya committed crimes in furtherance of a State or organisational policy, even if the Prosecutor is

unwilling or unable to disclose *which persons in particular* may have had this mental element. For the Pre-Trial Chamber, the failure of the Prosecutor to identify those who are alleged to have been responsible is unsatisfactory. The judges were likely to have been influenced by the ICC's Explanatory Note on Elements of Crimes, which looks to the mental element of the *alleged perpetrator*. Further, the approach of other Pre-Trial Chambers has been to consider whether there were reasonable grounds for believing that the *alleged perpetrator* knew that the acts being committed were part of a widespread or systematic attack. (See, for example, Katanga; Chui; and Bemba). Consequently, so that it could decide whether there is a "reasonable basis" for believing that crimes against humanity have been committed, in its Request for Clarification, the Pre-Trial Chamber requested that further information be provided on the identity of the local leaders, businessmen and politicians alleged to have been responsible for the violence. On 3 March 2010, the Prosecutor provided the Pre-Trial Chamber with this information, stating in its response that "senior leaders from both PNU and ODM parties" are believed to have been responsible for the violence, before providing the names of 20 persons in a confidential annex. The Pre-Trial Chamber will now consider this list of 20 persons to determine whether there is a reasonable basis for believing that attacks were made "in furtherance of a State or organisational policy."

#### ADMISSIBILITY: UNDER ARTICLE 17

Assuming that the Pre-Trial Chamber finds that there is a reasonable basis for concluding that crimes against humanity have been committed, it must then consider whether the case would be admissible under Article 17. This essentially requires the Pre-Trial Chamber to consider two issues:

- (a) Whether the principle of complementarity has been satisfied; and
- (b) Whether the requirement of sufficient gravity has been satisfied.

#### (a) The Principle of Complementarity

Pre-Trial Chamber I, in *Lubanga*, stated that the principle of complementarity is the "first part of the admissibility test." Article 17(1)(a) provides that a case will be inadmissible where it is "being investigated by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."

In *Katanga*, the Appeals Chamber stated that "inaction on the part of a State having jurisdiction ... renders a case admissible before the Court." In his Request for Authorisation, the Prosecutor argued that the failure of the Grand Coalition Government to establish a Special Tribunal for Kenya amounted to inaction because it has resulted in no investigations or proceedings pending against those bearing the greatest responsibility for the crimes allegedly committed.

The Pre-Trial Chamber's first concern in relation to complementarity was revealed in its Request for Clarification where it requested the Prosecutor to provide further information on the specifics of the alleged incidents and the identity of the alleged perpetrators. The Pre-Trial Chamber appears to be of the view that it is not possible to identify whether alleged suspects have been investigated and prosecuted, without first knowing who those alleged suspects are. As mentioned above, this information was provided to the Pre-Trial Chamber on 3 March 2010.

Many other thoughts are now likely to occupy the Pre-Trial Chamber judges' minds. First, can it be said that a State is "willing" to prosecute when leaders of its government publicly support the trial of suspected perpetrators but then fails to establish the necessary implementing legislation? Second, how long should the ICC be expected to wait for domestic investigations and prosecutions to commence? Finally, in the absence of any prosecutions, does the existence of the Truth Justice and Reconciliation Commission, which begins its work later this year, make the Kenyan cases inadmissible under Article 17?

While it has been nearly 18 months since the Waki Commission recommended the establishment of a Special Tribunal, of concern to the Pre-Trial Chamber is that discussions on how to establish a Special Tribunal are likely to continue in Cabinet meetings. Indeed, it may well be that the very process of the Prosecutor initiating a *proprio motu* proceeding restarts the debate on the Special Tribunal. It is therefore possible that, following the decision of the Pre-Trial Chamber to authorise formal investigations, a Special Tribunal may be established, thereby rendering the Kenyan cases inadmissible before the ICC. The Pre-Trial Chamber may therefore be reluctant to authorise official investigations while domestic investigations and prosecutions remain a possibility.

**(b) The Principle of Sufficient Gravity**

Article 17(1)(d) provides that a case will be inadmissible where it is “not of sufficient gravity to justify further action by the Court.” The term “gravity” is not defined in the Rome Statute, nor in the Rules of Procedure and Evidence, but in Lubanga, the Pre-Trial Chamber held that “gravity” requires two factors to be considered:

- (1) whether the situation was “systematic” or “large-scale”; and
- (2) whether the situation caused “social alarm” in the “international community.”

This approach, however, was rejected by the Appeals Chamber in a decision delivered on 13 July 2006. Despite rejecting the approach of the Pre-Trial Chamber, however, the Appeals Chamber did not hand down an alternative test, thereby leaving some uncertainty over how Article 17(1)(d) should be interpreted. In his Request for Authorisation, the Prosecutor makes no submissions on how the term “gravity” should be interpreted, merely stating in paragraph 20 that “the gravity threshold established by the statute is reached.”

As deGuzman has argued, it may be necessary to distinguish between gravity in a relative sense and gravity in a threshold sense. The first involves the Court in comparing the situation and cases in

question with other situations and cases to ensure that those that are selected for prosecution are the “most grave”. By contrast, the latter involves the Court in measuring the situation and cases in question against some objective criteria to determine whether a particular threshold of gravity has been met. It would appear that the use of the word “sufficient” in Article 17(1)(d) suggests that the second test of gravity is the appropriate test to adopt at the admissibility stage. The Request for Authorisation provides the Pre-Trial Chamber with an opportunity to define the threshold that must be met, and the criteria that must be considered when deciding this question.

This raises many interesting questions for the Pre-Trial Chamber. First, to whom is the situation required to be grave – the affected population, the region, or the international community? Second, what factors are relevant in determining gravity – the crimes committed, the identity and rank of the perpetrator, the number of victims, the geographical scope, the temporal scope, or a combination of each? The Pre-Trial Chamber is likely to be conscious of the need to avoid adopting any sort of rigid test to determine “gravity”. While such a test would not be binding, it may create a persuasive authority that prevents the Court from hearing certain serious cases in the future.

**INTERESTS OF JUSTICE**

Once the Prosecutor has taken into account the gravity of the crime and the “interests of victims”, Article 53(1)(c) then states that the Prosecutor must consider whether there are “substantial reasons to believe that an investigation would not serve the interests of justice.” The Prosecutor is of the opinion that, where the other criteria in Article 53 have been satisfied, there is a presumption in favour of investigation. In other words, the Prosecutor believes that he is not required to establish that an investigation or prosecution is in the interests of justice, but rather he shall proceed with the investigation unless there are particular circumstances that provide substantial reasons why it is not in the interests of justice to do so.

As there is no real threat of ICC investigations further destabilising the region, it seems reasonable to assume the proceeding with investigations in Kenya would be in the interests of justice. The Request for Authorisation nevertheless provides the Pre-Trial Chamber with the opportunity to state whether its understanding of the provision is the same as the Prosecutor's.

#### **CONCLUSION – IS THERE A “REASONABLE BASIS” UPON WHICH TO PROCEED?**

Ultimately, the decision of the Pre-Trial Chamber in relation to each of these issues identified in this essay will be heavily influenced by how it chooses to define “reasonable basis.” The Rome Statute provides four different standards of certainty, depending on the issue under consideration. In descending order, these are:

- (1) Conviction of the accused where his guilt is “beyond a reasonable doubt” (Article 66(3));
- (2) Confirmation of charges against the accused where there are “substantial grounds” for believing he committed the crimes charged (Article 61(7));
- (3) Issue of a warrant against the accused where there are “reasonable grounds” for believing he committed the crimes charged (Article 58(1)); and
- (4) Initiation of an investigation where there is a “reasonable basis” for believing crimes were committed.

With the Prosecutor only being required at this stage of the proceedings to satisfy the lowest of these four standards of certainty, the Pre-Trial Chamber may have concerns over whether each of the elements of Article 53 are satisfied, but may nevertheless grant the Request for Authorisation, thereby providing the Prosecutor with the benefit of any doubt. Regardless of the Pre-Trial Chamber's conclusion, the reasoning in the decision may provide greater clarity on several crucial elements of the Rome Statute.

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## **The Contribution African States Can Make to the ICC Review Conference**

**Valentina Torricelli**

*10 March 2010*

In the short life of the International Criminal Court (ICC), the Review Conference of the Rome Statute scheduled to take place in Kampala from 31 May to 11 June 2010 represents an historic moment. Africa will not only host the Conference, but will also be central to the stocktaking exercise, as to date all of the situations investigated by the prosecutor involve African victims. This essay argues that African states should also seek to play an active role supporting the ICC during the months leading up to the Review Conference.

The support of African states for the ICC was crucial both during and after the Rome Diplomatic Conference in 1998, where delegates debated the wording of the ICC Statute. Three African states thereafter referred situations in their countries to the Court. The Minister of Justice of Kenya also invited the Prosecutor to use his powers under Article 15 to seek permission to investigate the crimes committed during the post-electoral violence in 2007. African states should therefore, as they did in Rome and subsequently, stand on the side of African victims, recognize that justice lays a firm foundation for lasting peace and act fully in support of the ICC. Initiatives that could harm the integrity of the Rome Statute such as considering the creation of a regional criminal court, might undermine the effectiveness of the ICC and its efforts to deliver justice to victims of the worst imaginable crimes in Africa and elsewhere.

Recently, the extent of African support for accountability rather than impunity has been clear. In July 2009 the African Union (AU) reiterated “the unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent”. The ministers participating in the session of the AU-EU Troika on 14 October 2009 “underlined their commitment to fighting impunity at the national, regional and international level in conformity with the

principles of international law". The communiqué issued on 3 February 2010 reemphasised the AU's "commitment to justice and its total rejection of impunity". Widespread African support for the ICC has recently been highlighted by an Institute for Security Studies briefing paper in October 2009, following extensive consultation with African civil society. A number of African states, including Botswana, Kenya, Senegal, and South Africa have stated that they would comply with their obligations under the Rome Statute to arrest and surrender anyone named in an ICC indictment, and Burkina Faso recently adopted legislation implementing the Rome Statute.

However, in many instances AU members have raised concerns that "the search for justice ... [should] be pursued in a manner not detrimental to the search for peace." The contention that justice must be sacrificed to ensure peace and reconciliation must be rejected. Sustainable peace is based on re-building a society in which individuals can live their lives free from fear; in which perpetrators know that impunity will not be tolerated; and in which victims can see the perpetrators brought to justice and be provided with protective measures and reparations. As UN Secretary-General Ban Ki-moon said in a speech delivered on the 60th anniversary of the Geneva Conventions, "the debate on how to 'reconcile' peace and justice or how to 'sequence' them has lasted more than a decade. Today, we have achieved a conceptual breakthrough: the debate is no longer between peace and justice but between peace and what kind of justice."

The Rome Statute is not perfect. It represents a delicate compromise, balancing many unrelated articles and provisions. However, at this early stage in the ICC's history, any attempt to make substantive changes would be very risky and could destabilize the architecture designed in Rome. We should therefore reject the recent submission by South Africa on behalf of the AU to amend Article 16 of the Rome Statute in order to allow the UN General Assembly to defer cases for one year when the Security Council had failed to take such decision within a specified deadline. Any proposal of this nature must be

opposed as it would allow the General Assembly to stand in the way of international justice.

Another set of concerns over recent reactions to the ICC in Africa regards the issue of immunities. Each state party to the Rome Statute has a legal obligation under Article 27 of the Statute to cooperate with the arrest and surrender of any person charged by the ICC, even if the accused is a head of state. However, the AU decision on 3 July 2009, calling upon states not to cooperate with the ICC in the Bashir case, could be misinterpreted as a sign that African states parties to the Rome Statute oppose the Court's work to bring to justice those responsible for committing the worst imaginable crimes against African victims.

Although an analysis of the proposal to give the African Court of Justice and Human Rights jurisdiction over crimes under international law such as genocide, crimes against humanity and war crimes goes beyond the scope of this essay, such a decision would comport a huge cost to the AU, distract the African Court from an effective pursuit of its mandate, and duplicate the work of the ICC, which already enjoys active contributions and widespread support among African states (30 out of the 110 states parties to the Rome Statute and 5 out of 18 ICC judges are African). Furthermore, the perception among African civil society seems to be that the proposal regarding the African Court has been put forward to score political points rather than address the need for justice and international accountability for crimes under international law committed in Africa.

AU member states that have ratified or signed the Rome Statute must now commence a constructive dialogue with the ICC, to promote greater understanding of its jurisdiction and role, and improve cooperation. In this light, the AU Assembly's encouragement to member states in its 3 July 2009 decision to improve state-to-state cooperation in the investigation and prosecution of crimes under international law should be greatly welcomed. Although there are a number of regional treaties providing for extradition and mutual legal assistance, there is no single international or regional treaty that

has effective extradition and mutual legal assistance provisions with regard to all crimes under international law. The members of the AU should begin consultations internally and with the ICC on how to take this proposal forward.

The stock-taking component of the Review Conference this year offers an unparalleled opportunity for states to assess how vigorously and effectively the ICC has been fulfilling its responsibility to investigate and prosecute crimes under international law committed against victims when their own states fail to do so. It also is an unparalleled opportunity for each state participating in the Review Conference to assess how well it has been fulfilling its own complementarity obligations to investigate and prosecute these crimes and then to rededicate itself to bringing those responsible to justice. In short, Africa needs to re-discover its enthusiasm for the ICC as a necessary part of a comprehensive, long-term global action plan to end impunity.

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## **What the ICC Review Conference Can't Fix**

**Adam Branch**

*15 March 2010*

At a meeting with Africanist scholars in London in 2007, Luis Moreno-Ocampo faced tough questioning over why the ICC had decided to pursue only the Lord's Resistance Army (LRA) and ignore the Ugandan government's alleged war crimes and crimes against humanity, particularly its devastating policy of mass forced displacement and internment. Finally, his patience apparently having run out, Ocampo interrupted one of his most insistent questioners and, pointing an accusatory finger, burst out: "If you want to support the LRA, fine! But you should know they are a criminal organization." This type of response – ad hominem attacks on those who question his actions – appears to be part of a wider pattern of behaviour on the part of the Prosecutor, charted most damningly by Alex de Waal and Julie Flint, and has done much to undermine the legitimacy of the ICC. This has led some ICC supporters to maintain that the Court's problems will be greatly ameliorated once a new Chief Prosecutor takes the reins. As much as I agree that Ocampo represents a major problem for the ICC, I also believe that focusing on his personal failings obscures the deeper, structural problems with the Court as it is constituted. These problems will not be solved by the appointment of a new Prosecutor, nor will the upcoming Review Conference in Kampala be able to address them. An honest assessment of these problems, I believe, should lead us to ask tough questions about the Court as an institution of global justice, particularly in terms of its work in Africa.

The first of these inherent problems stems from the fact that the ICC, like any international mechanism intended to promote or protect human rights, faces the impossible task of acting morally in a political world rent by power inequalities, domination, and violence. Thus, because it lacks a coercive capacity of its own, the ICC, in its quest for efficacy, must accommodate itself to political power, which it has done through two routes. First, the ICC has prosecuted only Africans. This decision has been a



function of international power relations which make Africa the only region weak enough so that Western intervention and experimentation can take place there without accountability, and unimportant enough so that the West will allow the ICC to act as its sub-contractor there in place of more direct forms of intervention. Second, the ICC has accommodated itself to political power *within* Africa – this is very clear in Uganda, where the ICC eagerly became an instrument of the Ugandan government's counterinsurgency so as to ensure Uganda's cooperation with its prosecution of the LRA. In doing so the ICC also further proves its willingness to cooperate with US military interests in the region.

The ICC and its supporters have had to respond to these accusations of politicization. They have done so – when not resorting to ad hominem attacks – through a rhetorical strategy of shifting back and forth between declarations of outright denial and invocations of pragmatic exigency, between denying that ICC decisions have anything to do with political considerations and instead derive from legal reasoning alone, and admitting that the ICC goes after accessible targets in order to ensure its own survival. The denial side of this rhetorical strategy is evident when ICC supporters contend that the Court's exclusive focus on Africa stems from the continent's being the site of the most cases of extreme violence which require international legal intervention, and from the fact that African states have voluntarily referred these cases to the ICC. Thus, the ICC's accommodation to political power is denied, the focus on Africa is cast as a purely legal decision, and the Court's prosecution of certain parties to the exclusion of others is explained through reference to an obscure calculus of the gravity of crime.

But that is a hard line to maintain when the ICC is pressed on its decision to get involved in violence in Guinea and not in Iraq, Afghanistan, or Israel, or on its decision to ignore mass violence against civilians in Somalia by Ethiopian and US forces, or to dismiss violence by the Ugandan government against its own or neighboring peoples. Faced with such evidence of the ICC's accommodation to power, the Court's

supporters tend to shift their argument from outright denial to an admission of the necessity of pragmatism on the ICC's part in order for it to get any cases tried, but justify that pragmatism on the basis that it will result in some justice being done, which is better than no justice at all.

This rhetorical strategy of alternation between denying that pragmatic considerations influence ICC decisions and admitting that the Court must conform to political exigencies in order to get anything done, between dismissing its critics with self-righteous declarations of the ICC's role as the instrument of global justice and dismissing its critics with the demand that *they* be realistic – this strategy must itself be dismissed. We need an honest assessment of the ICC's capacity to be an instrument of universal and impartial justice, a need that cannot be avoided, as some ICC supporters attempt to do, by translating the gap between the ICC's current – partial – practice and impartial justice into a temporal gap between the imperfect present and an inevitable future in which the ICC will overcome the political interests of weak and strong states alike. This untenable evolutionary narrative lacks empirical grounding, and those focused on bringing justice to the world they live in now cannot afford such an ill-conceived faith.

Instead, we need to throw light on the consequences that result from the ICC's very real need to abide by these strict political limitations in order to ensure its own efficacy and survival. For those who argue that some justice is better than no justice, the ICC's accommodation to power is not a bad thing but rather simply the constitutive condition for the partial but genuine justice of the ICC. In the same way, according to those espousing the evolutionary narrative, Allied victory in WWII provided the constitutive condition for the partial but genuine justice of the Nuremburg trials.

The argument that some justice is better than no justice, however, does not hold. First, from the perspective of the survivors of conflict, criminal prosecutions of one side and not the other can appear a travesty of justice instead of its partial

realization – “some justice” may not be justice at all. More generally, the problem is that the assertion that some justice is better than no justice proclaims legitimate *any* politicization of justice, *any* instrumentalization of legal institutions to political interests, however unjust those interests are. From this point of view, it simply does not matter that justice conforms completely to repressive, violent political power locally or globally; as long as cases are tried and “some justice” is done, everything is fine. This is problematic morally, but also very dangerous politically since it declares international justice available as a mantle to be draped at will over political interests by those with the power to do so. As a result, the doctrine that some justice is better than no justice can end up not only making justice conform unapologetically to power, but also making justice an unaccountable tool of further violence and injustice.

The second inherent problem is that the ICC and its supporters have defined “global justice” for Africa as a goal that is to be pursued exclusively through the ICC and other formal legal mechanisms, thus restricting those issues that can be addressed and those actors who can be held accountable. In monopolizing the discourse of global justice in Africa, the ICC has placed certain fundamental issues outside the scope of what can be defined as unjust and thus subject to challenge and contestation through the pursuit of global justice.

This becomes obvious in terms of the ICC’s subject matter jurisdiction: the forms of violence, repression, and inequality that can be challenged as “unjust” are restricted to the most spectacular forms of overt violence. Less spectacular forms of domination, repression, and violence – such as economic exploitation, Western sponsorship of violent and anti-democratic political forces, internationally enforced disparities in access to medicines, trade regimes that undermine development and food security – none of these can be challenged through the pursuit of global justice when global justice is defined by the ICC. Global justice is exclusively associated with punishing the “most serious crimes of concern to the international community as a whole,” conceived of as

mass atrocities, while those crimes that *serve* the interests of the “international community” are conveniently outside the ICC’s scope. Mass atrocity is naturalized as the most pressing form of global injustice, and its prevention and punishment are naturalized as the most pressing issue for the pursuit of global justice, trumping all other concerns.

Personal jurisdiction under the ICC is similarly restricted, focusing as it does on placing the entire blame for violence on a few particularly “savage” Africans – whether Omar al-Bashir or the LRA – by misrepresenting situations and reducing the wide set of actors and structures involved in violence to one or two individuals. By focusing on those (Africans) with “greatest responsibility,” the ICC simply ignores the criminal responsibility of Western states, donors, aid agencies, and corporations even in those episodes of violent atrocity that the Court is willing to investigate. And finally, the ICC’s limited temporal jurisdiction excludes centuries of injustice, an entire history of Western violence in Africa.

Now, if the ICC were conceived as simply a technical mechanism for use in specific circumstances, there would be less of a problem. The problem, however, results from the ICC’s effective monopolization of the language of global justice in Africa. Thus, there is a vast regime of institutions and organizations engaged in a massive pedagogical project trying to build support for the ICC as the exclusive arbiter of global justice. It is precisely through the ICC’s mechanisms for victims’ “participation” and “empowerment” that the Court restricts people’s concepts of injustice and justice to those provided by the ICC and thus to put entire forms of domination, violence, and inequality beyond the scope of justice. This pedagogical “empowering” project thus furthers the management of Africa in the service of Western political and economic domination *through* the very discourse of global justice. The irony is that the discourse of global justice is uniquely positioned to challenge those forms of Western domination and international inequality, and so the ICC ends up impoverishing what should be the radical and emancipatory language of global justice.

It seems clear that neither of these two inherent problems – the ICC's counterproductive accommodation to power and its impoverishment of the discourse and practice of global justice – can be dealt with through reform of the ICC's Statute, let alone through a new Chief Prosecutor. Instead, these are problems fundamental to the ICC as an international legal institution, and they may in some form undermine *any* effort at finding global justice through law. Thus, the ICC's interventions need to be restricted to those cases where African citizenries themselves request that it play a role so that its politicization is minimized, and its self-serving claims need to be brought under control so that it does not monopolize the discourse of global justice. At the same time, these problems point to the need for alternative, democratic projects of justice to be articulated and developed, projects within which the ICC, perhaps, will play a part.

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## Peace, Justice and the International Criminal Court

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19 March 2010

### INTRODUCTION

The long-running debate about whether seeking justice for grave international crimes interferes with prospects for peace has intensified as the possibility of national leaders being brought to trial for human rights violations becomes more likely. The International Criminal Court (ICC), which is mandated to investigate and prosecute war crimes, crimes against humanity, and genocide, began operations in 2003 and has already issued its first arrest warrant for a sitting head of state – Sudan's President Omar al-Bashir. That the ICC operates while armed conflicts are ongoing fuels the justice versus peace debate.

Notwithstanding the general recognition that international law obliges countries to prosecute genocide, crimes against humanity, and war crimes, some diplomats tasked with negotiating peace agreements have argued that the prospect of prosecution by the ICC has made achieving their objectives more difficult.<sup>1</sup> Those negotiating peace have tended to view the possibility of prosecution as a dangerous and unfortunate obstacle to their work. Some fear that merely raising the spectre of prosecution will bring an end to fragile peace talks. The temptation to suspend justice in exchange for promises to end a conflict has already arisen with respect to the ICC's work in Darfur and Uganda, and threatens to recur in coming years as parties and mediators struggle to negotiate peace deals.

In the short term, it is easy to understand the temptation to forego justice in an effort to end armed conflict. However, Human Rights Watch's (HRW) research demonstrates that a decision to ignore atrocities and to reinforce a culture of impunity may carry a high price. Indeed, instead of impeding negotiations or stalling a peaceful transition, remaining firm on the importance of justice – or at least leaving the possibility for justice open, whether meted out by national or international prosecutions –

can yield short- and long-term benefits. HRW findings about the relationship between peace and justice are discussed at length in a July 2009 report "Selling Justice Short: Why Accountability Matters for Peace." While there are many factors that influence the resumption of armed conflict, and we do not assert that impunity is the sole causal factor, a review of HRW experience shows that the impact of justice is too often undervalued when weighing objectives in resolving a conflict.

Case studies in the HRW 2009 report are drawn from 20 years of research in as many countries. The ICC's reach has understandably been more limited to date. Six years after the court's operations began, its prosecutor is carrying out investigations in four situations (Uganda; Democratic Republic of Congo; Central African Republic; and Darfur, Sudan) and the ICC's first trial began in January 2009. The prosecutor's request to open a fifth investigation – in Kenya – is pending before a pre-trial chamber at the time of writing.

Thus far, however, the ICC's engagement in these countries lends support to the themes identified in HRW's broader review of the impact of national and international justice processes on – and, critically, their absence from – peace processes. Drawing on the findings of "Selling Justice Short", we illustrate below three of these themes with examples drawn from the ICC's experience to date.

First, arrest warrants do not necessarily hinder, and have at times benefited, peace processes through the marginalization of leaders suspected of serious crimes. Justice is an important objective in its own right and this marginalization effect should not motivate the commencement of justice processes. At the same time it has been a side effect of the issuance of arrest warrants in some cases. In the Uganda situation before the ICC, arrest warrants for leaders of the rebel Lord's Resistance Army (LRA) appear to have played a role in marginalizing the LRA by isolating it from its base of support in Khartoum. This, as well as an interest in seeing the ICC arrest warrants lifted, appears to have increased the LRA's

interest in participating in peace talks held in Juba, Sudan between 2006-2008. While the Juba talks did not ultimately lead to a final peace agreement, interim agreements – including on the issue of justice for crimes committed during the conflict were successfully concluded over the course of the talks, suggesting that peace processes can be conducted in the shadow of ICC arrest warrants.

Second, foregoing accountability does not always bring hoped-for benefits. In the Democratic Republic of Congo (DRC), the inclusion of alleged perpetrators in government – granting *de facto* amnesties, including to Bosco Ntaganda, a former rebel commander wanted by the ICC but integrated into the Congolese army in early 2009 – has had far-reaching negative consequences. Successive attempts to buy compliance with post-conflict transition processes by rewarding criminal suspects with positions of power and authority have only allowed these individuals to continue committing crimes or encouraged others to engage in criminal activity in the hope of receiving similar treatment. Far from bringing peace, this has instead allowed lawlessness and human rights violations to persist.

Third, pursuing international justice can have long-term benefits necessary to sustainable peace, including the reinstatement of the rule of law through domestic prosecutions. ICC investigations in the Central African Republic, for example, have placed pressure on national authorities to take at least nominal steps toward enforcing international humanitarian law. While this has not yet yielded domestic prosecutions, it seems to have at least raised awareness of serious international crimes and the rule of law, which may be the first step toward preventing future crimes. These three themes and examples are dealt with one by one in the three sections below.

#### **IMPACT OF ARREST WARRANTS ON PEACE TALKS**

Requests for warrants for high-ranking leaders are often opposed by those who believe that these will result in more violence and a prolonged conflict. They argue that leaders facing the possibility of trial and

likely conviction have little incentive to lay down their arms. Instead, they contend, these leaders will cling all the more tenaciously to power. The prospect of arrest may even spur them to continue to fight a war in an effort to maintain their position.<sup>2</sup>

The ICC has already created considerable controversy over whether its arrest warrants stand in the way of peace. ICC Prosecutor Luis Moreno-Ocampo's request for an arrest warrant against Sudan's President al-Bashir in July 2008 triggered a backlash by numerous actors, including the African Union (AU) and the Organization of the Islamic Conference, which asked the United Nations (UN) Security Council to defer the ICC's work in Darfur for 12 months.<sup>3</sup> Alex de Waal and Julie Flint, experts on Sudan, publicly criticized the ICC prosecutor for pressing charges against high officials in the government of Sudan, stating that, "[a]ttempts to deploy UNAMID [the AU/UN peacekeeping mission in Sudan] in Darfur are at a critical point. At this sensitive time, to lay charges against senior government officials, and to criminalise the entire government, will derail attempts to pull Sudan from the brink."<sup>4</sup> They argued that justice should wait until after those culpable are no longer in positions of authority, since seeking to prosecute while al-Bashir is still in control risks retaliation, including against those who work for humanitarian agencies.<sup>5</sup>

Negotiators and community leaders working for peace in northern Uganda had claimed that the ICC warrants for the rebel Lord's Resistance Army (LRA) leadership jeopardized peace prospects, and that starting investigations before the war ended risked both justice and peace.<sup>6</sup> Variations of these arguments have been used elsewhere, and as the ICC's operations increase, particularly in situations of ongoing conflict, the issue is likely to continue to arise.

However, limited experience – primarily outside the ICC context – shows that the assumptions made about the effect of an arrest warrant are not necessarily correct. Rather than scuttle peace talks or undermine a transition to democracy, an indictment may facilitate these processes by altering the power dynamics. The fear that the International Criminal

Tribunal for the former Yugoslavia's (ICTY) indictment of Slobodan Milosevic for crimes in Kosovo during his negotiations to end the conflict with NATO would impede negotiations proved unfounded. Only days after the warrant for Milosevic was announced, a peace agreement was reached.<sup>7</sup> In Bosnia and Herzegovina, the indictment of Radovan Karadzic by the ICTY marginalized him and prevented his participation in the peace talks, leading to the success of the Dayton negotiations to end the Bosnian war.<sup>8</sup> Similarly, the unsealing of the arrest warrant for Liberian President Charles Taylor for crimes in Sierra Leone at the opening of talks to end the Liberian civil war was ultimately viewed as helpful in moving negotiations forward.<sup>9</sup>

Within the ICC context, arrest warrants for LRA leaders in Uganda coincided with peace initiatives, including the Juba talks that began in mid-2006. The Juba talks did not lead to a final peace agreement; although violence has subsided in northern Uganda, the LRA continues to carry out attacks on civilians in the DRC. In light of these realities, claims about the positive impact of the ICC's involvement must necessarily be limited. At the same time, the ICC's arrest warrants did not block peace negotiations despite fears to the contrary. Moreover, the warrants appear to have contributed to isolating the LRA from some of its support base,<sup>10</sup> encouraging, at Juba, the most promising talks since the start of the 20-year conflict in Northern Uganda, and ensuring that accountability formed a major part of the agenda for those talks.

Driven by regional inequality, the conflict in northern Uganda intended to depose President Yoweri Museveni, began immediately after he took power by force in 1986. The rebel LRA, rooted in northern Uganda, struck fear in the civilian population by carrying out mutilations, killings, and forced recruitment of child soldiers mostly from their own Acholi people. Ugandan soldiers of the Ugandan People's Defense Forces (UPDF) committed numerous human rights violations during the war as well, including willful killing, torture, and rape of civilians. The government forcibly displaced the civilian population of Acholiland into squalid camps, arguing

that the move was needed to protect the population from the LRA and to cut off any civilian assistance to the LRA. Both sides committed numerous grave abuses during this protracted conflict.<sup>11</sup>

Efforts – including a national amnesty act in 2000<sup>12</sup> – to end the conflict decisively failed, and in December 2003 Museveni tried a new tack. He invited the International Criminal Court to investigate the LRA. In July 2005 the Court issued sealed warrants for the arrest of the top five LRA leaders – Joseph Kony (head of the LRA), Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen – for crimes including widespread or systematic murder, sexual enslavement, rape, and war crimes such as intentionally attacking civilians and abducting and enlisting children under the age of 15.<sup>13</sup>

The announcement of the referral to the ICC in January 2004 and the ICC's unsealing of warrants in October 2005 were met with a great deal of criticism. Numerous local nongovernmental organizations, international humanitarian organizations, academics, mediators, and others argued that ICC warrants would destroy the LRA's will to negotiate since they would ultimately end up on trial.<sup>14</sup> From 16 March to 18 March 2005, Acholi leaders met with the ICC prosecutor in The Hague in an effort to dissuade him from requesting arrest warrants.<sup>15</sup> Later, Acholi leaders said that the issuing of "international arrest warrants would practically close once and for all the path to peaceful negotiation as a means to end this long war, crushing whatever little progress has been made during these years."<sup>16</sup> The Roman Catholic Archbishop in northern Uganda, John Baptist Odama, saw the ICC's decision to issue indictments against the LRA leadership as "the last nail in the coffin" of efforts to achieve dialogue.<sup>17</sup> One-time Chief Mediator between the government and the rebels, Betty Bigombe, responded to the news of the warrants in October 2005 by saying, "[t]here is now no hope of getting them to surrender. I have told the court that they have rushed too much."<sup>18</sup> Others feared that defenceless, displaced northern Ugandans would become prey to further LRA attacks.<sup>19</sup> The Chairman of the Amnesty Commission, Justice Peter Onega, said

that the ICC's decision could encourage more atrocities as the LRA leadership could act as "desperately as a wounded buffalo."<sup>20</sup> Indeed, LRA attacks on international humanitarian workers in October 2005 were linked by some to the ICC's arrest warrants.<sup>21</sup> Justice Onega was also among those who argued that the ICC's involvement was inconsistent with the 2000 Amnesty Act and Acholi principles of traditional justice.<sup>22</sup> At the very least, many felt that the timing was "ill-conceived."<sup>23</sup> Human Rights Watch expressed frustration that the prosecutor had not also adequately explained his mandate to investigate crimes by the UPDF.<sup>24</sup>

In fact, the warrants have not proved to be as detrimental as many had feared. Since the mid-1990s the LRA's only state supporter has been the Sudanese government in Khartoum, support reportedly offered in retaliation for the Ugandan government's support of the rebel Sudan People's Liberation Movement/Army (SPLM/A).<sup>25</sup> Not long after the ICC referral was announced, Sudan agreed to a protocol allowing Ugandan armed forces to attack LRA camps in southern Sudan.<sup>26</sup> This access weakened the LRA's military capability. Following the signing of the Comprehensive Peace Agreement in January 2005, which ended hostilities between the Khartoum government and the SPLA, Sudanese armed forces withdrew from Southern Sudan, further weakening the LRA by depriving it of bases and support that it had enjoyed for years.<sup>27</sup>

The International Crisis Group (ICG) notes that the ICC's involvement "upped the stakes" for Khartoum as it could fall within the ICC's criminal investigation in Uganda for supporting the LRA.<sup>28</sup> In October 2005 the government of Sudan signed a memorandum of understanding with the court agreeing to cooperate with arrest warrants issued against LRA commanders.<sup>29</sup> Though the Sudanese government continued to support the LRA to some degree, it did so in a much more surreptitious manner.<sup>30</sup> By severing most of its ties, Sudan significantly weakened the LRA, forcing it – at least temporarily – into "survival mode."<sup>31</sup>

The increased isolation of the LRA may have also contributed to significant defections, including by two members of Kony's negotiating team.<sup>32</sup> Father Carlos Rodriguez, a Spanish missionary who was based in northern Uganda for many years, stated:

"Between April and September [2004] 500 or so combatants have come out of the bush with their guns including senior officers. So the ICC might not be so discouraging as we thought. Also those who have come out of the bush have told us that the Sudan Government has not been giving them anything since January this year. So the ICC may have had an influence on Sudan. The LRA will only reduce violence out of pressure and Sudan has changed its attitude because of the ICC. They are concerned about being prosecuted.... Now that Sudan is not involved, it forces the LRA to talk about peace."<sup>33</sup>

However, many of these defectors were given amnesty under the Amnesty Act of 2000, a provision with broad applicability within Uganda and which had not been used frequently up to that point in time in the context of the LRA insurgency.<sup>34</sup>

The issuance of arrest warrants has been cited as one of a number of factors (including the US government decision to list the LRA as a terrorist group) that helped to push the LRA and the Ugandan government to the negotiating table in Juba, Sudan, in mid-2006. Despite rebel leaders' claims to the contrary,<sup>35</sup> individuals close to the peace process believe that LRA leaders decided to enter talks in part as a result of the ICC warrants.<sup>36</sup> The investigation by ICG into the peace talks led it to conclude that the threat of prosecution, and the issuance of warrants in particular, provided pivotal pressure propelling the rebels towards peace talks. In speaking with commanders in the bush or their delegates at the negotiations, ICG found that "'ICC' is usually the first and last word out of their mouths."<sup>37</sup>

In addition, the prospect of prosecution by the ICC helped to insert the issue of accountability into the Juba peace negotiations and resulted in an important

framework for holding all parties accountable for their actions. In February 2008 the parties agreed to pursue domestic trials of the ICC cases in Uganda via a special division of the Ugandan High Court created to try war crimes committed during the conflict.<sup>38</sup> This was an approach that, at least in principle, could satisfy LRA demands to avoid trial in The Hague while meeting requirements under the ICC statute.<sup>39</sup>

The parties concluded negotiations on all agenda items in March 2008, but Kony failed to appear to sign the final agreement. Although violence has subsided in northern Uganda, civilians in the DRC (where the LRA is now based) continue to be victimized by the insurgents.<sup>40</sup>

The LRA's demands at Juba that the ICC arrest warrants be removed, and the prominence given to accountability in the final agreement, raise important questions as to whether the ICC is to blame for the ultimate breakdown of the peace talks. In our view, discussed in greater detail elsewhere, several important factors mitigate against this conclusion, including that LRA leaders have never made clear their reasons for refusing to sign the final peace agreement, and that interim agreements including justice provisions were successfully concluded over the course of two years of negotiations.<sup>41</sup> The impact of the insistence on prosecutions more generally (as opposed to ICC prosecutions) is less clear. Meanwhile, the resumption of LRA attacks on civilians and the failure of the LRA to implement commitments to assemble their forces in specified locations while the talks were ongoing reinforced concerns about the sincerity of the LRA's commitment to conclude peace under any circumstances, despite the robustness of the negotiations.<sup>42</sup>

Firm conclusions about the impact of the ICC's arrest warrants on peace prospects for northern Uganda are difficult to draw, not least because the conflict remains unresolved and civilians remain at risk. Contrary to some fears, however, the ICC's arrest warrants did appear to benefit the Juba talks in the ways described above and may yet help



encourage national accountability efforts through the Uganda High Court Special Division agreed at Juba.<sup>43</sup>

The Uganda experience – and the several examples from outside the ICC context touched on above – suggests at a minimum that indictments have not precluded peace talks. Justice is an important end in and of itself, and we do not advocate for the issuance of arrest warrants as a means of bringing about marginalization. Rather, we note that arrest warrants sought primarily as a means of bringing to account leaders responsible for serious international crimes have also at times had the side effect of marginalizing those leaders in ways that may benefit peace processes.

#### THE PRICE OF INCLUSION

In contrast to situations where alleged war criminals have been marginalized through indictments or arrest warrants, negotiators elsewhere have opted to include human rights abusers in a coalition government or a unified military in the hope of neutralizing them or enhancing stability (in effect granting them a *de facto* amnesty). In situations as diverse as Afghanistan, the DRC, and Bosnia and Herzegovina, however, Human Rights Watch has documented how, in post-conflict situations, leaders with records of past abuse have continued to commit abuses or have allowed lawlessness to persist or return.<sup>44</sup> Far from bringing peace, this strategy instead encourages renewed cycles of violence.

The DRC has paid a particularly high price. While a number of other key factors have contributed to the brutal violence in eastern DRC, including competition for control over natural resources, land rights, and ethnic cohabitation, a pervasive culture of impunity has been one of the greatest obstacles to sustainable peace.

The DRC has been wracked by two wars over the past dozen years. The first, from 1996 to 1997, ousted long-time ruler Mobutu Sese Seko and brought to power Laurent Désiré Kabila, the leader of a rebel alliance supported by the Rwandan and Ugandan armies. A year later, Laurent Kabila turned on his former backers

Rwanda and Uganda, who in turn launched the second Congo war, which lasted from 1998 to 2003.

Sometimes referred to as “Africa’s first World War,” the second war drew in six other African countries, spawned a host of rebel groups and local militias, and ultimately resulted in the deaths of an estimated 5.4 million people.<sup>45</sup> In 2002, international pressure led to peace talks between the national government and the major rebel groups in Sun City, South Africa, which paved the way for the establishment of a transitional government in June 2003.

While the ICC has carried out two investigations and issued four arrest warrants for crimes committed in Ituri, often described as the bloodiest corner of the DRC,<sup>46</sup> – and has launched an investigation in the Kivu provinces<sup>47</sup> – Congolese authorities have rarely conducted their own investigations and prosecutions.<sup>48</sup> Instead, the government gave posts of national or local responsibility, including in the army and police, to dozens of people suspected of committing international human rights violations in an effort to buy compliance with the transition process.<sup>49</sup> A Congolese lawyer, dismayed by such promotions, remarked, “In Congo we reward those who kill, we don’t punish them.”<sup>50</sup>

By offering to integrate commanders with abusive records into the government and armed forces, however, the government has reinforced the message that brutalities would not only go unpunished, but might be rewarded with a government post. The examples of Bosco Ntaganda, wanted by the ICC since August 2006 for the alleged use of child soldiers by his militia during the Ituri conflict in 2002–2003, and Laurent Nkunda, for whom Ntaganda served as chief of staff in military operations in the Kivu provinces in 2006–2009, illustrate the potential dangers of choosing to overlook abuses.

In June 2003, for example, the transitional government named Laurent Nkunda as a general in the new Congolese army despite his track record of abuses. Among other things Nkunda had been responsible the previous year for the brutal suppression of a mutiny in which at least 80 people



were summarily executed.<sup>51</sup> This included over two dozen people who were beaten, bound, and gagged before being executed and their weighted bodies thrown off a bridge into the water below.<sup>52</sup> Nkunda, a Congolese Tutsi, refused to take up his post citing concerns for his own safety.<sup>53</sup> In subsequent military operations commanded by Nkunda, Human Rights Watch researchers documented that forces under Nkunda's command in a military operation in Bukavu killed civilians and carried out widespread sexual violence during their operations.<sup>54</sup>

UN peacekeepers were unable to stop Nkunda's offensive on Bukavu and the resulting crisis nearly derailed an already weak transitional government. In October 2004 the Security Council directed UN forces to cooperate with Congolese authorities "to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice,"<sup>55</sup> and a year later, in September 2005, the Congolese authorities issued a warrant for the arrest of Nkunda.<sup>56</sup> However, international diplomats made no concerted efforts to follow up on the Security Council's request.<sup>57</sup>

Throughout 2005 and into 2006, the international community's attention was focused on presidential and parliamentary elections in DRC, the first democratic elections in over 40 years. Caught up in the political and logistical challenges of the election process, many Congolese leaders, as well as representatives of the donor community and the United Nations Organization Mission in the Democratic Republic of Congo (Mission de l'Organisation des Nations Unies en République démocratique du Congo, MONUC), accepted that little progress would be made on such major issues as army reform or establishing a functioning judicial system. Diplomatic representatives stated that it would be unproductive to push too hard on such issues, including seeking to arrest those suspected of serious crimes, preferring not to "rock the boat."<sup>58</sup> With respect to Nkunda, MONUC decided to pursue a strategy of containment: take no action to arrest or confront him, but use deterrent action to contain his activities and zone of influence to minimise possible disruptions to the elections.<sup>59</sup> The

strategy was ill-advised and short-sighted. Nkunda used the time to found the National Congress for the Defense of the People (Congrès National pour la Défense du Peuple, CNDP) with a program of preventing the exclusion of Tutsi from national political life and assuring their security.<sup>60</sup> In 2006 and 2007, Nkunda's CNDP enlarged the area that it controlled, effectively creating a state within a state. Human rights abuses by the CNDP and other armed groups increased, especially when the Congolese government launched failed military operations to attempt to defeat Nkunda. Horrific attacks on civilians – including murders, widespread rape, and the forced recruitment and use of child soldiers – by all sides to the conflict followed. Hundreds of thousands of people were forced to flee their homes.<sup>61</sup> A peace agreement negotiated in Goma, North Kivu on 23 January 2008, with 22 armed groups, of which the CNDP was the most influential, did not hold. Conflict resumed, and, so too did attacks on civilians in the Kivus (see below).

Faced with the possibility of losing eastern DRC, and with no support coming from other African allies or the European Union, Congolese President Joseph Kabila struck a secret deal with his former enemy, the Rwandan government. DRC would allow Rwandan troops to return briefly to eastern DRC to pursue their enemy – the Rwandan Hutu militia the Democratic Forces for the Liberation of Rwanda (Forces Démocratiques de Libération du Rwanda, FDLR) – in exchange for arresting Nkunda. On 22 January 2009, Nkunda was called to a meeting in Gisenyi, Rwanda, and detained by Rwandan officials.<sup>62</sup>

Instrumental in Nkunda's downfall was Ntaganda, formerly a senior military commander from the Union of Congolese Patriots (Union des Patriotes Congolais, UPC) armed group in Ituri who had fallen out with the UPC and had joined Nkunda in 2006, becoming his military Chief of Staff. Ntaganda had already been implicated in brutal human rights abuses, but was one of five Ituri leaders who in December 2004 had been granted positions as generals in the newly integrated Congolese army. Ntaganda had not taken up this post: fearing for his security in the capital, Kinshasa, he had refused to attend the swearing-in ceremony.

In January 2009, in an effort to divide Nkunda's CNDP, Ntaganda, with support from Rwanda, led a putsch to oust Nkunda from leadership and to install himself as the group's military commander. In exchange, the Congolese government rewarded him for a second time with the post of general in the Congolese army.

Like Nkunda, Ntaganda's track record is one of widespread human rights abuses. In November 2002, Ntaganda, then in charge of military operations for the UPC in Ituri, led troops in attacks on the gold mining town of Mongbwalu, where at least 800 civilians were brutally slaughtered on an ethnic basis. Such attacks were repeated in dozens of other locations.<sup>63</sup> According to UN peacekeepers, troops commanded by Ntaganda were responsible for killing a Kenyan UN peacekeeper in January 2004 and for kidnapping a Moroccan peacekeeper later that year.<sup>64</sup> Ntaganda was placed on the UN sanctions list in November 2005 for breaching a UN arms embargo.<sup>65</sup> While Ntaganda acted as military Chief of Staff in the CNDP, troops under his command were responsible for the 4-5 November 2008 massacre of 150 civilians in Kiwanja in North Kivu.<sup>66</sup>

While Nkunda's removal might have opened up new possibilities for finding peace in eastern DRC, political expediency rather than the interests of justice have determined both his and Ntaganda's contrasting fates.

As indicated above, Laurent Nkunda has been implicated in numerous serious crimes since May 2002, and, in spite of repeated calls by the UN and others for those responsible for the crimes in Kisangani to be brought to justice, Nkunda was not investigated or prosecuted. The government sought to accommodate him, but that accommodation was unsuccessful: rather than preventing further crimes, the opposite occurred. Nkunda's forces went on to commit additional crimes and to contribute to a major political, military, and humanitarian crisis. Arresting Nkunda in 2002 when he was first implicated in perpetrating war crimes would likely have had substantially lower political and diplomatic costs.

As for Bosco Ntaganda, in August 2006 the International Criminal Court issued an arrest warrant against him for the war crime of enlisting and conscripting children under the age of 15 and using them in hostilities between 2002 and 2003 in Ituri.<sup>67</sup> The Congolese government, which requested that the ICC investigate crimes in DRC, and which to date has been cooperative with the Court, in this case failed dramatically in its legal obligation to arrest Ntaganda. In a televised press conference on 31 January 2009, President Joesph Kabila invoked the peace versus justice dilemma, stating that he faced a difficult choice between justice or peace, stability, and security in eastern DRC. He said his choice was to prioritize peace. Ntaganda is reported to have served as a high-ranking advisor to UN peacekeeping forces on their operations in DRC, despite his status as a wanted man at the ICC.<sup>68</sup>

Congolese authorities attempted to legitimize Ntaganda as a "partner for peace," reinforcing the perception that those who commit heinous crimes against civilians in Congo will be rewarded rather than punished. Dozens of local human rights nongovernmental organizations condemned the decision. HRW experience in the Congo and elsewhere suggests that rewarding human rights abusers does not tend to bring the hoped-for peace or a cessation of abuses.

#### **STRENGTHENING THE RULE OF LAW: ENHANCED DOMESTIC CRIMINAL ENFORCEMENT**

As the examples cited above suggest, demurring on justice issues in the context of peace processes does not necessarily bring hoped-for benefits in terms of lasting peace, while remaining firm on the importance of justice – including where international arrest warrants are at stake – may ultimately facilitate peace and security. The latter appears to be particularly true in the long run: HRW research suggests that the promotion of international justice for serious crimes may have a positive impact on the development of domestic law enforcement tools.<sup>69</sup> Prosecutions in courts far from the places where the crimes occurred – whether at ad hoc international tribunals for the former Yugoslavia and Rwanda or through universal

jurisdiction – have played a role in strengthening or galvanizing the establishment of domestic mechanisms to deal with these crimes, in turn consolidating the rule of law and fostering stability.<sup>70</sup> Even at this early phase of its development, the International Criminal Court has spurred at least nominal steps toward domestic proceedings in each country in which it is investigating.

The experience in Central African Republic (CAR) is illustrative.<sup>71</sup> On 25 October 2002, the Central African Republic's former army Chief of Staff, Gen. Francois Bozize, launched a rebel offensive against then-President Ange-Felix Patasse. Unable to rely on his army, which had been weakened by several mutinies and military coups, Patasse obtained support from forces of the Congolese rebel Jean-Pierre Bemba's Congo Liberation Movement and a mostly Chadian mercenary force. Both groups committed widespread atrocities, including massacres and rapes. Fighting continued sporadically from October 2002 to 15 March 2003, when Bozize finally seized power.

On 22 December 2004, the CAR government referred the events in 2002-03 to the Office of the Prosecutor at the ICC after CAR's Court of Appeal recognized the inability of domestic courts to investigate and prosecute war criminals effectively. Two and a half years later the ICC prosecutor announced that he would investigate crimes committed during the 2002-03 fighting and would monitor more recent events to determine whether crimes committed in the north as part of a counterinsurgency campaign would warrant investigation.

The possibility of ICC prosecution (an issue stressed by victims' associations calling for justice) increased pressure on the CAR government to respond to abuses committed in the north as part of a conflict that began following the May 2005 elections. Human Rights Watch's September 2007 report on violence in the CAR,<sup>72</sup> which named suspects and emphasized ICC jurisdiction, generated a great deal of publicity around the question of whether the ICC would investigate leaders of the elite Presidential Guard (which is under the president's control) and made it

more difficult for the government to turn a blind eye to crimes. Following the publication of Human Rights Watch's report, President Bozize admitted that CAR forces had committed abuses and said that those responsible will be held to account.<sup>73</sup> The ICC prosecutor put direct pressure on the CAR authorities to follow up on prosecution for the more recent crimes, including in a 10 June 2008 letter. In response Bozize sought the United Nations' assistance in suspending ICC investigations, arguing in a letter to the UN Secretary General that the CAR justice system is competent to investigate and prosecute more recent crimes itself.<sup>74</sup> Though there has been little evidence of genuine will to prosecute in CAR (by mid-2009 only individual low-ranking members of the CAR security forces had been prosecuted and convicted of ordinary crimes such as assault, battery and manslaughter) in September 2008 the CAR government established an office for international humanitarian law within the army, which is responsible for conveying the laws of war to its members.<sup>75</sup> Abuses in the north diminished after international pressure caused the government to withdraw much of the Presidential Guard from the area.<sup>76</sup> The involvement of the ICC has at least served to increase awareness of crimes, which may be the first step in preventing them.

## CONCLUSION

While limited, the experience of the ICC to date bears out three important findings of Human Rights Watch's broader survey of the impact of justice efforts on peace processes. First, the existence of arrest warrants for leaders suspected of war crimes does not necessarily preclude peace talks. ICC arrest warrants played a role in isolating Uganda's LRA from its base of support in Khartoum; this, along with the LRA leaders' interest in leveraging peace talks to have the ICC arrest warrants rescinded, may have increased the willingness of LRA leaders to engage in peace talks with the government of Uganda. While the talks were ultimately unsuccessful, a number of interim agreements – including provision for national cases as a possible substitute for those brought by the ICC – were concluded during the talks notwithstanding the existence of the arrest warrants.

Second, ignoring justice does not necessarily benefit peace processes. In the DRC, incorporating suspected war criminals into positions of power in order to buy compliance with transitional processes has done little to stem cycles of human rights violations. Instead, pervasive impunity has been a key factor in renewed cycles of violence that continue to this day.

Third, pursuing international justice can translate into enhanced domestic law enforcement efforts. This can reassert and strengthen the rule of law, a key factor in long-term stability. In the CAR, ICC investigations appear to have been a factor in decisions by authorities there to commit rhetorically (if not yet in practice) to holding those responsible for crimes to account and to raise awareness of crimes, including through the establishment of an office for humanitarian law within the army. At least nominal steps toward national prosecutions have been undertaken in all other ICC country situations under investigation as well.

We recognize that it remains too early to draw firm conclusions about the ICC's legacy in countries where its investigations are ongoing. Justice – regardless of the contributions it makes to peace and stability – is an important objective in its own right. At the same time, given that sacrificing justice in the hope of securing peace is often projected as a more realistic route to ending conflict and bringing about stability than holding perpetrators to account, we find it useful to put important facts and analyses on the table to better inform the debate about accountability and peace. Those who call for forgoing justice in or out of the ICC context need to address the facts that contradict their oft-repeated assumptions and the evidence that suggests that pursuing justice can contribute in many ways towards building and sustaining peace. Because the consequences for people at risk are so great, decisions on these important issues need to be fully informed.

\* This article is adapted from a lengthier Human Rights Watch report, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/node/84264>. The report relies

heavily on past reports by numerous Human Rights Watch researchers across the organization and over many years.

1. Former United States special envoy to Sudan, Andrew Natsios, for example, writes "They [the leaders of Sudan's National Congress Party] are prepared to kill anyone, suffer massive civilian casualties, and violate every international norm of human rights to stay in power, no matter the international pressure, because they worry (correctly) that if they are removed from power, they will face both retaliation at home and war crimes trials abroad." Andrew Natsios, "Beyond Darfur: Sudan's Slide Toward Civil War," *Foreign Affairs*, May/June 2008, <http://www.foreignaffairs.com/articles/63399/andrew-natsios/beyond-darfur> (accessed December 14, 2009), p. 82.
2. For a short discussion of the differing reactions to these types of warrants see Helene Cooper, "Waiting for Justice," *New York Times*, July 27, 2008.
3. See, for example, African Union Peace and Security Council, "Communique of the 142nd Meeting of the Peace and Security Council," PSC/MIN/Comm (CXLII), July 21, 2008, [http://www.iccnw.org/documents/AU\\_142-communique-eng.pdf](http://www.iccnw.org/documents/AU_142-communique-eng.pdf) (accessed November 4, 2009); Letter from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council, July 22, 2008 (copy on file with Human Rights Watch).
4. Julie Flint, Alex de Waal, and Sara Pantuliano, "ICC approach risks peacemaking in Darfur," letter to the editor, *Guardian* (London), June 10, 2008, <http://www.guardian.co.uk/world/2008/jun/10/sudan.unitednations> (accessed June 16, 2009).
5. Julie Flint and Alex de Waal, "Justice Off Course In Darfur," commentary, *Washington Post*, June 28, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062702632.html> (accessed June 16, 2009).
6. "Uganda: Acholi leaders in The Hague to meet ICC over LRA probe," *IRINnews*, March 16, 2005, <http://www.globalsecurity.org/military/library/news/2005/03/mil-050316-irin03.htm> (accessed May 11, 2009); "Uganda: ICC indictments to affect northern peace efforts, says mediator," *IRINnews*, October 10, 2005, <http://www.irinnews.org/report.aspx?reportid=56654> (accessed May 11, 2009); Richard Dowden, "ICC in the Dock," commentary, *Prospect Magazine*, May 2007, <http://www.prospectmagazine.co.uk/article-details.php?id=9269> (accessed May 12, 2009).
7. Human Rights Watch, *Selling Justice Short*, pp. 18-19.
8. *Ibid.*, pp. 25-27.
9. *Ibid.*, pp. 20-25.
10. Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *American Journal of International Law*, vol. 99 (April 2005), p. 404; Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, March 2008), pp. 15-16; and O'Brien, ICG, "The impact of international justice on local peace initiatives." See also Gareth Evans, "Justice, Peace and the International Criminal Court," International Crisis Group presentation to the Second Public Hearing of the Office of the Prosecutor, September 25, 2006, <http://www.crisisgroup.org/home/index.cfm?id=4431&l=1> (accessed May 18, 2009).
11. Human Rights Watch/Africa, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (New York: Human Rights Watch, 1997), <http://www.hrw.org/en/reports/>

- 1997/09/18/scars-death; Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda*, vol. 15, no. 7(A), March 2003, <http://www.hrw.org/reports/2003/uganda0303/uganda0403.pdf>; *Abducted and Abused: Renewed Conflict in Northern Uganda*, vol. 15, no. 12(A), July 2003, <http://www.hrw.org/sites/default/files/reports/uganda0703.pdf>; *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, vol. 17, no. 12(A), September 2005, <http://www.hrw.org/sites/default/files/reports/uganda0905.pdf>.
12. Lucy Hovil and Zachary Lomo, Refugee Law Project, "Whose Justice? Perceptions of Uganda's Amnesty Act 2000: the potential for conflict resolution and long-term reconciliation," working paper no. 15, February 2005, [http://www.refugeelawproject.org/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/working_papers/RLP.WP15.pdf) (accessed May 15, 2009), p. 24. The chairman of the Amnesty Commission, Justice Peter Onega, described the passage of the Amnesty Act as "a deliberate effort to try and find a peaceful way of ending the conflicts and rebellions the country has had." See "UGANDA: Forgiveness as an instrument of peace," *IRINnews*, June 9, 2005, <http://www.irinnews.org/report.aspx?reportid=54859> (accessed May 15, 2009). Two years later, however, Justice Onega called for an end to blanket amnesty because "former rebels granted amnesty were going back into rebel activities and committing greater crimes against humanity." Josephine Maseruka and Charles Ariko, "Scrap blanket amnesty, says Onega," *New Vision* (Kampala), August 14, 2007, <http://www.newvision.co.ug/D/8/13/581394> (accessed May 26, 2009). See also The Uganda Human Rights Commission, Fifth Annual Report to parliament for the period of January 2001-September 2002, <http://www.uhrc.ug/uploads/Chapter3-8.pdf> (accessed May 15, 2009), p. 56 ("The passing of the amnesty law showed the government's desire [to] implement a policy of reconciliation to establish peace, security and tranquility"); and *Amnesty International Report 2001*, Uganda chapter, reproduced at <http://www.unhcr.org/refworld/pdfid/3b1de3914.pdf> (accessed May 15, 2009).
  13. *Prosecutor v. Kony, Otti, Odhiambo and Ongwen*, ICC, Case No. ICC-02/04-01/05, Decision on the prosecutor's application for the warrants of arrest under Article 58, July 8, 2005. Lukwiya died in 2006 and Otti in 2007. Once the court exercises its jurisdiction, it has the authority to prosecute crimes by any individual, regardless of affiliation, provided the crimes were committed after 2002.
  14. For a summary of the many criticisms, see Tim Allen, Crisis States Research Center, "War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention," February 2005, <http://www.crisisstates.com/download/others/AllenICCReport.pdf> (accessed May 15, 2009), pp. 49-64.
  15. "UGANDA: Acholi leaders in The Hague to meet ICC over LRA probe," *IRINnews*, March 16, 2005, <http://www.globalsecurity.org/military/library/news/2005/03/mil-050316-irin03.htm> (accessed May 15, 2009).
  16. "UGANDA: Amnesty and Peace groups urge ICC to probe government army too," *IRINnews*, February 3, 2004, <http://www.globalsecurity.org/military/library/news/2004/02/mil-040203-irin03.htm> (accessed May 15, 2009), quoting a statement issued by a chief negotiator of the Acholi Religious Leaders' Peace Initiative.
  17. "Justice for a Lawless World? Rights and reconciliation in a new era of international law," *IRIN In-Depth*, July 2006, <http://www.irinnews.org/pdf/in-depth/RightsAndReconciliationPart1.pdf> (accessed May 15, 2009), p. 72.
  18. "LRA talks over, says Bigombe," *New Vision*, October 10, 2005, <http://www.newvision.co.ug/D/8/12/460057> (accessed May 15, 2009).
  19. Cassandra Veney, "Between the Devil and the Deep Blue Sea: Internally Displaced Women and Girls in Liberia and Uganda and the Role of the International Community," *Journal of International Women's Studies*, vol. 7 (May 2006), p. 214; Adam O'Brien, "The impact of international justice on local peace initiatives: The case of Northern Uganda," International Crisis Group (ICG) expert paper for International conference: Building a Future on Peace and Justice, June 2007, <http://www.crisisgroup.org/home/index.cfm?id=4927> (accessed June 18, 2009).
  20. "ICC Indictment to affect northern peace efforts, says mediator," *IRINnews*, October 10, 2005, <http://www.irinnews.org/report.aspx?reportid=56654> (accessed May 19, 2009).
  21. See, for example, "NGO attacks condemned in Uganda," *BBC News Online*, October 27, 2005, <http://news.bbc.co.uk/2/hi/africa/4383150.stm> (accessed June 11, 2008); "Uganda: Two aid workers killed in north by suspected LRA rebels," *IRINnews*, October 27, 2005, <http://www.globalsecurity.org/military/library/news/2005/10/mil-051027-irin01.htm> (accessed May 30, 2008); Jason Beaubien, "Uganda rebels step up attacks while offering talks," *NPR*, January 3, 2006, <http://www.npr.org/templates/story/story.php?storyID=5080409> (accessed May 30, 2008).
  22. "ICC Indictment to affect northern peace efforts, says mediator," *IRINnews*, October 10, 2005; Frank Nyakairu, "Uganda: Victims Want Special Court for Kony," *Monitor* (Kampala), August 30, 2007, <http://allafrica.com/stories/200708291083.html> (accessed May 18, 2009); and Refugee Law Project, "ICC statement: position paper on the announcement of formal investigations of the Lord's Resistance Army by the Chief Prosecutor of the International Criminal Court and its implications on the search for peaceful solutions to the war in northern Uganda," July 28, 2004, <http://www.refugeelawproject.org/archive/2004/RLP.ICC.investig.pdf> (accessed May 15, 2009), pp. 7-9. Despite the calls for traditional justice, a survey (and Human Rights Watch's own research) indicates only a small percentage of people in northern Uganda believe that traditional justice mechanisms are the most appropriate means for dealing with those responsible for human rights violations. See Patrick Vinck et al., "Research Note on Attitudes about Peace and Justice in Northern Uganda," Human Rights Center at UC Berkeley report, August, 2007, <http://hrc.berkeley.edu/pdfs/Uganda-survey-research-note.pdf> (accessed May 18, 2009). See also Allen, Crisis States Research Center, "War and Justice in Northern Uganda," p. 87 ("Many individuals we interviewed are very interested in the punishment of Kony and his commanders, and forgiveness is by no means as prevalent as is asserted by some activists and interest groups.").
  23. Refugee Law Project, "ICC statement: position paper," July 28, 2004.
  24. Human Rights Watch has called for the ICC Office of the Prosecutor to look into crimes by all sides, and if it determines that abuses by the government forces do not meet the criteria for ICC cases, to encourage the national authorities to investigate and prosecute them. See, for example, "ICC: Investigate All Sides in Uganda," Human Rights Watch news release, February 4, 2004, <http://www.hrw.org/en/news/2004/02/04/icc-investigate-all-sides-uganda> ("Human Rights Watch has documented many shocking abuses by the LRA in Uganda," said Richard Dicker, director of the International Justice program at Human Rights Watch. "But the ICC prosecutor cannot ignore the crimes that Ugandan government troops allegedly have committed.>"). See also Human Rights Watch, *Courting History: The Landmark*



- International Criminal Court's First Years*, 1-56432-358-7, July 2008, <http://www.hrw.org/sites/default/files/reports/icc0708.1.pdf>, p. 42, which recognizes that as a result of the prosecutor's failure to adequately explain his investigation of UPDF crimes, "the prosecutor's work in Uganda is perceived by many of those in affected communities as one-sided and biased."
25. See Gerard Prunier, "Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986-99)," *African Affairs*, vol. 103 (July 2004).
  26. Robert Smith, "Consolidated Appeals Process 2004: Mid-Year Review Uganda," UN Office for the Coordination of Humanitarian Affairs, May 2004, [http://ochadms.unog.ch/QuickPlace/cap/Main.nsf/h\\_398ED03F0BF3FDCC1256DC2004EAC51/02DAEC2B53577A41C1256EA1004D2140/\\$FI LE/ MYR\\_2004\\_Uganda.PRINT.pdf?OpenElement](http://ochadms.unog.ch/QuickPlace/cap/Main.nsf/h_398ED03F0BF3FDCC1256DC2004EAC51/02DAEC2B53577A41C1256EA1004D2140/$FI LE/ MYR_2004_Uganda.PRINT.pdf?OpenElement) (accessed May 18, 2009), p. 3; and "Uganda thanks Sudan for allowing its army to pursue rebels over border," *Sudan Tribune*, April 16, 2004, [http://www.sudantribune.com/spip.php?page=imprimable&id\\_article=2511](http://www.sudantribune.com/spip.php?page=imprimable&id_article=2511) (accessed May 18, 2009).
  27. "UGANDA-SUDAN: Optimism that Sudanese peace deal could help pacify northern Uganda," *IRINnews*, January 11, 2005, <http://www.irinnews.org/Report.aspx?ReportId=52628> (accessed May 18, 2009).
  28. O'Brien, ICG, "The impact of international justice on local peace initiatives."
  29. Grono and O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Waddell and Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa*, p. 16.
  30. Ibid.; and O'Brien, ICG, "The impact of international justice on local peace initiatives."
  31. John Prendergast, "End This African Horror Story," *Washington Post*, April 7, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A32735-2005Apr6.html> (accessed May 18, 2009).
  32. Akhavan, "The Lord's Resistance Army Case," *American Journal of International Law*, pp. 404, 417-418.
  33. Allen, Crisis States Research Center, "War and Justice in Northern Uganda," p. 58.
  34. Abigail Moy, "The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity," *Harvard Human Rights Journal*, vol. 19 (2006), p. 271. Between January 1, 2000, and January 19, 2009, 12,503 former LRA combatants have received amnesty. Statistics provided by the Amnesty Commission, Kampala, January 19, 2009.
  35. Peter Clotey, "Uganda's LRA Rebels Say ICC Arrest Warrants Obstacles to Peace," radio report, Voice of America, November 13, 2007, <http://www.voanews.com/english/archive/2007-11/2007-11-13-voa2.cfm?CFID=201871731&CFTOKEN=11796895&jsessionid=8830a01d1ac6a00475005f774865744b5f39> (accessed May 18, 2009); and Peter Clotey, "Uganda's LRA Rebels Displeased with ICC Chief Prosecutor," radio report, Voice of America, 15 October 2007, <<http://www.voanews.com/english/archive/2007-10/2007-10-15-voa2.cfm?moddate=2007-10-15>> (accessed May 18, 2009).
  36. Human Rights Watch interview with western diplomats (names withheld), Kampala, March 2 and 15, 2007.
  37. O'Brien, ICG, "The impact of international justice on local peace initiatives." See also Grono and O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Waddell and Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa*, pp. 15, 19; and Evans, ICG, "Justice, Peace and the International Criminal Court." Ironically, shortly before these peace talks, Museveni had again offered LRA leader Kony amnesty. "U.S. Position on LRA Amnesty," US Department of State press release, <http://northernuganda.usvpp.gov/lraamnesty.html> (accessed May 19, 2009); and Frank Nyakairu, "Uganda: Museveni amnesty to Kony illegal – ICC," *Monitor*, July 6, 2006, <http://www.afrika.no/Detailed/12493.html> (accessed May 18, 2009). This offer, however, did not become the focus of accountability discussions in Juba. Negotiations instead centered on the possibility of national alternatives – including the use of traditional justice measures – to trial by the ICC.
  38. Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, June 29, 2007, paras. 4.1-4.2, 6.1-6.2; and Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement on 29th June 2007, Juba, Sudan, February 19, 2008, paras. 7, 10-14.
  39. For a more detailed discussion of these issues, see Human Rights Watch, *Benchmarks for Justice for Serious Crimes in Northern Uganda: Human Rights Watch Memoranda on Justice Standards and the Juba Peace Talks*, May 2007 – February 2008, [http://www.hrw.org/legacy/pub/2008/ij/uganda\\_memos\\_cover.pdf](http://www.hrw.org/legacy/pub/2008/ij/uganda_memos_cover.pdf).
  40. Uganda, Sudan, and the Democratic Republic of Congo launched a joint operation on December 14, 2008, against the LRA. Due to poor planning and logistical challenges, the operation failed to apprehend LRA leaders indicted by the ICC. The LRA responded by killing at least 865 civilians and abducting several hundred people. See Human Rights Watch, *The Christmas Massacres: LRA attacks on Civilians in Northern Congo*, 1-56432-438-9, February 2009, [http://www.hrw.org/sites/default/files/reports/drc0209web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/drc0209web_0.pdf).
  41. See Elise Keppler, "Managing Peace and Justice in the Juba Process," (forthcoming) (manuscript on file with Human Rights Watch). At the same time, communication between LRA representatives in Juba and the LRA leadership appeared to be intermittent and suffered from a relative breakdown in the final months of the talks, raising questions as to the degree of involvement of the LRA leaders in negotiating the agreements, especially the February 2008 agreement on accountability. See International Crisis Group, "Northern Uganda: The Road to Peace, With or Without Kony," Africa Report No. 146, December 2008, pp. 1-4; and Joe Wacha, Institute for War and Peace Reporting, "Kony Adds to Peace Process Turmoil," July 3, 2008, <http://www.globalpolicy.org/component/content/article/207/39840.html> (accessed September 23, 2009).
  42. Keppler, "Managing Peace and Justice in the Juba Process." 43 Ibid.
  44. See Human Rights Watch, *Selling Justice Short*, part IV.
  45. Many of the deaths were due to hunger and lack of medical care, others due to direct violence. Benjamin Coghlan et al., International Rescue Committee and Burnet Institute, "Mortality in the Democratic Republic of Congo: An Ongoing Crisis," January 2008, [http://www.theirc.org/resources/2007/2006-7\\_congomortalitysurvey.pdf](http://www.theirc.org/resources/2007/2006-7_congomortalitysurvey.pdf) (accessed May 20, 2009), pp. ii, 16.
  46. Tens of thousands were brutally slaughtered on an ethnic basis between 1999 and 2009. At this writing, killings continue in Ituri with at least two militia groups continuing to fight the Congolese army. There has been considerably less violence since 2007 than in previous years. See "Top UN official signals improvement, tough challenges in eastern DR Congo," *UN News Service*, April 9, 2009, <http://www.un.org/apps/news/story.asp?NewsID=30442&Cr=democratic&Cr1=congo> (accessed May 20, 2009); Médecins Sans Frontières, "DRC: LRA Attacks' 'Lasting Effect,'" May 18, 2009, <http://www.doctorswithoutborders.org/news/article.cfm?id=3626&cat=voice-from%20the%20field&ref=home-side-bar-right> (accessed May 20, 2009).

47. Office of the Prosecutor, International Criminal Court, Statement of Mrs Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, Sixteenth Diplomatic Briefing, Brussels, May 26, 2009, [http://www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280424/DP\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280424/DP_ENG.pdf), p. 2.
48. At times, Congolese judicial officials with the help of UN human rights specialists tried to stem the wave of impunity, notably including the March 2009 conviction of Mai Mai commander Gedeon Kyungu Mutanga on charges that included crimes against humanity. See "DR Congo: Militia Leader Guilty in Landmark Trial," Human Rights Watch news release, March 10, 2009, <http://www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial>. But too often their efforts were undermined by political interference, corruption, or prison breaks where some militia leaders who had been arrested managed to escape. See further discussion in Human Rights Watch, *Selling Justice Short*, pp. 49-50.
49. See extended discussion of several such cases – including those of Gabriel Amisi, Jerome Kakwavu, Floribert Kisembo Bahemuka, and Peter Karim – in Human Rights Watch, *Selling Justice Short*, pp. 45-40.
50. Human Rights Watch, *Democratic Republic of Congo – Renewed Crisis in North Kivu*, vol. 19, no. 17(A), October 2007, <http://www.hrw.org/reports/2007/drc1007/drc1007web.pdf>, p. 59. Despite the government's policy of appeasing human rights abusers, an August 2008 survey by the Berkeley-Tulane Initiative on Vulnerable Populations found that in eastern DRC, 85 percent of the population believes that it is important to hold those who committed war crimes accountable and that accountability is necessary to secure peace. Patrick Vinck, Phuong Pham, Suliman Baldo, and Rachel Shigekane, "Living With Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo," August 2008, <http://hrc.berkeley.edu/pdfs/LivingWithFear-DRC.pdf> (accessed May 20, 2009), p. 2.
51. "DRC: Controversy Surrounds Certain Military Appointees," *IRINnews*, August 26, 2003. The UN special rapporteur indicated her unhappiness at seeing Nkunda, who had been accused of crimes and human rights violations, being appointed to government institutions. See "DRC: Three RDC-Goma officers summoned before military court," *IRINnews*, September 10, 2003, <http://www.irinnews.org/PrintReport.aspx?ReportId=46037> (accessed May 21, 2009). On the crimes committed in Kisangani, see Human Rights Watch, *Democratic Republic of Congo – War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny*, vol. 14, no. 6(G), August 2002, <http://www.hrw.org/legacy/reports/2002/drc2/DRC0802.pdf>, p. 2. The UN later put the figure at 163, including civilians. See also "Death Toll in Congo Raid," *New York Times*, July 17, 2002, <http://www.nytimes.com/2002/07/17/world/death-toll-in-congo-raid.html> (accessed May 20, 2009).
52. Human Rights Watch, *War Crimes in Kisangani*, p. 19.
53. The new military leader called for the arrest of Nkunda and two other officers who refused to attend the ceremony. "Congo's army orders arrest of three rebel officers," Reuters, September 10, 2003.
54. Human Rights Watch also documented serious crimes committed by the Congolese army during the Bukavu crisis. See Human Rights Watch, *D.R. Congo: War Crimes in Bukavu*, June 2004, [http://www.kongo-kinshasa.de/dokumente/ngo/hrw\\_110604\\_en.pdf](http://www.kongo-kinshasa.de/dokumente/ngo/hrw_110604_en.pdf).
55. United Nations Security Council, Resolution 1565 (2004), S/RES/1565(2004), <http://daccessdds.un.org/doc/UNDOC/GEN/N04/531/89/PDF/N0453189.pdf?OpenElement> (accessed May 21, 2009), para. 5(g).
56. The warrants for Nkunda and Jules Mutebesi included war crimes and crimes against humanity. They were issued by the government but were not supported by appropriate substantive judicial investigation. Implementation of the warrants without additional legal procedures would not have met necessary fair trial standards. Human Rights Watch, *Renewed Crisis in North Kivu*, pp. 59-60.
57. The Security Council repeated its call to bring those responsible for violations of human rights and international humanitarian law to justice on 21 December 2005. United Nations Security Council, Resolution 1649 (2005), S/RES/1649(2005), <http://daccessdds.un.org/doc/UNDOC/GEN/N05/658/00/PDF/N0565800.pdf?OpenElement> (accessed May 21, 2009), preamble.
58. Human Rights Watch, *Democratic Republic of Congo – Elections in sight: "Don't Rock the Boat" ?* December 15, 2005, <http://www.hrw.org/legacy/background/africa/drc1205/drc1205.pdf>, p. 3.
59. Human Rights Watch interview with MONUC officials (names withheld), Goma, February 9 and May 12, 2007.
60. He claimed that other ethnic groups too had a role in his new movement. See, for example, Congrès National pour la Défense du Peuple, "Cahier de Charges du Congrès National pour la Défense du Peuple (CNDP)," October 2006, condensed version available in French at [http://www.cndp-congo.org/index-fr.php?subaction=showfull&id=1220528453&archive=&start\\_from=&ucat=6&](http://www.cndp-congo.org/index-fr.php?subaction=showfull&id=1220528453&archive=&start_from=&ucat=6&) (accessed May 21, 2009).
61. In a report to the UN Security Council in June 2007, the UN secretary-general noted with concern increased recruitment of children in the DRC and Rwanda for service with Nkunda's units. He remarked that "commanders loyal to Laurent Nkunda" and Nkunda himself actively obstructed efforts to remove children from military ranks. He called for the arrest of Nkunda and others involved in recruiting and using child soldiers and asked MONUC to assist in making such arrests if necessary. Human Rights Watch, *Renewed Crisis in North Kivu*, pp. 49-54; and United Nations Security Council, "Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo," S/2007/391, June 28, 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/N07/390/16/PDF/N0739016.pdf?OpenElement> (accessed May 21, 2009), paras. 22-23, 29, 72.
62. John Kanyunyu and Joe Bavier, "Congo rebel leader Nkunda arrested in Rwanda," Reuters, January 23, 2009, <http://www.reuters.com/article/worldNews/idUSTRE50M14N20090123> (accessed June 26, 2009). To date, no charges have been brought against him. The DRC requested his extradition to stand trial for war crimes and crimes against humanity, but without the establishment of an ad hoc court or major reform to the DRC judicial system, Nkunda is unlikely to get a fair trial there.
63. Human Rights Watch, *Ituri: "Covered in Blood": Ethnically Targeted Violence in Northeastern DR Congo*, vol. 15, no. 11(A), July 2003, <http://www.hrw.org/sites/default/files/reports/DRC0703.pdf>, pp. 23-27; and *The Curse of Gold: Democratic Republic of Congo* (New York: Human Rights Watch, 2005), <http://www.hrw.org/en/node/11733>, pp. 23-34.
64. Letter from Human Rights Watch to all EU Foreign Ministers, "Urge Congolese Government to Enforce ICC Arrest Warrant on War Crimes Charges," February 2, 2009, <http://www.hrw.org/en/news/2009/02/02/urge-congolese-government-enforce-icc-arrest-warrant-war-crimes-charges>.
65. Ibid. See also United Nations Security Council, Resolution 1857 (2008), S/RES/1857(2008), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/>

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66. Human Rights Watch, *Democratic Republic of Congo – Killings in Kiwanja: The UN's Inability to Protect Civilians*, 1-56432-422-2, December 2008, <http://www.hrw.org/sites/default/files/reports/drc1208web.pdf>, p. 10.
  67. *Prosecutor v. Ntaganda*, ICC, Case No. ICC-01/04-02/06, Warrant of Arrest, August 22, 2006, <http://www2.icc-cpi.int/iccdocs/doc/doc305330.PDF> (accessed May 21, 2009).
  68. "Congo ex-Rebel 'working with UN,'" *BBC News Online*, April 29, 2009, <http://news.bbc.co.uk/2/hi/africa/8023978.stm> (accessed May 21, 2009). The government's inclusion of abusive leaders in the army has also set the stage for further atrocities by its own forces. Human Rights Watch research over the course of 2009 has documented the deliberate killing of more than 1,400 civilians between January and September 2009 during two successive Congolese army operations against a Rwandan Hutu militia, the Democratic Forces for the Liberation of Rwanda (FDLR). Ntaganda served as the *de facto* deputy commander of the second operation, *Kimia II*. See Human Rights Watch, "You Will Be Punished": *Attacks on Civilians in Eastern Congo*, December 2009, [http://www.hrw.org/sites/default/files/reports/drc1209web\\_1.pdf](http://www.hrw.org/sites/default/files/reports/drc1209web_1.pdf).
  69. Our research indicates that other long-term benefits include protecting against revisionism. In addition, successful investigations and prosecutions may ultimately have some deterrent effect in the long term by, at a minimum, increasing awareness of the types of acts that are likely to be punishable offenses. See Human Rights Watch, *Selling Justice Short*, pp. 117-27.
  70. *Ibid.* pp. 93-100 (ad hoc tribunals), 108-16 (universal jurisdiction).
  71. The impact on national proceedings of ICC investigations in Uganda, Democratic Republic of Congo, and Darfur, Sudan, as well as on two situations under preliminary examination by the ICC prosecutor—Kenya and Colombia—are discussed in Human Rights Watch, *Selling Justice Short*, pp. 100-03, 105-08.
  72. Human Rights Watch, *Central African Republic – State of Anarchy: Rebellion and Abuses against Civilians*, vol. 19, no. 14(A), September 2007, [http://www.hrw.org/sites/default/files/reports/car0907webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/car0907webwcover_0.pdf).
  73. Human Rights Watch, *World Report 2008* (New York: Human Rights Watch, 2008), Central African Republic chapter, <http://www.hrw.org/legacy/englishhrw2k8/docs/2008/01/31/carepu17887.htm>.
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# Darfur, Bashir and the International Criminal Court

## PART TWO

### If Ocampo Indicts Bashir, Nothing May Happen

Phil Clark

13 July 2008

Regarding the ICC's likely indictment of Sudanese President Omar al-Bashir, one of the main concerns expressed is that it would cause Khartoum to lash out and inflict further atrocities on civilians, worsening the security and humanitarian situations in Darfur. While it is near-impossible to predict the impact that pursuing international justice will have on domestic politics and peacemaking, I propose that quite a different problem may emanate from the Bashir case: Because of the ICC's failures in Sudan and elsewhere to date – especially its inability to arrest key indictees – its move against Bashir may represent a hollow threat which Khartoum could easily ignore and which may ultimately have little impact on the political and conflict situation in Sudan. The concern is not that the indictment of Bashir may have a negative effect but that it may have no effect at all, raising questions about the fundamental purpose of the ICC in responding to mass atrocity.

My argument here leads on from debates in the recent Royal African Society collection, *Courting Conflict? Justice, Peace and the ICC in Africa*, in which Alex de Waal and I disagree on the role of the ICC in pursuing major suspects, especially sitting heads of state such as Bashir, Congolese President Joseph Kabila and Ugandan President Yoweri Museveni. In his chapter in the collection, de Waal praises the ICC for its initially 'cautious step-by-step strategy' in Sudan. He argues that the ICC's 'politically astute' approach of issuing arrest warrants for two middle-ranking figures, Amhed Mohamed Haroun and Ali Mohamed Abdel Rahman 'Kushayb', while not indicting individuals at the highest level of government such as Bashir and thus avoiding explosive confrontation with Khartoum, judiciously

balanced concerns for justice and peace. In contrast, in my chapter I criticise the ICC for its generally timid approach in the Democratic Republic of Congo (DRC) and Uganda, where the Court has eschewed the most difficult cases – principally those concerning suspects in the Congolese and Ugandan governments – in favour of those that could have been ably handled by the domestic courts. In the process, the ICC has contravened its own principle of complementarity, as outlined in Article 17 of the Rome Statute, which holds that the Court should not investigate or prosecute cases when domestic institutions are genuinely willing and able to do so. By avoiding cases that a global Court is mandated to pursue, particularly those involving high-ranking national officials who have insulated themselves from domestic justice, the ICC has also forfeited much of its legitimacy among populations affected by conflict.

To fulfil its mandate and maintain its legitimacy in the Darfur situation, the ICC should indict Bashir. This represents precisely the sort of case for which the ICC was created, holding accountable a head of state for committing grave crimes against his own citizens, while the domestic courts display no genuine willingness or ability to investigate or prosecute the case. Unlike the DRC or Uganda situations, where the ICC has intervened following state referrals that were gained after sustained diplomacy between the Court and local political officials (my research indicates that the ICC spent almost a year trying to persuade the Ugandan government that a referral was in its interests), the Darfur situation was referred to the Court by the UN Security Council. The Court has never had to maintain positive working relations with the Sudanese government, either at the referral stage or during its investigations. Although Sudan's non-cooperation with the ICC greatly hampers the Court's gathering of evidence, the flipside is that it faces little domestic political impediment to indicting Bashir or other senior Sudanese figures. Meanwhile

concerns about the ICC's impact on the pursuit of peace in Sudan may be overstated. Commentators opposed to the indictment of Bashir on the grounds that it would lead to further violence are right to emphasise that the ICC is a political as well as legal institution and that the impact of the Court must be assessed in political and peacemaking terms before the Court decides to intervene domestically. However, the impact of the ICC so far in Sudan and elsewhere suggests Khartoum has little reason to take the Court's indictment of Bashir seriously. If the Sudanese government interprets this as an empty threat, it will have little reason to react to it by unleashing further mayhem on civilians.

In the Sudan and Uganda situations, the ICC has proven to be a toothless tiger, issuing warrants for major perpetrators – Haroun, Kushayb and the leadership of the Lord's Resistance Army (LRA) – who remain at large and are unlikely to be transferred to The Hague any time soon. The ICC relies on national and international police and military actors to capture and arrest suspects. However, the Court has generally failed to foster meaningful relations with UN peacekeeping missions and other ground-level institutions that are vital to its cause. Officials from MONUC, the UN peacekeeping mission in the DRC, told me in 2006 that they were deeply frustrated by the ICC's unilateralism. One MONUC official in Bunia, the main town in Ituri province, said ICC investigators had "arrived out of the blue" in 2004 and demanded evidence regarding serious crimes in Ituri which MONUC had systematically gathered with the intention of aiding the local judiciary's prosecution of major atrocity perpetrators. Another official stated that the ICC had failed to adequately recognise the role that MONUC and the Congolese army played in arresting key suspects, including Thomas Lubanga and Germain Katanga, who were subsequently transferred to the ICC for prosecution. The official said that the ICC's failure to build strong relations with MONUC made the peacekeeping force reluctant to assist with other ICC cases, for example capturing and arresting the leaders of the LRA who have been based in north-eastern DRC since 2005. A breakdown in cooperation between MONUC and the ICC is a key

reason why the UN is currently refusing to allow the Court's chief prosecutor, Luis Moreno Ocampo, to make public UN-gathered evidence regarding the Lubanga case. Without the UN's permission for Ocampo to hand over key documents to Lubanga's defence team, this case – which was supposed to lead to the ICC's first-ever trial – is on the brink of collapse and Lubanga may soon walk free.

At a meeting in May 2008 hosted by Oxford Transitional Justice Research, Ocampo stated that the fundamental role of the ICC is to coordinate its activities with government and non-government actors in order to help end conflict. The Court, Ocampo said, is simply one piece of the peacemaking puzzle. Evidence from the ground, however, suggests that the ICC has not always sought this collaboration and often perceived itself as the lead organisation to which all others are answerable. Without reliable police and military allies, the ICC cannot deliver justice for individuals such as Haroun and Kushayb. Bashir may therefore interpret an ICC indictment as mere bluster; an attempt by Ocampo – who is facing increasing pressure over the Lubanga and LRA cases and his overall failure to get 'judicial results' – to show that the Court is willing to prosecute the highest-ranking officials but without the practical capacity to do so. Given these calculations, it is the likelihood that the ICC's indictment of Bashir would have little impact at all on the behaviour of the Sudanese government – neither producing a violent backlash in Darfur nor deterring future crimes – that should cause alarm.

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## Dilemmas of Confrontation and Cooperation: Politics in Sudan during Ocampo v Bashir

Sharath Srinivasan

18 July 2008

Important debates about peace versus justice do not get us very far in understanding what is happening in Sudan after the ICC Prosecutor outlined charges against President Bashir. Sudan, for its entire unrelenting calamity, has frequently exhibited a practice of well-oiled political calculation. To know what lies ahead, it is these calculations that we must focus on. I begin by making the case for Ocampo's political objectives in boldly seeking justice in the way he has. Well-prepared days before the Prosecutor outlined his charges, Khartoum is employing well-tested strategies of confrontation and cooperation. Similar strategies adopted by those opposed to Bashir and his National Congress (NC) party explain the current state of calm, but also portend the challenges ahead. Justice is indeed having an impact politically, and it may yet turn out to be a positive one.

Any outside actor foraying into Sudan is highly politicised, whatever its business: 'humanitarians,' 'peacemakers,' and now the 'justicemaker'. When Khartoum failed to hand over two middle-level indicted suspects and dismissed the ICC, Ocampo first successfully buttressed his mandate with a statement from the UN Security Council in June that all parties in Sudan must 'cooperate fully with the Court'. He then went for the jugular and 'command responsibility': the President; Genocide. Mired by doubts over his ability to deliver the critical successes needed by a nascent ICC, Ocampo has gone for bust. But surely this cannot be because he banks on Bashir's arrest or surrender following any future indictment? And the genocide charge too is, for reasons most accept, not the easy win option in Darfur.

The risk of nothing happening is high, as Phil Clark explains in the previous essay, but perhaps it is the reward of something *not necessarily judicial* happening that Ocampo finds tantalising. Has Ocampo wagered that an indictment will be a dam-

breaker, possibly in obtaining Khartoum's cooperation on the two already indicted suspects, but more hopefully in making the ICC a player in conflict management? In a BBC interview on Monday, he was at pains to emphasise that it was the Security Council with its referral that decided that justice was an 'important component of conflict management' and 'genocide management'. Ocampo focused on this, not future legal proceedings: 'If the judges confirm the charges, I'm sure the Security Council will take the measures to stop the genocide'. Seen from this perspective, even an Article 16 deferral is a possible success: *if* it prompts international action and comes at a price for Khartoum. Ocampo might well settle for being Bashir's Damoclean sword for an indefinite period.

If this assessment of Ocampo's strategy is right, it is risky to play such politics with Khartoum. Bashir's NC certainly sees Ocampo as a minion in its longstanding battle with a liberal interventionist West. For 19 years, Bashir and company have seen off more potent 'aggressors'. We can expect a wily mix of confrontation and cooperation that is purposefully contradictory, fits-and-starts-then-fits-again, good-cop bad-cop. It has worked before: humanitarian access, peace talks, peacekeepers, counter-terrorism. Externally and internally, the NC will choose to keep the ICC political, because that is the game it plays best.

Externally, confrontation has been the first line of defence. Already Khartoum has drummed up support against the ICC and for an Article 16 one-year deferral of the Bashir case by the UN Security Council. On Khartoum's side are the African Union, the Arab League, Russia and China. The strength of this support dilutes any need to cooperate with the Court. Thus, the NC has refused to bite on hints that it could hand over the two indictees as part of a deal on Bashir. This will not change unless the NC feels under far more pressure. A key question is whether the Article 16 debate in the Security Council happens before or after the three trial judges decide about an indictment.

Other, messier avenues for external confrontation play to the fears held by many diplomats and commentators: Vice-President Ali Osman Taha said, 'Southern Sudan are the first to be harmed by the disruption of the peace implementation if the procedure is engaged to its end'; on the current Abyei dispute, Sudan's ambassador to the UN said, 'It will create a very bad situation within the presidency'; a wait-and-see approach by Darfur rebels on peace talks, a senior official predicted, 'produces a stalemate'. Violence, to civilians or to peacekeepers or humanitarians, looms silently but darkly over all of this.

Internally, so far confrontation has taken the guise of successful reaching out to political adversaries to build united opposition to an indictment of Bashir. And cooperation has focused on showing progress on Darfur and the Comprehensive Peace Agreement (CPA) to demonstrate what is at stake and to expand the divide between the ICC and its detractors. There is a new national unity government initiative for peace in Darfur headed by Saddiq al-Mahdi, former prime minister and opposition Umma party leader. The much-heralded adoption of election laws was timed to be on 14 July, the day Ocampo filed his charges.

So why the level of cooperative support that Bashir enjoys against the ICC from northern opposition parties, and even the southern-based Sudan People's Liberation Movement (SPLM)? Surely this is a precious chance for them to confront their old foe? Saddiq al-Mahdi, hitherto a vocal supporter of the ICC, has now declared for constitutional stability over justice. The Communists, Democratic Unionists and al-Turabi's Popular Congress all agree. Northern opposition parties are collectively far more popular than Bashir's NC but toothless in the face of the latter's military-security domination. They are banking on elections in 2009 or a new unity government, stubbornly optimistic that the NC may yield its absolute power. A presidential palace besieged by the ICC, they know, will batten down the hatches. Hardliners will dominate decisions, probably given succour by the emboldened belligerence of Darfur rebel groups. When politics gets more violent, these northern

opposition parties become less relevant. Mixed with a strong patriotism, to date they have stood behind the state and its president. But they have yet to name their price.

For the SPLM, a Bashir indictment would be a new addition to the 'can't live with or without you' CPA dilemma. Bitterly or not, the NC is their 'partner' in the national 'unity' government; the sole co-signatory to their precious peace deal. With much to lose, confrontation is not an option. Not yet. Although they talk up the country's unity, the SPLM is split between secessionists and 'New Sudanists'. The latter, especially those in northern Sudan frustrated with the CPA, have a lot more to gain by capitalising on NC vulnerability. So far, after heated debates in Juba, the SPLM is backing its partner. Again, the SPLM will expect the NC to pay up, starting perhaps with resolving the Abyei dispute.

As for the Darfur rebel groups, they have predictably rejoiced with loud support for a possible indictment of Bashir, but so far they have limited themselves to words. JEM won few friends in Sudan or abroad with its recent attack on Khartoum, and right now a repeat effort would be very risky given northern opposition and SPLM support for the NC.

Thus far, things are much calmer than predicted. But we should remember that the trajectory of events in Sudan before 14 July was already dire. The CPA was shaky at best after the Abyei crisis in May. Last week, the NC railed against SPLM secretary-general Pagan Amoum for calling Sudan a 'failed state'. As for democratisation, the security crackdown on Darfuris after the JEM attack, redoubled attacks of press freedom, a shambolic census and bitter debates over the election laws all boded badly. A peace deal for Darfur was more of a long shot than ever. And the unconfirmed defection of sole rebel signatory Minni Minawi to the 'bush' may kill off the Darfur Peace Agreement once and for all.

Vulnerable and distrusted, the NC needs to offer more substantial concessions and guarantees on Darfur, Abyei, and democratisation and reform under the CPA

to maintain vital domestic support ahead and beyond any Article 16 decision by the Security Council. Even a one-year deferral puts Bashir in an invidious position come the time of elections next year. Relinquish power and he is exposed to the indictment. Gerrymander the elections and lose important domestic support. Northern opposition parties could decide that justice now trumps stability. Darfur rebels could go for broke, while SPLM 'New Sudanists' might resurrect the objective of the Movement's late founder to take Khartoum. Bashir could dig in and fight but, 20 years on, one wonders whether he has the wherewithal. And a lurking fear would be that some quarters in the NC might decide to sacrifice him.

Bashir's best option may be accepting an inclusive national agreement that deals him and his lot some kind of enduring role in government and a local reconciliatory version of justice. It will cost him serious reforms and the NC's relinquishing its absolute hold on power. It would have to bring in the numerous armed Darfur political groups and protect the CPA gains for the southerners. This is improbable and hard to stomach for those in the NC used to a free hand. If an indictment, deferred or not, is considered to have played a role in delivering any of this, Ocampo may yet have cause to argue that his was a job well done. The deterrence effect may flow not only from successful prosecutions but because powerful politicians are forced by international institutions to respond and change their behaviour.

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## **Ocampo v Bashir: The Perspective from Juba**

**Naseem Badiey**

*18 July 2008*

The perspective on the ground in Juba regarding the ICC prosecutor's request for an arrest warrant for President Bashir is very different from that in Khartoum and Europe. Here there is concern about the impact of the warrant on the fragile Comprehensive Peace Agreement (CPA) signed in 2005. This agreement has only recently saved the people of Southern Sudan from the same suffering and deprivation that has prompted international outcry over Darfur. What is the point, ask some Southern Sudanese, of taking action in support of Darfuris if it is at the expense of the people of the South?

While the situation in Darfur seems only to get worse, Southern Sudan can be cautiously viewed as a success story. Within three years, Southern Sudan has come to look and feel like a separate country. Roads have been de-mined and paved for the first time, buildings are going up everywhere, people are returning, jobs abound. While international agencies have evacuated staff from Khartoum, life in Juba goes on as usual: peaceful, hopeful, and now even bustling. This is in stark contrast to life here only a few years ago.

For the past few days, people in Juba have been reading the newspapers and watching the news on satellite television, and many conclude that they could do without both Bashir and Ocampo. While some Jubans support the purpose and aims of the ICC – and certainly few have any sympathy for Bashir – many shake their heads at international actors so focused on symbolism and lofty ideals that they fail to consider the practical impact of their actions on the people of this region. Here justice is a pipe dream, a luxury few can afford. What people want is peace and development. They want healthcare, clean water, education, and most of all security.

The conflict in Darfur has raged for the last five years. The civil war between the 'North' and the

'South' lasted 22 years, involving various rebel factions, regular forces, and counterinsurgency forces with 'Northerners' and 'Southerners' on both sides. Since the CPA, Southern Sudan has been occupied with the task of rebuilding a region lacking infrastructure, but there are many complex issues that remain to be worked out. Foremost among them is the relationship between the new Southern state and the region's many communities. Institution-building, the resettlement of refugees and IDPs, developing a land policy, drafting legislation, building human capacity, providing much-needed services, preparing for elections – these are the immediate issues that concern Southern Sudanese, not exposing Bashir's crimes or punishing him for his role in Darfur.

Here, many people bear responsibility for atrocities committed during two decades of war. Almost all of the Southerners now in the Government of Southern Sudan fought either with the Sudan People's Liberation Army or in Khartoum's counter-insurgency campaigns. That the success of 'South-South reconciliation' has brought together the likes of Paulino Matiep (former commander of the South Sudan Defence Forces), Clement Wani (former Sudanese Armed Forces General and leader of the Mundari Militia), Salva Kiir and Riek Machar to work towards a common goal is a remarkable feat. Indeed, it is a model of a successful reconciliation process, led by Southern Sudanese themselves, and a gain worth protecting.

Here abstract ideals of international constitutionalism are far from most people's minds. Having experienced the cynical realities of post-independence politics and too familiar with the harsh realities of war, many people do not want their lives to become test cases for theoretical debates on the future of international law. Jubans recount tales of the war, meanwhile hoping the judges of the ICC will exercise restraint. The ICC will not necessarily bring Bashir to justice, but it will certainly have an immense impact on hopes for democracy here, and may in the end destroy what Southern Sudan has only just started to build.

The atrocities in Darfur and the role of the Government of Sudan certainly warrant international action. Yet just as the conflict in Darfur cannot be divorced from its domestic and regional contexts, neither should international involvement be pursued without consideration of its domestic and regional consequences. So far the only hope of a future peace in Darfur, and indeed of stability in the region, is a strong, developed Southern Sudan, with political ties to its neighbours and to the international community. This is the only objective that seems achievable. It is reckless to jeopardise this possibility in an effort to secure justice in Darfur.

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## What Does it Mean for the Prosecutor to be a Political Actor?

**Teddy Harrison**

*21 July 2008*

In the wake of Luis Moreno Ocampo's application for an arrest warrant for Sudanese President Omar al Bashir, a number of commentators have been keen to point out that the prosecution of a state's leadership is always an inherently political act. While this observation has the potential to be an illuminating starting-point for analysis, it is instead frequently presented as an unexamined basis for entirely separate arguments. Too often it is presented as if both the meaning and consequences of such a statement were self-evident; they are not. We should be asking, in what ways is such prosecution political? Crucially, what follows from the realisation that the role of the ICC prosecutor is, in at least some ways, a political one?

That ICC prosecution of a head of state has political consequences is undeniable, but this alone does not qualify such prosecution as a political act. Political consequences can exist in the total absence of agency, as with natural disasters that alter the political landscape (take, for instance, the 2005 Indian Ocean tsunami). Action in various fields, taken for apolitical reasons, can also have political ramifications. This is frequently the case with new scientific discoveries or technical innovations. Likewise, this could be the case with prosecutions pursued entirely according to norms of justice. The impartial prosecution of domestic politicians for domestic abuse, for instance, could change the outcome of an election but will often not be a political act.

When consideration of political consequences plays a role in prosecutorial decisionmaking, a line is crossed into political action. The thrust of much criticism is that it would be irresponsible for the prosecutor to fail to do so. Thus, many critics would see the prosecutor play a role as a fully-fledged political actor. This brings us to a series of important questions: Should the prosecutor play such a role as a

political actor, or attempt to leave political considerations to others (such as the UN security council)? If the prosecutor is to be a political actor, which considerations are relevant?

There are certainly political considerations that we would not want to enter into prosecutorial decision-making. Great care has been taken to ensure the independence of the office of the prosecutor from undue political influence. If the prosecutor is to be making political decisions, some way must be found of ensuring that such decisions are not taken to further the interests of powerful actors or to pursue agendas other than those for which the court was established.

There is also a political role for the prosecutor that is more ambiguous. When the prosecutor acts to bolster support for his fledgling institution, he acts politically. This can be helpful; when the prosecutor engages with the media to act as an ambassador for the court, he may be acting entirely within his mandate. However, if decisions on whom and how to prosecute are made in order to secure support from powerful states or to ensure new signatories, it is likelier that the integrity of the prosecutor's office is undermined. Nevertheless, the prosecutor may have an important role to play in ensuring the survival and success of the court. Once again, serious discussion is necessary about how to ensure that the prosecutor exercises appropriate political agency.

The prosecutor of the ICC is not unique in having a political role that includes substantial discretion. However, he differs from prosecutors in domestic courts in some important ways. First, because the ICC can initially take on so few cases and there are, regrettably, so many crimes being committed, prosecution is much more selective than is usually the case. This greatly increases the scope of discretion; if political factors are allowed to influence decisions, they could be making the difference between prosecution and no action. Second, the prosecution involves an international actor (the prosecutor and ICC) affecting domestic and international politics. In domestic prosecutions, political consequences flow



directly from the structure they affect, greatly reducing the resultant controversy; exogenous action is much more likely to be seen as disruptive and political in a negative sense. Third, the ICC remains a relatively new entity in which, in the absence of regularised institutional patterns and standards of behaviour, there is great scope for individual action. On the other hand, new institutions are much less resilient – and therefore cannot as easily afford individual error.

I suggest, then, that it is appropriate to focus more on the (political) conduct of the prosecutor as an individual – and as more than just a metonym for the ICC. Simply stating that his action is political does not get us very far. If he is to be a political actor, what is the appropriate form of agency? How can we ensure that such agency is exercised appropriately? These are difficult questions to which we do not, as yet, have ready answers. Yet the controversy over the latest indictment shows that it is important that we find them.

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## Understanding Darfur's Saviours and Survivors<sup>1</sup>

**Harry Verhoeven, Lydia Kemunto Bosire and Sharath Srinivasan**

*3 August 2009*

Crises in African countries are too often given a media attention-span of a couple of days. Millions of deaths in the Democratic Republic of Congo, Somalia's two decades of disorder, and the famines in Ethiopia only capture the imagination when related to gorillas, pirates and rock stars, respectively, before they return to their footnote status. Darfur, however, is different. A resource-poor region of Africa is at the centre of the most vibrant student activist campaign in a generation. In a unanimous vote in mid-2004, both the US House of Representatives and the Senate labelled it "genocide" (before sending out a mission to inquire into whether it really was, but no matter). For five years since and counting, Darfur has top-billed the agenda for human rights activists, media-outlets and the Western-led international community: aid organisations have set up the world's largest humanitarian operation and more than 15,000 UN and AU peacekeepers now operate in Western Sudan. To cap it all, the International Criminal Court has issued an arrest warrant for Sudanese president Omar al-Bashir and is appealing to add a charge of genocide. What is going on?

"Saviours and Survivors" is Prof. Mahmood Mamdani's answer to this question. This is a book about the naming and framing of violence, and its consequences: it explains why this war in particular has received such unusual publicity and become the object of international political and judicial activism. Through an investigation into the roots of the violence, Prof. Mamdani challenges the moral, apolitical rendering of the conflict in the activist – consequently global – consciousness. Combining analytical strength and historical knowledge with a provocative tone, this book has unleashed, since its preview essay in the *Nation* and the *LRB* a year ago, one of the most heated discussions of an African conflict in recent time.



According to Mamdani, the ICC's arrest warrants, the campaign of the Save Darfur Coalition (SDC), and the principle of the 'Responsibility to Protect' should be understood in the context of a wider emerging Western thinking and discourse epitomized by the Global War on Terror (GWOT).

"Saviours and Survivors" does not try to tie a conspiratorial thread between the GWOT, the ICC and the SDC as some of its critics allege. Rather, it explicitly aims to highlight the problematic nature of the increasing tendency of the Western-led international community to remove the 'political' – the adversarial, the contestable – from key areas of public life and public decision-making. The SDC, just like GWOT-theorists, depoliticises conflicts, preferring to cast them in intellectually easy, intuitively appealing and politically convenient terms of 'good' and 'evil'. What is effectively a technocratic banner of 'global justice' and 'universal values' obscures quintessentially political questions about the who, what and why of 'global' interventionism and thereby also veils powerful interests and highly partisan decisions. In the GWOT-Zeitgeist, complex violent processes are radically simplified and packaged in catchy soundbites and emotionally charged messages. The contradictions and particular stakes of politics are removed from the war setting and replaced by absolutist norms that leave us with only one 'a-political' (and hence morally obvious) choice: military action. And just like the GWOT, the supporters of military intervention in Darfur cannot be bothered with local nuances, socio-historical processes and the messy nature of on the ground conflict realities that do not fit nice legal or ethical categories. There can be no discussion of how certain 'perpetrators' were once 'victims' and how the 'victims' are at risk of becoming 'perpetrators' due to outside intervention; or of how the 'saviours' of some continue to be the oppressors of others.

The reason for action is moral. Politics is to be kept at bay; it is too messy, analysing and understanding it takes too long; look where politics got us in Rwanda.

And Rwanda is particularly emotive for the Darfur activists. As Mamdani notes, "The lesson is to rescue

before it is too late, to act before seeking to understand. Though it is never explicitly stated, Rwanda is recalled as a time when we thought we needed to know more; we waited to find out, to learn the difference between Tutsi and Hutu, and why one was killing the other...What is new about Darfur, human rights interventionists will tell you, is the realisation that sometimes we must respond ethically and not wait. That time is when genocide is occurring." In other words, prescribe the solution without understanding the problem. What "Saviours and Survivors" suggests is that an understanding of the problem would lead to a vastly different understanding of what solutions are necessary.

Mamdani perceptively contrasts the current wave of Darfur activism with the anti-war campaign regarding Vietnam, or the struggle against apartheid – SDC's bottom-line is about military intervention: it mobilises for war, not for peace. The tactics used to influence public opinion too are very different – a particularly striking paragraph is Mamdani's description of how the SDC, in its early days, distributed 'action packets' according to faith with a specific message tailored to religious stereotypes: if Christians were asked to lead (cf. the burden to save) and Jews were uniquely placed to bear witness (cf. the Holocaust), then Muslims, cast in the GWOT-framework, were asked to fight oppressors in their midst and identify perpetrators.

SDC's mischaracterisation of the Darfur conflict as being about 'Arabs' committing genocide against Darfur's 'African' population was meant to appeal to a very broad albeit only American audience, uniting East Coast liberals, African-American churches and Deep South nativists behind Congress resolutions. Lead by movie stars and campus activists who decried Darfur as an 'African Auschwitz', Mamdani rightly criticises this ad hoc coalition of right-wing conservatives and youthful Western progressives for turning Darfur into a place and an issue 'to feel good about yourself because we're doing the "right" thing and not engaging in politics'. Put differently, intervention in this brave new post-9/11 world claims to destroy evil, not to tackle a political problem. Quod non, of course.

The outcome? Humanitarian impunity. Here, Mamdani points out that Africa is the site of experimentation: the logic of societal experimentation in the form of Structural Adjustment Programmes that led to collapse in the public sector continues in the work of the humanitarians. Today, in the messy situations of ongoing conflict, a new idea is being advocated, that of prosecutions at all cost, even when increased violence – as seen with the murderous rebels of the Lord's Resistance Army now engaged in violence in the Congo – becomes a real outcome. What are the implications for the institution of accountability itself and our hierarchies of principles when we embrace the dogma of unconditional, immediate justice – justice by force or through the suspension of peaceful negotiation if necessary? Who gets to decide which right trumps others? And before we say 'the international community', what legitimacy and accountability have those who constitute this group, assuming we can agree to the analytical content of this 'international community'? In theory, prosecution and military intervention are elegant interventions. However, if they go wrong – and humanitarianism is littered with interventions gone wrong – architects do not have to live with the consequences of their action.

Whereas "Saviours and Survivors" offers some excellent reflections on the ideological background of the international community's role in the Darfur conflict, it is less good at analysing what has actually (not) happened. For all Mamdani's claims about the extraordinary efficiency of the SDC and its Congress resolutions, the policy of Washington (and by extension, other Western countries) towards Sudan over the past years has been incoherent and deeply ineffective. Nor has the principle of the 'Responsibility to Protect' (R2P) and its definition of sovereignty transformed the will of interveners. In making a case for the concept, one of R2P's philosophical fathers, Gareth Evans said, "While the primary responsibility to protect its own people properly lies with the sovereign state, if that responsibility is abdicated, through ill-will or incapacity, then it shifts to the international community collectively – who should respond with force if large scale killing or ethnic cleansing is

involved, and that is the only way to halt or avert the tragedy." While Mamdani sees this discourse as thrusting open doors for the violation of African sovereignty, this outcome has not been forthcoming.

Instead, America has swung back and forth between long periods of silence, outright confrontation with al-Bashir, support for the former rebels of the Sudan People's Liberation Army, and attempts at normalising diplomatic relations with Khartoum. It initially supported African Union troops, then considered them to be inadequate, subsequently lobbied for a UN peacekeeping force only to fail to seriously support it when it finally took over in January 2008; simultaneously the Bush administration invited Sudan's intelligence chief to Langley, Virginia for collaboration in the context of the GWOT. Overall then, Washington and other stakeholders who have embraced the genocide-label have struggled to manage competing interests – the Khartoum-SPLA peace agreement, terrorism, regional stability, Darfur – and have failed to develop a coherent long-term policy that really improves the human security of Sudanese civilians. It has been exactly this problem of inconsistency, confusion and the exigencies of Realpolitik, rather than bellicose confrontationalism inspired by militant activism, that has dominated real world Western actions.

This brings us to the second of three major shortcomings of the book: its own portrayal of the violence in Darfur. While "Saviours and Survivors" does a masterful job of exposing the flaws in the orthodox 'genocide'-narrative of the Darfur conflict, demanding that history and politics are injected into our understanding, it offers an account of its own that lacks engagement with critical parts of the historical context of violence in Sudan. In effect, Mamdani diminishes the importance of contemporary Sudanese politics that do matter to the understanding of Darfur.

For Mamdani, Darfur is, essentially, a two decades old war over land, caused by the nefarious interplay of prolonged drought, the colonial legacy of re-tribalisation and the Cold War's negative impact.

Building on earlier scholarship, he argues that Darfur's history cannot be constructed as a simple settler (Arab) vs native (African) narrative, as the SDC does, with a bad 'Arab' government as spoiler-in-chief; we need a far more sophisticated analysis in both space and time to understand the contemporary violence. While Darfur served as a launching pad for proxy warfare in neighbouring Chad between France, America and Libya, displacement through desertification in the 1980s unleashed a struggle over ever shrinking quantities of land: as Darfurians responded by resorting to increasingly narrow racial-ethnic constructs, the Malthusian trap became ever more violent. For Mamdani then, the national government's role in all of this has largely been one of misreading local dynamics and failed attempts to broker negotiated settlements. By 2003, the violence had spiralled out of control and acquired broader national implications; the rise of two potent rebel movements lead to a brutal counter-insurgency marked by gross human rights violations.

The problem is not so much that these claims are wrong (though some scholars have taken issue with its reconstruction of the history of land and identity in Darfur), but that through their selectiveness, they could be seen as absolving the current regime in Khartoum from its devastating political, moral and legal responsibility for the atrocities and displacement in the region. Mamdani effectively diminishes the importance of recent deliberate political actions through an under-analysis of why Darfur is not exceptional and of why Sudan has been torn apart since independence by countless macro and micro-conflict: war in Sudan – whether in the East, in the South or in the West – is fundamentally not a “clash of (Islamic and Christian) civilisations”, nor a question of irreconcilable 'Arab' and 'African' cultures, but a result of the brutal exclusionary rule of a faction of Sudanese elite who control the country. “Saviours and Survivors” overlooks how since coming to power in 1989, the ruling National Congress Party (NCP) has radicalised these core-periphery tendencies under the banner of militant Islam, rhetorically welcoming as equals all those from the peripheries who wanted to join its cause, but in reality deepening the political-

economic realities of exclusion and wealth accumulation in Sudan. During the last decades, Darfur, like other 'backward' parts of Sudan, has been totally deprived of public goods like security provision, decent health care and roads, while its people have been excluded from government jobs at the centre. Historically, Darfurians had a wide range of mechanisms to deal with both climatic changes and tribal-political upheaval and did so without falling into ethno-ecological conflicts; the intensification of violence from the mid-80s onwards has thus less to do with creeping desertification and 'unfortunate' governmental misunderstanding, then with a context of structural exclusion that makes, and keeps, people vulnerable to disasters, whether natural or political. The ruling NCP did not merely fail to 'think through' the colonially crafted divide, as Mamdani sees it, but it reinforced and exploited divisive ideas of race, identity and citizenship in order to manage patronage politics, as it has done elsewhere in Sudan.

The similarities between the tragedy in Darfur and wars elsewhere in the country go beyond their position in the Sudanese state and relate to the dynamics of the conflict itself: there is a vicious and deliberate interlocking of decentralised violence, forced migration, racialised language and ethnic divide and rule. The scorched earth tactics in which displacement and terror are often more important than actual killing; the dehumanising discourse that stirs up hate and antagonises communities; the use of proxy militias, composed of marginalised groups in their own right, who are given total impunity to combat the enemy; the systematic transfer of assets (cattle, land, water holes...) from those targeted by the government to those fighting for Khartoum; the aerial bombardment of civilians and the use of aid as a weapon against people; the false cease-fires and the relentless obstruction of humanitarian operations to wear down the international community and rebel opposition: the pattern of violence in Darfur eerily mimics that of war in the 80s and 90s in Southern Kordofan, Equatoria and Bahr al-Ghazal. Ahmed Haroun (who has been indicted by the ICC on charges of crimes against humanity), exemplifies how the horrors of Darfur are connected to massacres in other

parts of Sudan. Haroun was not only one of the chief organisers of the Janjaweed in 2003-2004, he also led the government militias in their 1990s jihad in the Nuba Mountains, raping, pillaging and killing to break the soul of the local communities.

None of this is to be found in "Saviours and Survivors." While Mahmood Mamdani rightfully criticises the international community's simplistic account of 'genocide' in Darfur, he engages in his own distortion through his downplay of the agency of those factions of the Sudanese elites in control of the state. War, exclusion and underdevelopment in Sudan have a history that needs to be told. And Darfur is now more than ever before an integral part of that history.

The third problem with the book is in its vision of the contents of accountable politics. For Mamdani, there are three kind of justice possible – political, criminal and social. Quite apart from the problem of the Court being an extension of the antipolitical humanitarian fundamentalist Zeitgeist – after all, the ICC considers cases according to technical specifications of gravity and applies the appropriate procedures, unencumbered by the politics that produced the violence – the ICC's focus on criminal justice is inadequate. Seeking to deliver justice in accordance to the 'Nuremberg Model', the court assumes it is possible to tell apart good and evil, perpetrators and victims. It also assumes that the survivors do not have to live together, that the violence has ended and that there is a winner. In Darfur, as South Africa, Mamdani offers, the situation is different. Right and wrong, perpetrator and victim, are far more fluid. People have to live together, there are no winners and losers. Everyone is a survivor. The solution lies in the establishment of political change and inclusive institutions, with an acknowledgement that amnesty may be a price to be paid. Instead of criminal justice, the focus should be political justice based on what Mamdani calls the Kempton Park model that brought an end to Apartheid in South Africa. There, the focus was on political justice, not criminal justice. The process focused on the political needs of the nation, privileging the sovereignty of the country over the principles of the amorphous international community.

What Mamdani does not address is that the 'Kempton Park'-choices of apartheid South Africa, Mozambique and Southern Sudan were easier to make because the outside world was not all mobilized behind one principle, right or wrong. Is Kempton Park still on the table now that the rules of peace negotiations – and of who should end up in parliament and who should be in jail – have been transformed? Might the activists be satisfied with delayed justice, where amnesty and political transformation are privileged, with the knowledge that later, whenever domestic politics allows it, prosecutions can take place? After all, many countries are recently revisiting their old amnesty provisions. Mamdani does not make this proposal but it might be one worth considering, including its moral hazard. Further, South Africa has demonstrated that the Kempton Park model does not automatically address social justice, the other pillar of justice that is often part of the root causes of violence. Where does this leave us? This is not addressed.

In conclusion, "Saviours and Survivors" demonstrates how the humanitarian project – with SDC and ICC being just two examples thereof – has shifted and continues to shift the vocabulary through which all local claims are made, how people understand their problems, and what solutions are availed to them and which ones are excluded. This thought-provoking book leaves us with an existential question: what are we to do with a humanitarianism which, instead of increasing the agency of those it hopes to support, removes from them the possibilities of acting out of their predicament, turning them into wards, passive subjects in need of saving?

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1. This essay appeared originally in *Sudan Tribune*, 3 August 2009: <http://www.sudantribune.com/spip.php?article32018>.

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## The Force of Law and Problem of Impunity

Yvonne Malan

25 July 2008

*'But this is a new world – we are trying to establish a global community based in law.'* Luis Moreno Ocampo (interview with CNN)

The storm that has broken out over ICC Prosecutor Luis Moreno Ocampo's decision to file genocide charges against Sudanese president Omar al-Bashir is intriguing for a number of reasons, not least because of what it says about the role of criminal trials in transitional justice.

This essay focuses on why non-judicial approaches to transitional justice are less effective than is often claimed and why prosecutions are an important way of dealing with past injustice. It is often overlooked that arguments in favour of reconciliation have become a useful way to defend amnesty and impunity. Part of the uproar over Ocampo's decision is based on a school of thought that has demonised criminal trials as a way of dealing with the past. There are of course other arguments against the ICC's decision, but what I want to focus on is the prejudice against criminal trials and the dangers of non-judicial approaches.

Non-judicial ways of facilitating political transitions have predominated in recent decades, truth commissions being the most prominent transitional mechanism. More than thirty such commissions have been established since 1990. They are largely non-confrontational and follow in the wake of amnesty for perpetrators. Their main purpose is usually to uncover the 'truth' about the past in a context where criminal trials will not be held.<sup>1</sup>

Of these commissions the South African Truth and Reconciliation Commission (TRC), established nearly a year after the country's transition to democracy, has become the dominant global model.<sup>2</sup> This model manifested two primary features: the enormous emphasis on reconciliation; and the TRC's particular brand of restorative justice. Both of these were

strategies to defend the TRC process against claims that, because of the amnesty provisions, it had completely abandoned the notion of justice. Amnesty for perpetrators who had committed acts of gross human rights violations (for example, torture, murder, kidnapping) was the founding reason for the TRC. The amnesty deal was not struck at the multi-party negotiations that decided on other aspects of the transition but instead behind closed doors between the major political parties, the African National Congress and National Party, that stood to gain the most from an amnesty. Initially the amnesty deal was defended on pragmatic grounds (even by the country's Constitutional Court): it was necessary to ensure a peaceful transition to democracy, lest the apartheid security establishment revolt and it was the best mechanism to uncover the truth about the past. Yet, what was initially a political compromise became gradually portrayed as a form of forgiveness, typical of the reconciliatory nature of the 'Rainbow Nation'.

Perpetrators had to apply for amnesty individually (which would give them immunity against criminal prosecutions and civil suits) and they had to meet certain requirements. This included making a full disclosure about the acts they had committed. On paper this seemed to add some balance to proceedings and would give victims the opportunity to learn the truth about the past. In reality, perpetrators disclosed the bare minimum in order to gain amnesty. A member of the TRC stated that 99% of victims gained no new information about their cases. The TRC – whose Investigation Unit was quickly overwhelmed – did not, in most cases, have the capacity to challenge perpetrators' version of events and determine whether a full disclosure was made.<sup>3</sup> Still, by far the majority of applicants received amnesty and, regardless of the atrocities they had committed, were allowed to slip away into obscurity.

Accused of abandoning justice, the TRC concocted a particular brand of restorative justice. Some of the key assumptions of this approach included that victims valued truth over justice; the choice for amnesty and forgiveness was not a political compromise, but a moral triumph; and virtues such as

reconciliation and forgiveness trumped human rights and the rule of law. It demonised criminal trials as a lust for revenge.

The emphasis on reconciliation and disdain for criminal trials marginalised debates about human rights and responsibility. This failure defines the legacy of this allegedly successful truth commission. Nearly a decade after the commission's final report was released, victims are still angry about the lack of justice (as seen after the farcical trial of apartheid minister Adriaan Vlok<sup>4</sup>). As Dorota Gierycz, who was involved with the Liberian truth commission, noted in a recent interview: 'I have doubts as to whether it is really the people on the ground that want perpetrators of atrocities to be forgiven. Who is speaking on behalf of these people? Did anybody really talk to them?'<sup>5</sup>

Amnesty and attempts to redefine justice as a form of restorative justice provide shaky ground on which to build a new society. Richard Wilson, in his book on the South African TRC, makes a crucial point that is often overlooked:

The appropriation of human rights by nation-building discourse and their identification with forgiveness, reconciliation and restorative justice deems social stability to be a higher social good than the individual right to retributive justice and to pursue perpetrators through courts. This image of human rights undermines accountability and the rule of law and with it the breadth and depth of the democratization process.<sup>6</sup>

Furthermore, attempts at redefining justice cannot simply exclude the notion of the law as easily as the proponents of 'reconciliation' assume. As Pascal noted, 'force without justice is tyrannical...justice without force is contradictory, as there are always the wicked'. Justice without the force of law becomes toothless.

For all of their failings and political complexities, the Nuremberg trials at least established the principle

that following orders is not an excuse, those who commit genocide will be held accountable, and injustice will not be ignored. However, with the prominence of truth commissions and an emphasis on amnesty-for-reconciliation the world has become comfortable with the notion of impunity. If nothing else, Ocampo's bold decision is a serious and timely challenge to this.

1. For an extensive background on truth commissions, see Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity – How Truth Commissions Around the World are Challenging the Past and Shaping the Future* (New York: Routledge, 2001)
2. It should be noted that, according to Alex Boraine, who served as deputy chairperson of the TRC, the South Africa Commission was greatly influenced by those of Chile and Argentina.
3. See for example, Zenzile Khoisan *Jakaranda Time: An Investigator's View of South Africa's Truth and Reconciliation Commission* (Cape Town: Garib Communications, 2001)
4. Vlok is a former apartheid era police general and cabinet minister who, among other things, authorised bombing campaigns and assassinations. He was tried in 2007 for his role in the attempt to assassinate Frank Chikane (a former activist, now director general in the Office of the President). He was given a suspended sentence. He made no disclosures. In the plea agreement a great deal of emphasis was once again placed on the importance of reconciliation.
5. Gierycz is the former representative of the UN high commissioner for human rights in Liberia.
6. Richard Wilson, *The Politics of Truth and Reconciliation in South Africa* (Cambridge: Cambridge University Press, 2001), p. 26.

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## **Bashir and the ICC: The Aura or Audition of International Justice in Africa?**

**Stephen Oola**

*15 October 2008*

The recent move by the prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, seeking the indictment of Sudanese President Omar al-Bashir on grounds of his aiding and abetting the commission of war crimes, crimes against humanity and genocide in Darfur has taken the world by storm. Ocampo has stated that over 35,000 Darfuris have been killed and another 2.5 million subjected to a campaign of rape, hunger and fear by Sudanese armed forces and the Janjaweed militia in what he calls "genocide by attrition."

This move was not unprecedented since Bashir is poised to become the third sitting head of state to be indicted by an international court after Yugoslavia's Slobodan Milosevic and Liberia's Charles Taylor. Nonetheless, this is a controversial move, as Bashir has allowed the United Nations to send a joint UN-AU peacekeeping force to stabilise Darfur amid several peace initiatives that some commentators believe the ICC charges could jeopardise. This move also followed the indictment of two Sudanese ministers in Bashir's government, Ahmed Haroun (Humanitarian Affairs minister) and Ali Kushayb (Janjaweed militia leader) and the secret indictment and surprise arrest in Belgium of former Congolese rebel-leader-turned-opposition-politician, Jean Pierre Bemba. The recent ICC charges have fuelled an already heated debate (and growing scepticism among African observers) about the ICC's involvement in Africa.

The ICC's uncompromising search for justice in Africa – in places such as northern Uganda, ravaged by the Lord's Resistance Army (LRA), Central African Republic (CAR), the Democratic Republic of Congo (DRC) and Sudan's Darfur region – has startled many observers. Are we witnessing in Africa an end to impunity or simply a test-run of an international justice system?

There is no doubt that, in only six years of operation, the ICC has drawn attention to concerns about justice and impunity in Africa and beyond. It has highlighted the malevolence humanity endures every day, and has awakened the international community to the need to fight injustice. The ICC has also signalled that impunity shall not be tolerated and no individual is above the law.

Nonetheless, the ICC has thus far controversially involved itself in only a few situations in Africa but left Iraq, Afghanistan, Burma and other areas untouched. Of the over 139 complaints made to the ICC, it has managed to investigate and find evidence warranting indictments only in Africa, although war crimes are being committed all over the world. This suggests that the ICC is more concerned with impunity in Africa than addressing war crimes and crimes against humanity committed in other parts of the world.

By disproportionately focusing on Africa, the ICC prosecutor seems to have reduced the problem of impunity to an exclusive African phenomenon. Even African states such as Sudan which did not ratify the Rome Statute are being subjected by the United Nations Security Council to a system they do not recognise. However, some permanent members of the Security Council do not themselves recognise the Rome Statute. And, moreover, in the case of Sudan, not only has the Security Council referred a dissenting sovereign state to the ICC, but it did so against a backdrop of international outrage over its acquiescence to the international crimes being committed by some of its own permanent members, such as the US, Russia and China (with China even answerable for its support of the Sudanese government).

Over the last four years, Ocampo's ICC has increasingly resembled a misguided missile. To advocate for punitive justice only for Africa is to miss the target of comprehensive justice in the fight against impunity. Africa comprises societies accustomed to restorative justice approaches. Having suffered atrocities and abuses over decades, the

fabric of African societies is torn and demands something more than convictions and imprisonment. The restoration of peace might be the first measure of justice in all of the African situations currently under investigation by the ICC.

Furthermore, the ICC's very involvement might be part of the suffering as it often constitutes an obstacle to an immediate cessation of hostilities and long-term end to conflict. The ICC prosecutor might well bear no responsibility for renewed and heightened violence and atrocities in conflict situations under his investigation, for example in Darfur and northern Uganda, even when his continued involvement may frustrate a realistic chance of ending the commission of international crimes. The fear of ICC prosecution might scare indicted parties from engaging in a meaningful peace negotiation. Some people affected by the LRA insurgency in northern Uganda, for example, blame the ICC for their continued plight. Many northern Ugandans initially believed that the ICC would arrest Kony and bring the war to an end. They now know that there can be no permanent peace in the region as long as Kony and the LRA remain at large. The recently concluded Juba peace process may have had a different outcome had it not been for the ICC's indictment of Kony and his top commanders.

Norbert Mao, chairman of Gulu district in LRA-affected northern Uganda, once wrote that Ocampo would not hesitate to drop or suspend the charges against the LRA commanders for the sake of peace, had Ocampo's own mother been decaying in a squalid IDP camp. A caller to the "Beyond Juba Project" talk show on Mega FM, a local radio station in Gulu, complained, "We would not be dying of this Hepatitis E disease had the ICC not frustrated the Juba peace talks. We would all be back in our villages and not in these congested camps. But how can we go back when Kony is not coming back home fearing the ICC? How sure are we that he is not going to decide to fight forever to die rather than be taken to the ICC?"

The mechanical pursuit of punitive justice by the ICC in complex situations like northern Uganda and

Darfur, where victims want an immediate end to their anguish, is iniquitous, especially in the presence of more pragmatic efforts like peace negotiations. Whereas the ICC's involvement may have forced the parties to the negotiating table, peace talks have happened before and succeeded without any threat from the ICC, and none has so far succeeded in its presence.

Meanwhile, Ocampo's move to indict Bashir represents an empty threat; simply part of the ICC's unrealistic desire to pursue punitive justice in all situations. In light of many African leaders' sugar-coated approach to Robert Mugabe in Zimbabwe, the ICC did not expect pressure or cooperation against Bashir from any other African leaders. Most African heads of states are (potential) criminals in the eyes of the ICC and the leaders are well aware of this. What happened to Charles Taylor is fresh in every African leader's mind, and the irresponsible quest for justice by the ICC prosecutor reminds them of Taylor being whisked off in handcuffs to The Hague aboard a United Nations helicopter. Like Mugabe, Bashir and his cohorts will stop at nothing to retain power. They will stifle opposition groups and rig elections with impunity, while those engaged in a liberation struggle or military rebellion like that of Kony's LRA and Bemba's *Mouvement de Libération du Congo* (MLC) will be labelled terrorists and referred to the ICC. The regime in power might even create conditions conducive to the commission of atrocities, while feigning some willingness to cooperate with the ICC. For example, Presidents Yoweri Museveni of Uganda and Joseph Kabila of the DRC – who referred the conflict situations in their countries to the ICC – have themselves committed international war crimes.

Before the recent aggressive pursuit of punitive justice by Ocampo and the ICC, it was thought that an effective international justice mechanism would help maintain global stability, stop impunity and complement states' efforts to administer justice. For sixty years, since the adoption of the Universal Declaration of Human Rights (UDHR), several international and regional instruments for accountability, including the International Court of



Justice (ICJ), existed without igniting a globally polarising debate as the ICC has done. However, the structure and impact of the ICC on states' sovereignty, compounded by the uncompromising stance of its principals such as Ocampo, is calamitous given the current global political situation, which includes China and the US squabbling for oil in Sudan.

Until the adoption of the Rome Statute, international law and conventions – and the institutions in charge of their enforcement – recognised the importance of state sovereignty, especially where there was a genuine willingness and attempt to redress a wrong and move forward. Many states struggled with injustices and atrocities meted out in conflict situations but ultimately made progress because there were no threats of international prosecutions. Domestic struggles and peace talks, not international justice, ended a century of apartheid in South Africa and led to an ongoing process of reconciliation. In Angola, Sierra Leone, Liberia and Rwanda, attempts are now being made to heal divisions and meet the need for justice without the involvement of the ICC, and only after direct hostilities have ceased. Negotiations halted the 23-year-old violent conflict between the northern Khartoum government and southern Sudan People's Liberation Army (SPLA), producing an agreed solution to the oldest Afro-Arab conflict. Protracted talks between the government of Uganda and the LRA ushered in three years of unprecedented peace and facilitated the cautious but gradual return of IDPs to their villages, leaving behind the inhumane conditions in the camps. The above cases emphasise the need for promotion of local solutions and flexibility on the part of the international community in order to nurture local solutions to the often complex conflicts in Africa. They underscore the need to carefully sequence peace and justice and pave the way for a situation where the search for justice does not perpetuate conflict nor ignore the ongoing suffering of victims.

By seeking the arrest and prosecution of Bashir at this particular time, the ICC now risks thwarting the on-going peace initiatives not only in Darfur but also the fragile Comprehensive Peace Agreement in

southern Sudan. It also undermines the ICC's own interests in arresting the LRA indictees because realistically only Sudan could have captured them. The statement by Ocampo that he does not have the luxury to look away since he has evidence of serious crimes with which to indict Bashir, highlights his insularity. He risks portraying the ICC as detached from present global political and conflict realities.

The world now waits to see how the Sudanese government will react. The immediate effect though is that many aid agencies are frightened and threatening to withdraw from Darfur, thus affecting the delivery of much-needed food aid and other relief services. The United Nations has raised its security alert in the region and started evacuating non-essential staff. The ruling National Congress Party remains defiant and has warned of further violence. An impending referendum on independence for Southern Sudan now appears fraught and may not take place at all if Bashir feels threatened. The impact of the ICC's approach is that Darfuri victims may be left without relief supplies and without hope for a peaceful solution to the conflict.

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## Another Piece in the Puzzle: Accountability and Justice for International Crimes in Sudan

Lutz Oette

29 October 2008

An important aspect that has been neglected in the debate triggered by the recent decision of the Prosecutor of the International Criminal Court (ICC) to apply for an arrest warrant against Sudan's President al-Bashir is its impact on the ongoing quest for accountability for international crimes in Sudan itself. It is true that the referral of the Darfur situation to the ICC and the bringing of charges against alleged perpetrators may be taken as an indication of the absence of effective domestic accountability mechanisms. However, the latest events also provide a timely opportunity to assess how Sudan has responded to the broader challenge of holding to account those responsible for international crimes committed anywhere in Sudan.

In light of responses to the application by the ICC Prosecutor, it is pertinent to ask about the prospects of accountability and justice for such crimes generally in Sudan. Seeing such justice done is an essential prerequisite for a lasting peace, not least because impunity has arguably contributed to the perpetuation of conflicts and violations. Given the controversy surrounding the latest charges, it is also appropriate to consider how the ICC proceedings themselves may contribute to the development of the rule of law and accountability in Sudan.

Human rights lawyers, NGOs, the United Nations, the African Commission for Human and Peoples' Rights and other bodies have documented a range of gross violations of international human rights and serious violations of international humanitarian law in Sudan that may constitute international crimes. This includes violations committed in the course of various conflicts, particularly in the South (1955-1972 and 1983-2005), in the Nuba Mountains (1985-2002), and in Darfur (2003-present). Violations have reportedly consisted of, *inter alia*, indiscriminate killings of civilians, summary executions, forced

disappearances, torture, systematic rape, arbitrary arrests, destruction of livelihood and forced displacement. These crimes have resulted in hundreds of thousands of civilians killed and injured, and millions of displaced persons. In parallel, a series of violations such as arbitrary arrests, torture, extrajudicial killings and lack of fair trials against a large number of individuals, especially those considered political opponents, and whole communities have been reported over the past two decades. To date the perpetrators of these crimes have enjoyed almost complete impunity. There are only few cases where largely low-ranking officers have been held to account.

This impunity can be attributed to a series of factors, namely: deficiencies in the legal framework; the lack of transparency and effective monitoring; the absence of an independent judiciary; and the failure to establish adequate accountability mechanisms in response to violations committed in the course of conflict. The Comprehensive Peace Agreement (CPA) that ended the North-South conflict in 2005 triggered the adoption of the National Interim Constitution (NIC) and envisaged reforms to bring key national laws in line with human rights standards. The Bill of Rights in the NIC guarantees fundamental rights, including human rights binding on Sudan as a matter of international treaty law. The NIC also provides for institutional changes to strengthen the rule of law, such as the establishment of a Constitutional Court and a National Human Rights Commission.

However, three years on, reforms undertaken or under consideration have failed to address the key legal obstacles that perpetuate impunity. This is due to a combination of factors, including a lack of a clear political commitment, a prevailing mindset of shielding members of law enforcement agencies from legal responsibility as well as delays and other shortcomings in the law-making process. The Armed Forces Act enacted in 2007 incorporates international crimes for the first time in Sudanese legislation but its definition of international crimes is not in conformity with international and comparative

statutes and jurisprudence. The definition and evidentiary requirements of the criminal offences of rape and torture still contained in the 1991 Criminal Code are such that there have been very few successful prosecutions. Proposals to reform the relevant provisions, particularly on rape and sexual violence, have made limited progress to date.

The Armed Forces Act and the Police Act of 2008 retain immunity provisions, and there are justified concerns that the same will be the case in the National Security Forces Bill to be considered despite repeated calls by civil society organisations and UN human rights bodies to abolish these immunities. The rule that any official can be prosecuted only with the approval of his or her superior effectively creates a separate legal regime that is not subject to judicial review and has in practice resulted in impunity. Immunities are seen as necessary for law enforcement agencies to function and are deeply engrained in Sudanese legal culture. Taken together with the wide-ranging powers enjoyed by the law enforcement agencies, including in emergency legislation, immunities are one of the most visible manifestations of a system of opaque and unaccountable exceptionalism. This system has been allowed to operate without any effective restraints to date, as the National Human Rights Commission is yet to be appointed and the Constitutional Court is still finding its feet. Suits are pending that challenge immunity and emergency legislation as well as statutes of limitations for the crime of torture but it is at present unclear what role the Constitutional Court will play in upholding fundamental rights.

The CPA contains a strong commitment to human rights but is, as other peace agreements in Sudan before and after, silent on accountability. This is not least because omitting any reference to accountability for violations of international humanitarian law and international crimes seemingly served the mutual interest of both parties, i.e. the Government of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (SPLM/SPLA). As a result, there has been no truth mechanism, investigations, prosecutions or trials of the thousands of

perpetrators responsible for the most serious violations committed in one of the longest lasting conflicts in Africa.

The Darfur Peace Agreement concluded in 2006 between the Government of Sudan and the Minni Minawi faction of the Sudan Liberation Army (SLA) is equally silent on the question of accountability. A Special Criminal Court had been set up in June 2005 in Darfur following the opening of an investigation by the ICC prosecutor into international crimes committed during the conflict. This step was ostensibly designed to show that domestic courts were able and willing to try such crimes, which, if it were the case, would have rendered ICC prosecutions inadmissible by virtue of the principle of complementarity in the Rome Statute. However, the Special Criminal Court has had the jurisdiction and capacity to try only a small number of cases, which have mainly concerned charges for ordinary criminal offences rather than international crimes. To date, these cases have not addressed the bulk of instances in which international crimes are alleged to have been committed in Darfur and have not dealt with the perpetrators suspected of bearing the greatest responsibility for such crimes. By all accounts, the Court and other related measures have failed to constitute a credible accountability mechanism.

The ICC proceedings on Sudan take place against a historical backdrop of a lack of accountability and serious concerns about the rule of law and the protection of human rights in the criminal justice system. Defendants in criminal trials, particularly in conflict-related cases, have been subject to the jurisdiction of special courts and denied their right to a fair trial. Given the adverse publicity that the ICC faces in Sudan and other countries in the region, it is imperative that all its organs adhere strictly to fair trial standards and clearly explain the rationale for any measures taken. By so doing, it can set an example of taking a rule of law approach to justice that seeks to investigate and, where sufficient evidence is available, prosecute even-handedly those responsible for having committed international crimes in Darfur. Such an approach will assist, or at least not

hinder, domestic civil society efforts aimed at fostering a culture of accountability that signifies respect for the rule of law and human rights in Sudan.

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## **Implications of the Absence of Genocide Charges for Bashir<sup>1</sup>**

**Zachary Manfredi**

*20 March 2009*

The ICC prosecutor's request for an indictment of Omar al-Bashir charged the Sudanese president with three distinct categories of crimes: war crimes, crimes against humanity, and genocide. The Pre-Trial Chamber of the Court, however, granted an indictment only on the grounds of crimes against humanity and war crimes, stating that "the material provided by the Prosecution in support of its application for a warrant of arrest failed to provide reasonable grounds to believe that the Government of Sudan acted with specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups."<sup>2</sup>

The allegation of genocide has prompted great controversy in the Darfur case, and the Pre-Trial Chamber's ruling will undoubtedly contribute further to this. While an international legal consensus appears to be emerging that the violence in Darfur does not constitute genocide, the political use of the term by certain advocacy groups is unlikely to diminish as a result of the Pre-Trial Chamber's ruling. The schism between legal and popular use of "genocide" may ultimately pose a serious problem for the advocacy movement and lead to tensions between international jurists committed to upholding strict standards of law and human rights activists demanding accountability for mass atrocities.

While activist groups and government officials in the US have labelled the Darfur conflict "genocide" for years, the 2005 UN investigation into the conflict, while confirming possible war crimes and crimes against humanity, found that "the Government of Sudan has not pursued a policy of Genocide [in Darfur]."<sup>3</sup> Prominent critics of international intervention in Darfur such as Mahmood Mamdani have also decried the use of the term in describing the conflict.<sup>4</sup>

The crime of genocide, as defined in international law by the 1948 Genocide Convention, requires a standard of specific intent (*dolus specialis*): the perpetrators of

the genocide must act with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Despite its restricted definition in international law, in political discourse the genocide label is applied more liberally to a vast array of conflicts. For example, activist groups once labelled both the Australian government’s policy towards aboriginal peoples and the 1990s international economic sanctions regime against Iraq as genocides.<sup>5</sup>

Political mobilisation around the Darfur conflict in particular has relied heavily on the fact that genocide generates near unparalleled moral outrage and concern. In the US, the Genocide-Intervention Network (GI-Net) and STAND (GI-Net’s student division) both describe their organisations as “anti-genocide coalitions”. While some major international NGOs like Human Rights Watch and Amnesty International have not described the violence in Darfur as genocide, an entire community of niche groups specifically devoted to Darfur advocacy makes ubiquitous use of the word “genocide” in discussing the conflict. Even the Enough Project, which describes itself as “a project to end genocide,” has taken to characterising the violence in Darfur as a genocidal campaign. The popular “never again” slogan of activist groups also seeks to link Darfur to historical cases of genocide in Rwanda and Nazi Germany. In political discussion about Darfur, the word “genocide” is ever-present, appearing in most of the literature of activist organisations and in many speeches by Western political leaders.

Increasingly, however, it appears that the political perspective of groups seeking international action concerning mass atrocities diverges from the legal perspective of international jurists about the specificity of the crime of genocide. While the Pre-Trial Chamber did note that future evidence could be introduced to charge Bashir with genocide, the refusal to grant Ocampo’s initial request will complicate the agenda of activist organisations. While human rights groups appear to have universally trumpeted the ICC announcement as a success for the rule of law, the absence of the genocide charge may cast a spectre over their celebration.

It may become more difficult for activist groups to continue to rely on support from international legal institution in their campaigns if there is increasing dissent about whether the conflict can be accurately viewed as genocide. Activist groups appear to have initially viewed the ICC’s warrant as a victory, but over time international legal precedent may impair the ability of these groups to continue to describe the violence in Darfur as a genocide. Political leaders and even constituent groups could make use of the Pre-Trial Chamber’s ruling as a way to downplay the gravity of the violence in Darfur and dispute activist groups’ claims for the necessity of immediate intervention.

There is little dispute that serious crimes have been committed in Darfur, but crimes against humanity and war crimes do not possess the same power as genocide in terms of political mobilisation. Other instances of mass atrocities in the Democratic Republic of Congo (DRC), Sierra Leone, Colombia, Uganda and Afghanistan have not garnered anything close to the attention political activists and popular media, especially in the United States, have devoted to Darfur, despite the fact that in the case of the DRC, civil war death tolls from direct violence far exceed those in Sudan. While it is not immediately clear that the label of genocide alone constitutes the reason for the greater attention paid to Darfur vis-à-vis other serious international conflicts, the findings of the Pre-Trial Chamber might potentially decrease the potency and momentum of some campaigns for humanitarian intervention in Darfur. Should the Darfur conflict, as a result of international legal consensus, begin to lose its popularly perceived pre-eminent status as the world’s only ongoing genocide, activists may be forced to develop new tools and strategies to encourage political and humanitarian action in Darfur.

1. A shorter version of this essay appeared on the Oxford Transitional Justice Research “ICC Observers” website: <http://iccobservers.wordpress.com>.
2. ICC-02/05-01/09 Case The Prosecutor v. Omar Hassan Ahmad Al Bashir Situation in Darfur, Sudan. Public Court Records – Pre-Trial Chamber I. 04 March 2009. At <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>

3. 'Report of the International Commission of Inquiry on violations of international law and human rights law in Darfur,' UN Doc. S/2005/60. [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)
4. Mamdani, Mahmood. "The Politics of Naming: Genocide, Civil War, Insurgency." *The London Review of Books*, March 2007.
5. See Hirsh, David. *Law Against Genocide*. Glasshouse Press: London, 2003. pp 51 for these and other examples.

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## The Perils of an Article 16 Deferral for Bashir<sup>1</sup>

**Zachary Manfredi**

20 March 2009

Leaders from the African Union (AU) have assembled a delegation to argue for a deferral of the ICC arrest warrant for Sudanese president Omar al-Bashir on the basis of Article 16 of the Rome Statute. Previously, China, Egypt and other members of the Arab League had failed to successfully delay the investigation of crimes in Sudan. While Article 16 does allow the UN Security Council (UNSC) the option of delaying an ICC investigation for twelve months, the issue of deferral is both unprecedented and highly contentious.

Article 16 states, "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

To invoke Article 16, nine members of the fifteen-member UNSC must vote for the delay. Furthermore, the five permanent members of the UNSC must all either assent to the resolution or abstain from the vote. In addition to the five permanent members of the UNSC, Austria, Burkina Faso, Costa Rica, Croatia, Japan, Libya, Mexico, Turkey, Uganda and Vietnam currently serve as non-permanent members. The current makeup of the UNSC raises doubts over whether Sudan could garner the necessary nine affirmative votes for a deferral; earlier attempts by China and Egypt to invoke Article 16 in the Bashir case have thus far all failed. Austria, Burkina Faso, Costa Rica, Croatia, Japan, Mexico, Uganda, the UK and France have all ratified the Rome Statute. Assuming that ratification implies a serious political commitment to ending international impunity, these states are less likely to vote for delaying its investigations except in the most extreme circumstances covered under Chapter VII of the UN Charter. A successful Article 16 deferral is even less likely given that political pressure from domestic

constituencies in the US, UK, and France will make it exceedingly difficult for those three permanent members of the Council to either abstain or vote in favour of a deferral. The Obama administration will find it particularly difficult to support a deferral given the public statements by high-ranking officials, especially UN Ambassador Susan Rice and Vice President Joe Biden, arguing for the necessity of accountability for violence in Darfur.

Despite the political obstacles facing the AU in trying to implement Article 16, there will no doubt be intense debate and great diplomatic energy exerted to delay the ICC investigation. Given the willingness of AU, Arab League and Chinese leaders to rally in support of Sudan, a pause to the proceedings against Bashir is not impossible.

Article 16 deferrals grant the UNSC the ability to act in accordance with Chapter VII provisions of the UN Charter. Chapter VII empowers the UNSC to act to “maintain or restore international peace and security” when it has found “the existence of any threat to peace, breach of peace or act of aggression.” Human rights groups have thus argued that Article 16 should be used only in the most extreme conditions in order to avoid the collapse of international peace and stability.<sup>2</sup>

Sudan has responded to the ICC indictment by so far expelling thirteen international NGOs operating in the country. Some could argue that the loss of services provided by these organisations and possible escalation of violence against civilians in Darfur constitute precisely the type of exceptional circumstance Article 16 was designed to address. Human Rights Watch and others have described the expulsion of groups as an additional war crime. Still, those who advocate for a deferral on such grounds will have to contend with the argument that Sudan’s action would effectively have cowed the ICC and set a dangerous precedent of impunity for regimes committing mass atrocities. It is deeply unsettling that Bashir might gain an Article 16 deferral as a result of committing new war crimes; such a precedent could establish a perverse incentive

structure whereby those indicted by the ICC might have reason to commit additional atrocities in order to avoid prosecution. This would greatly undermine the authority and efficacy of the ICC.

The potential loss of life that Sudan’s policies might inflict, however, makes the peace versus justice debate palpable in this case. While a deferral at this point does seem an unconscionable action for those who are seriously committed to strengthening the authority of international criminal law and establishing international norms that challenge impunity, it is also naïve to deny that the ICC effort to prosecute Bashir may result in an increase in violence and suffering in the short term. Those committed to advancing the goals of the Court will have to consider the full range of consequences of the Court’s decisions regarding both the future legitimacy of international criminal justice and the future well-being and security of those communities suffering from mass atrocities. In the Bashir case, however, the stakes may simply be too high for the Court’s future to risk a deferral. In order for the ICC to establish itself as a legitimate and independent actor on the international stage it must avoid being manipulated by particular political interests. Should the AU, Arab League and China manage to delay Bashir’s indictment it will, in this case, undoubtedly represent a victory for impunity and political power over accountability and judicial independence.

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1. A shorter version of this essay originally appeared on the Oxford Transitional Justice Research “ICC Observers” website: <http://iccobservers.wordpress.com/>.
  2. See Human Rights Watch, “Article 16 Q&A,” <http://www.hrw.org/en/news/2008/08/15/q-article-16>
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## Activism, Genocide and Darfur

Marc Gustafson

24 March 2009

Two weeks ago, the ICC Pre-Trial Chamber elected not to include genocide charges in the arrest warrant for Sudanese president Omar al-Bashir. Since then, many observers have wondered what this will mean for the Darfur activist movement in the United States. The answer to this question depends on the type of activist group one is referring to. Since 2004, most American activist groups have typically advocated for either military intervention in Darfur or an increase in peace-keeping troops. To these activists, using the word 'genocide' has been central to their campaign of attracting followers and to their lobbying efforts. International consensus against using the word 'genocide', however, is quickly building, which may force these groups to reevaluate the use of the word and their overall strategy. Nevertheless, it is unlikely that the ICC's decision to exclude genocide charges will have an impact on the activist campaigns because the relevance of using the word 'genocide' has already come and gone.

In 2004 and 2005, use of the term 'genocide' was an essential part of the marketing strategy for the Save Darfur Coalition and the Genocide Intervention Network, which are the two largest American activist campaigns for Darfur. By the end of 2006, these groups had reached out to tens of millions of Americans and collected almost \$100 million dollars in contributions, according to publicly available reports from the Internal Revenue Service. At this point, the use of the term 'genocide' arguably became less critical because the activists had already achieved their goal of raising public awareness.

Today, the strategy of the American campaigns differs greatly from a few years ago. Instead of focusing on public awareness, the activist groups are now using the funds and energy they have raised to lobby Congress for a change in US policy toward Darfur. They are putting tremendous pressure on Congress to stop the 'genocide' in

Darfur, even though the majority of institutions monitoring the crisis, including Amnesty International, Human Rights Watch, the United Nations, the European Union, the ICC, Médecins Sans Frontières and the African Union, have declared that genocide did *not* occur in Darfur.

These groups have concluded that genocide did not occur based on three criteria. The first and most commonly cited criterion is the fact that the government of Sudan did not demonstrate genocidal intent, but rather, as the 2005 United Nations Report of Inquiry stated, it "pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare."<sup>1</sup> The second criterion, less commonly cited, concerns the identity of the targeted groups. Some observers still question that the targeted groups' nationality, religion, race and/or ethnicity are different than that of their perpetrators.<sup>2</sup> Lastly, critics, such as Alex De Waal, argue that the commonly used definition of genocide from the Genocide Convention is too broad and ambiguous to be used to describe what is happening in Darfur.

The only investigation that concluded that genocide had occurred in Darfur was the one conducted by the United States and led by former secretary of state, Colin Powell, in the summer of 2004.<sup>3</sup> The evolution of this study, however, was peculiar. Immediately following the investigation and before the results were finalised, Powell announced on National Public Radio that genocide had not occurred.<sup>4</sup> After two months of intense pressure and protests from activists, particularly from the Sudan Campaign Coalition and the Congressional Black Caucus, Powell changed his mind and declared in front of the Senate Foreign Relations Committee, on 9 September 2004, that genocide had occurred. In light of Powell's reversal and the vociferous calls from activists, it is easy to see why Congress, shortly after Powell's speech, unanimously passed Senate Concurrent Resolution 133 to use the word 'genocide' to describe the situation in Darfur.<sup>5</sup> No congressperson wanted to be identified with voting against fighting genocide.



Regardless of whether or not the word 'genocide' does or does not accurately describe the situation in Darfur, there have been many problems with using the word to raise awareness and mobilise activists. While the use of the word was helpful in the nascent stages of the US awareness campaign, it became problematic when the activist groups began to influence policy-making. Over the past few years, activist groups, particularly the Save Darfur Coalition, have pressured the US into sending over \$1 billion towards funding peace-keeping troops in order to stop the 'genocide' in the Darfur region. If the activist campaigns, however, had not been so fixated on stopping the 'genocide', then they would have realised that the violent crime and violent deaths caused by the government of Sudan and the Janjiweed had almost completely ceased in April of 2004, months before the activist campaigns began.<sup>6</sup>

The other problematic byproduct of using the word 'genocide' was that it highly mischaracterised the conflict in Darfur. Using the word 'genocide' often comes with the Manichean implication that the action includes a villain and its victims (i.e. the government in Khartoum and the innocent black Africans, respectively). Therefore, most American advocates and the general public, who received their information through the prism of the activists' marketing campaigns, were oblivious to the fact that the government in Sudan had not even started the civil war in Darfur and that many of the Darfuri insurgents were responsible for crimes as heinous as the ones committed by the government. Had the word 'genocide' not been used, then the activists may have recognised that, (a) there were two sides in this conflict, (b) a comprehensive peace process was underway, and (c) most of the violence had already stopped by the time their campaigns began. Instead, the activists continued to advocate for military intervention and peace-keeping long after the violence had stopped.

If stopping the 'genocide' had not been the central focus of the US activist campaigns, then perhaps more effort and money could have been put toward

the underfunded and often ignored peace process in Abuja, Nigeria in 2005, which involved all of the key Sudanese parties. Furthermore, more could have been done to address the rising death rates in the refugee camps due to disease and malnutrition.

The growing international consensus against using the word 'genocide' to describe the situation in Darfur may allow the activist groups to reflect on the suitability of their response to the situation in Darfur. In this regard, the ICC's decision not to charge Bashir with genocide should be a signal for the campaigns to retool their strategy, moving from advocating for military intervention and peace-keeping to peace-making and providing humanitarian assistance.

On the other hand, if Bashir continues to block the lifeline of humanitarian aid to the refugee camps in Darfur, as he has been doing since the ICC charges were filed, then the case for military intervention in Darfur may become more potent. Casualty rates will likely rise and the international community will not want to stand idly by. This is especially true because, unlike during the first few years of the conflict, outsiders now have a window into what is happening in Darfur. United Nations and African Union monitors are stationed in every region of Darfur and they are publishing their observations monthly. If casualty rates rise again, the world will know immediately and the activist campaigns' efforts will be strengthened.

1. "Report of the International Commission of Inquiry on Violations of International Law and Human Rights Law in Darfur," UN Doc. S/2005/60. [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)
2. This concern was cited in line 135 and 136 of the ICC's Pre-trial Chamber's Decision of the Prosecutor vs. Bashir case. It is often difficult in Darfur to positively identify differences in race and ethnicity because of the history of intermarriage and the artificial construction of race labels. For example, the Masalit tribe has at times referred to itself as Arab and at times referred to itself as Black African.
3. The report was conducted by the State Department's Bureau of Democracy, Human Rights, and Labor. The report and commentary on the report's findings can be found in Samuel Totten, "The Darfur Atrocities Documentation Project", *Social Education*, vol. 68, 2004.
4. National Public Radio Transcript from 30 June, 2004: <http://www.npr.org/templates/story/story.php?storyId=3050059>
5. Senate Resolution 133: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_bills&docid=f:sc133ats.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:sc133ats.txt.pdf)

6. The sudden drop in violent deaths after April of 2004 is apparent in the study, *Darfur: Counting the Deaths* conducted by the Centre for Research on the Epidemiology of Disasters (CRED) at the University of Louvain. This has been the most comprehensive study of Darfur casualties to date. It uses the data from 24 surveys conducted in every region of Darfur and eastern Chad. The most logical reason for this drop was the ceasefire agreement of 8 April 2004.

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## Would al-Bashir Get a Fair Trial? Lessons from Guantánamo or the ICC<sup>1</sup>

Rid Dasgupta

20 August 2009

ICC prosecutor Luis Moreno Ocampo's decision on 14 July 2008 to seek an arrest warrant for Sudanese President Omar al-Bashir on ten counts of genocide (under Article 6 (a) of the Rome Statute, which governs the ICC), war crimes (under Article 8 (2)(e)(i)), and crimes against humanity (under Article 7 (1)) has given rise to much brouhaha in the political blogosphere. Commentators such as Phil Clark and Teddy Harrison have focused on the politics (both real and perceived) of the prosecutor's role. On the doctrinal front, Han-ru Zhou argues that the Rome Statute's "deferential stance towards collective enterprises of states ... weakens the ICC's ability to enforce international criminal justice." Naseem Badiey touches upon the international legal ramifications of the sought arrest warrant but ultimately concludes that, at least from the contemporaneous vantage point of Southern Sudan, this daring ICC prosecutorial decision is quixotic "legal adventurism."

Few observers have spoken on the legal methodology to be employed if, in fact, such a trial gets underway – understandably so, as Ocampo's warrant request to the Pre-Trial Chamber will be granted *only if* the prosecutor's summary of evidence constitutes "reasonable grounds to believe" al-Bashir's commission of the crimes enumerated in the indictment. The current enforcement quagmire may be resolved and the Sudanese head of state might be extradited (now or after his official tenure ends). This essay addresses how we can transport the lessons of certain deficiencies in the United States' military commission proceedings in Guantánamo Bay, Cuba,<sup>2</sup> to the context of the ICC's moves against al-Bashir. The international community must focus on two commonalities regarding both systems: (i) amorphous international legal structures susceptible to insider manipulation and political expediency; (ii) trials of politically unpopular defendants likely to receive prejudiced judicial fora. Neither the ICC nor Guantánamo is free of these two concerns.

### TASK AHEAD

Certainly the legal process attending the Guantánamo Bay military commissions is not easy to transpose to the ICC system. The Guantánamo commissions were designed to try alleged enemy combatants with procedures deliberately speedy or slow to suit prosecutorial needs. They are fundamentally different from a courts-martial system where criminally accused military personnel enjoy the full panoply of legal protections.

Let us survey the notion that the ICC could be considered superior to the Guantánamo military commissions. The ICC is a formal institution with rules and procedures entrenched in the Rome Statute, while the Guantánamo commissions were the United States Government's *ad-hoc* response to the U.S. Supreme Court's pronouncements in *Hamdi v. Rumsfeld* (2004)<sup>3</sup> and *Rasul v. Bush* (2004)<sup>4</sup>. These cases opened United States courts to detainee challenges from Guantánamo and required a "neutral decision-maker" to decide culpability. A third case, *Hamdan v. Rumsfeld* (2006),<sup>5</sup> referenced Common Article 3 of the Geneva Conventions<sup>6</sup> and the Uniform Code of Military Justice (UCMJ) (rights protected by U.S. federal law)<sup>7</sup> in striking down the Guantánamo military commissions' trial procedures as lawfully wanting. Suggesting, however, that the ICC inherently is a better alternative is an oversimplification. Certain scholars, such as Giovanni Conso, Gerhard Hafner, and Anita Ramasastry, offer reasons suggesting why the United States has not signed the ICC Treaty, but a larger doctrinal compatibility also appears to be present.

Certain protections at the core of an American criminal trial and considered fundamental judicial guarantees are not secured to an ICC defendant. First, the ICC's Rules of Procedure and Evidence ("ICC Rules") do not guarantee the defendant a speedy trial, a right preserved by the Sixth Amendment to the U.S. Constitution. Rules 117-120 permit pre-trial restraint of the defendant. An ICC detainee is allowed, once every six months, to request release pending bail. The ICC, however, is not obligated to grant that request. Nor is there a stipulation about

the maximum length of time that a prisoner may be detained, thus causing significant delay in the commencement of a trial. Second, Rule 150 allows prosecutors to appeal a criminal defendant's acquittal. In the United States, the Fifth Amendment to the Constitution categorically forbids such double jeopardy, fearing the vexation likely to result from incessant government efforts to convict.

Third, Rule 74 enables the ICC to require witnesses to provide self-incriminating testimony, only if the Court itself privileges the testimony as classified and secretive, *including from the defense itself*. The Fifth Amendment to the U.S. Constitution expressly rules out all judicial or governmental efforts to compel self-incrimination. Fourth, either individually or in tandem, Rules 81 and 82 allow secret trials, the use of hearsay or anonymous testimony, or narrow the rights of defendants to confront their accusers. In contrast, the U.S. Constitution guarantees the right to a public trial (Fifth Amendment), bans hearsay or anonymous testimony (Sixth Amendment), and promises the actual confrontation by the accusers in court (same). Finally, the ICC trials are adjudicated by five judges, of whom a majority must vote to convict. In the United States, however, the constitutional rights to jury trial (Sixth Amendment) and due process (Fifth Amendment) have been construed to require a *unanimous* vote to convict by the *jury* of one's peers, not judges. Granted that some of these differences, *i.e.*, trials by judges rather than juries, regulations weakening the defendant's right to cross-examine witnesses, and no prohibition against double jeopardy, result from the distinctions inherent in Anglo-American *common law* versus continental European *civil law*. From the standpoint of defendants' rights, then, these points of tension demonstrate that the ICC proceedings are not categorically superior to American criminal trials.

Structural reasons, too, militate against summarily preferring the ICC structure over the Guantánamo commissions. The Rome Statute's precedential history is far from time-tested; in fact, the Statute itself is only six years old.<sup>8</sup> On the other hand, unlike the ICC, the body of case-law (*stare decisis*) germane to

Guantánamo is substantial. As noted earlier, the legal bases for the Guantánamo challenges were the Geneva Conventions and the Uniform Code of Military Justice (UCMJ). The Geneva Conventions, adopted in 1949, concern the treatment of non-combatants and prisoners of war. Their precursors were the Hague Conventions of 1899 and 1907.<sup>9</sup> The UCMJ's roots run even deeper, before the founding of the American Republic and before the Declaration of Independence. In 1775, the Continental Congress passed 69 Articles of War to govern military conduct; in 1806, Congress first enacted 101 Articles of War into federal law; and in 1951 the modern-day UCMJ became effective.<sup>10</sup> The *Rasul-Hamdi-Hamdan* line of precedent traced the American court cases that have helped develop this strain of jurisprudence. The ICC, by comparison, is relatively new.

Certainly both the Rome Statute and U.S. laws afford the defendants certain basic safeguards. The Rome Statute in Article 66 (2) provides that the prosecution bears the burden of proof throughout the trial and in Article 67 (3) (i) states that the accused must not bear any reversal of the burden of proof or any onus of rebuttal. Presuming innocence, Article 67 (3) (g) gives the accused the right to remain silent. And Article 55 states that no person shall be compelled to incriminate herself or to confess guilt; be subjected to coercion, duress, threat, torture or ill-treatment; or be subjected to arbitrary arrest or detention. The same protections, preserved in American law and now applicable to Guantánamo by virtue of the Supreme Court's decisions, are "closely linked historically with the abolition of torture," and are regarded as a "landmar[k] in man's struggle to make himself civilized."<sup>11</sup>

However, the protections will mean very little if the enforcement mechanism, *the threat of inadmissibility*, is not strong enough to deter prosecutorial overreach. According to both due process in American courts and Article 69 (7) of the Rome Statute, evidence obtained in a manner contrary to universal human rights is inadmissible if the violation would mar the integrity of the proceedings. But, then, who determines when the

risk of error is substantial if certain evidence were to be admitted? And what salience would the theoretical protections have for an individual defendant if the admissibility criteria themselves were opaque, malleable and susceptible to insider manipulation by experts versed in the field?<sup>12</sup> A prime example derives from the text of the ICC prosecutor's application for an arrest warrant against al-Bashir: as evidence for the "fate of the displaced persons," the application presents "[d]ata from refugee camps in Chad and camps for internally displaced persons ... within Darfur."<sup>13</sup> Simply owing to the difficult situation on the ground, the reliability of this data is likely to be imperfect. Yet there might be pressure to admit this or other forms of evidence, including anecdotal testimony, in order to make a morally compelling case against al-Bashir. Similarly, there might be international insistence from many quarters to ignore rules concerning hearsay as well as victim impact statements (VIS)<sup>14</sup> which, in ordinary cases, are scrutinised rigorously before being admitted into a criminal proceeding.

#### A (NECESSARY) CONVERSATION

Whatever becomes of the prospect of trying al-Bashir in the ICC, a conversation is needed to decide upon the prerogatives of the prosecutor and of the Court, the protections to be afforded this defendant (or a similarly situated defendant in the future), and how best judicial impartiality and independence may be preserved. These concerns have less to do with *how political the prosecution is* and more to do with *what, according to the international legal norms, is the remedy if an intolerable conflict of interest or other deviation from lawful prosecutorial behaviour is uncovered*. In other words, the cautionary concern of this essay is less theoretical in nature and centred more on the pragmatic legal considerations likely to arise. The Guantánamo example is undoubtedly recent, but that is not the only reason that it is informative in the current ICC context. In short, what went "wrong" (at least through the often clouded lens of international law) in Guantánamo could recur here.

Which elements constitute the charges against al-Bashir and what are the evidentiary burdens that the ICC prosecutor must carry? First, since the Rome Statute pertains to all persons irrespective of their official capacity and since Article 27 expressly refuses to exempt heads of state from ICC prosecution, an argument could be made that the ICC retains jurisdiction over al-Bashir. Second, *genocide* is defined as the pervasive commission of certain acts, executed with the specific intent to eliminate a group based on nationality, ethnicity, race or religion. The acts specified by the Rome Statute are killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to facilitate physical destruction, inflicting measures intended to prevent births, and forcibly migrating children beyond their community. To prove *genocide*, the ICC prosecutor must prove that some or all of the above acts were committed and that they were committed with the particular intent of obliterating a population.

Third, to meet the burden of proving a *crime against humanity*, the prosecutor must demonstrate that the accused committed one of a number of acts (such as murder, extermination, deportation or forcible transfer of a population, rape, torture, persecution, or other inhumane acts) as part of an extensive or methodical attack against civilians. The prosecutor must also show that these acts were committed as part of governmental or organisational policy with the accused's knowledge. Under the Rome Statute there are two forms of criminal liability. Article 25 states that *individual responsibility* is triggered when the person commits a crime individually or jointly, by ordering, soliciting, or inducing the commission of a crime; by aiding and abetting the crime; or by otherwise contributing to the commission. *Command responsibility*, according to Article 28, is at issue when an actual or *de facto* military commander does not control (or punish) forces subordinate to him who, in his knowledge, were committing or were about to commit crimes against humanity.

These questions could be murky in a criminal case against al-Bashir, and decided by convenience rather than truth-seeking. In a prospective al-Bashir trial,

the presiding judges will discern whether particular evidence is exceedingly prejudicial or otherwise reliable *or* the extent to which a certain Exhibit X denotes culpability. Since the judges will almost certainly be subject to immense international scrutiny and political expectations, the inevitable subjectivity of these judgements will provide opportunity to tinker with the procedural rules. This is especially problematic given that the data accumulated by the ICC prosecutor is almost entirely secondary, and based on evidence from the Sudanese diaspora rather than independent investigations on the ground. Other weaknesses of the ICC include an inability to effectively communicate information to victims and communities affected by the crimes, an incapacity to protect witnesses (making consequential and forthcoming testimony in the future more difficult to obtain), and the ICC's frequent failure to apprehend suspects.

As a supranational judicial body, the ICC is handicapped by its reliance on the cooperation of the United Nations and of constituent states. According to a July 2008 report by Human Rights Watch (HRW), "the international community has too often downplayed justice amid other important diplomatic objectives, such as peace negotiations and the deployment of peacekeeping forces."<sup>15</sup> The remedy fashioned by the Rome Statute to neutralise some of these deficiencies is to enable victims of human rights violations to be parties to the trials. In al-Bashir's case, this panacea might have the unintended effect of supplanting demanding rules of evidence entirely with anecdotes, hearsay and otherwise questionable testimony – concerns familiar to the military commissions at Guantánamo.

#### PROBLEMS WITH THE MILITARY COMMISSIONS AT GUANTÁNAMO

Let us now trace the development of the Guantánamo commissions and their legal deficiencies. More than four years ago, the U.S. Supreme Court ruled in *Hamdi* and *Rasul* that Guantánamo is sovereign American territory; that habeas corpus, the common law right of the accused to have her detention challenged in court, applies there; and that

"a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." Responding to these decisions, the President and the U.S. Department of Defense created the Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantánamo were "enemy combatants" who took up arms against the United States.

Indeed, the detainees whose case led to the Supreme Court's latest word on the legality of the Guantánamo military commissions, in *Boumediene v. Bush* (2008),<sup>16</sup> had been detained for more than two years without significant judicial review. *Boumediene* found that Congress could not suspend the constitutionally secured right to habeas corpus for Guantánamo detainees and that the alternative provided by Congress, a federal statute named the Military Commissions Act (MCA),<sup>17</sup> was an *inadequate* substitute for habeas.

What, then, were the CSRT system's shortcomings? Why did the Supreme Court nullify the CSRT remedy as an insufficient surrogate for habeas? And most importantly, what temptations are likely to present themselves in an ICC trial of a reviled perpetrator of genocide? In *Hamdan*, the Guantánamo military commissions were judged by the Supreme Court to be unlawful by providing fewer jury members, distinctive rules of evidence (including allowing hearsay in certain situations), and greater flexibility regarding the defendant's presence at trial than would otherwise be permissible. Unlike the Guantánamo commissions, the Rome Statute in Article 24 proscribes retroactive prosecutions and states clearly that "in the event of a change in the law ... the law more favourable to the person being investigated, prosecuted or convicted shall apply."

An overarching problem lies in the concentration of power in the structure of the Guantánamo commissions. The "Appointing Authority ... who convenes and refers charges against individuals to the military commissions" also decides the questions over the "establishment and proceedings of the commissions": the selection of jurors to vote on the

accused's culpability, how to exercise oversight concerning the chief prosecutor, whether to permit plea agreements between the prosecutors and the accused, to decide when the fact-finding mission has been exhausted, and to respond to the presiding officer's interlocutory questions.<sup>18</sup>

But these were not all. Other deficiencies may include the limitations placed upon the accused's ability to rebut the allegations; evidence that has been labeled *classified* is not accessible to the defendant who consequently cannot deny or disprove the accusations. It may appear tempting, purportedly for preserving international security, to deter the accused from obtaining evidence to challenge the ICC prosecution's case. In Guantánamo, for instance, "[r]epresentation by counsel, even with security clearance, was expressly forbidden. Instead, the rules only allowed [the detainees] to meet briefly with a 'Personal Representative,' who was not a lawyer, did not represent the [accused]'s interests, and could not have confidential communications with him."<sup>19</sup> Article 67.1(d) of the Rome Statute – enforced by Rule 22(1) of the ICC Rules – recognises the defendant's right to be represented by preferred counsel, but offers only vague notions of fundamental justice to govern the trial itself. But the extent of attorney-client privilege, privacy, and confidentiality are unclear. Moreover, interests of witness or victim protection against public humiliation (particularly relevant for rape victims) or physical danger, or other security concerns could be shown as adequate to deprive even *counsel* of the right to examine evidence and witnesses to be offered against their clients.

The theoretical admissibility of hearsay (or evidence procured by torture and other coercive techniques) implies that the accused will be unable to meaningfully confront and cross-examine witnesses. In July 2008, military commission judge Navy Capt. Keith Allred, presiding in the Guantánamo trial of Salim Hamdan (a former chauffeur to Osama bin Laden, the leader of the al Qaeda terrorist network), was compelled to exclude certain pieces of evidence because of "the highly coercive environments and conditions under which [the statements] were made."

Hamdan was "kept in isolation 24 hours a day with his hands and feet restrained, and armed soldiers prompted him to talk by kneeling him in the back. He says his captors at Panshir repeatedly tied him up, put a bag over his head and knocked him [to] the ground."<sup>20</sup> Such an interrogative environment can introduce the risk of factual error in confessions, testimony, or other evidence exacted from the accused.

### CONCLUDING THOUGHTS

These procedural guarantees largely followed in civilian trials are not merely academic; they form the backbone of a fair trial consisting of rights, both procedural and substantive, to which even a defendant accused of the most reprehensible crimes is entitled. When trying al-Bashir, who is suspected of committing or negligently standing by genocide, war crimes, and crimes against humanity, it will be enticing to afford him a cursory and incomplete process. However, the protections, if whittled away, stand to benefit no one in the long term. Some words of the American patriot Thomas Paine are instructive: "He that would make his own liberty secure, must guard even his enemy from opposition; for if he violates this duty he establishes a precedent that will reach to himself."

9. "Geneva Convention relative to the Treatment of Prisoners of War," *United Nations: Office of the High Commissioner for Human Rights*.
10. "Index & Legislative History of the UCMJ (1950)" in MILITARY LEGAL RESOURCES, *Library of Congress*.
11. E. Griswold, *The Fifth Amendment Today* 7 (1955); see *id.*, at 8 (Fifth Amendment expresses "one of the fundamental decencies in the relation we have developed between government and man").
12. See, e.g., John McGinnis and Ilya Somin, *Should International Law be Part of Our Law?*, 59 STAN. L. REV. 1175, 1181 (2007).
13. See Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad al-Bashir, p. 4.
14. Even though the U.S. Supreme Court upheld the facial admissibility of VIS in criminal proceedings, if "a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair" then that evidence is inadmissible. See *Payne v. Tennessee*, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring).
15. "Courting history": Human Rights Watch Report on the ICC (July 2008).
16. 553 U.S. \_\_\_\_ (2008).
17. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948-50; 18 U.S.C. § 2441; and 28 U.S.C. § 2241(c)-(e)) (2006).
18. Hamdan v. Rumsfeld: *Establishing a Constitutional Process, Hearing before the S. Comm. on the Judiciary*, 109th Cong. (July 19, 2006) (statement of Neal Katyal).
19. *Brief for Petitioners 6* (in *Boumediene*).
20. See Melia, Mike. "Gitmo trial begins for bin Laden's driver," Associated Press, July 21, 2008.

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1. A different version of this paper is being processed as a Note by the Nottingham Human Rights Law Review for publication in its next autumn issue.
2. Operated by Joint Task Force Guantánamo (JTF-GTMO), this U.S. detention centre is located in Guantánamo Bay Naval Base, which is on the shore of Guantánamo Bay, Cuba. Since the commencement of the present U.S. hostilities in Afghanistan, 775 detainees have been brought to Guantánamo and 420 detainees have been released. As of May 2008, 270 detainees remain.
3. 542 U.S. 507 (2004).
4. 542 U.S. 466 (2004).
5. 548 U.S. 557 (2006).
6. *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, [1955] 6 U. S. T. 3316, T. I. A. S. No. 3364 (Third Geneva Convention).
7. 10 U.S.C. § 801 *et seq.* (2000 ed. and Supp. III).
8. The historic roots of both the Rome Statute, starting with the International Committee of the Red Cross in 1872, and the Geneva Conventions run deep. See "History of the ICC," *Coalition for the International Criminal Court*. However the latter has been developed doctrinally more than former. This process was facilitated by linking Common Article of the Conventions to domestic law. No such development has occurred for the Rome Statute.



## The Security Council, Article 16 and Darfur

Robert Cryer

29 October 2008

In mid 2004, the issue of the humanitarian crisis in Darfur was expressly linked to international peace and security by United Nations Security Council Resolution 1556 (30 July 2004). This paved the way for the Security Council to decide, in Resolution 1593, that the situation in Darfur should be referred to the International Criminal Court (ICC). Hence, the link was made between international peace and security and the prosecution of crimes in Darfur. However, there have recently been suggestions that to encourage peace in Sudan the Security Council should request, under Article 16 of the ICC's Statute, deferral of the prosecution of Sudanese government officials for one year. Prominent commentators such as Professor David Scheffer believe this would be unlawful, and unwise. This piece seeks to show that, while it may be ill-advised, it would be lawful for the Security Council to make such a request.

Under Article 13(b) of the Rome Statute of the ICC, the Court is entitled to receive referrals of situations from the Security Council, irrespective of whether or not they involve the territory or nationals of a State Party to the Statute. The ICC did this in the case of Security Council Resolution 1593. Nonetheless, predictably, the Sudanese government reacted furiously, calling the referral part of an imperialist agenda. The government's concerns aside, some aspects of Resolution 1593 were certainly discomforting, in particular its exemption of peacekeepers from the referral and the refusal of funding for the investigation. However, it has been generally accepted that owing to the referral, the ICC may lawfully invoke its jurisdiction over Sudanese nationals acting in Darfur.

The issue of the referral has continued to unfold, with Sudan periodically denouncing the Court, refusing to co-operate with it, and at times seemingly acting contemptuously towards it (for example, by naming Ahmed Haroun as Minister for Humanitarian Affairs

after his indictment for crimes against humanity). The question of the referral flared again in July 2008 when the ICC Prosecutor asked a Pre-Trial Chamber to confirm charges (including genocide) against the Sudanese President, Omar Hassan al-Bashir, and to issue an arrest warrant against him. The response of the Sudanese government was multifaceted, but included a thinly veiled threat to peace processes throughout the country. Sudan argued that the Comprehensive Peace Agreement (CPA), as well as peace in Darfur, rested on a knife edge, and that any warrant would undermine those processes.

As a result, there have been suggestions that the Security Council should, at least, defer any further action against al-Bashir. These suggestions have come from various parties, including the African Union. The Security Council initially responded to these calls, in Resolution 1828 (31 July 2008), with language that had all the clarity of a compromise:

*Taking note* of the African Union Communiqué of the 142<sup>nd</sup> Peace and Security Council...[which asked the Security Council to issue a deferral request compliant with Article 16 of the Rome Statute]...*having in mind* concerns raised by members of the Council regarding potential developments subsequent to the application of the Prosecutor of the International Criminal Court of 14 July 2008, and *taking note* of their intention to consider these matters further...

This language led the US, rarely the ICC's greatest supporter, to abstain from the vote on this resolution and to express displeasure at the possibility of the Council deferring any proceedings by virtue of Article 16 of the ICC Statute, which reads:

No investigation or prosecution can be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a Resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

One of the most well-known contributors to the debate over the ICC and Darfur is David Scheffer, previously the lead US delegate at the Rome Conference that adopted the ICC Statute. Scheffer opines in a carefully worded piece in *Jurist* that “the original intent underpinning Article 16 was to grant the Security Council power to suspend investigations or prosecutions of situations *before either is launched* if priorities of peace and security compelled a delay of international justice.”<sup>1</sup> Scheffer argues that, since Article 16 was based around a jurisdictional compromise over the US position at Rome that no investigation or prosecution should occur in the absence of Security Council consent, it should also have no relevance to a situation referred by the Council itself. Scheffer is deeply concerned that seeking to defer proceedings against al-Bashir “is...rolling the dice with an individual whose track record is deplorable”, and might lead to abuse of Article 16, by using it beyond the purpose for which it was drafted.

Scheffer concedes that Article 16 might be read as giving the Council the authority to request an ICC deferral at this stage, and perhaps even when an arrest warrant is issued. However, in his view this would amount to a “technically manipulative” reading of Article 16, similar to the one adopted in Resolutions 1422 and 1487, which were deeply controversial and, in my view, inconsistent with that Article.<sup>2</sup>

Contrary to Scheffer, on the basis of the language of Article 16 (which is perhaps the best indicator of the intention of the drafters), I believe that, at least before an arrest warrant is issued, and perhaps beyond, the Security Council can intervene by virtue of that Article. If the drafters had intended Article 16 to apply only to State referrals or to investigations initiated by the Prosecutor under his *proprio motu* powers, it was open to them to say so. The fact that they did not at least gives reason to believe that they did not seek to limit the authority in Article 16 to those referrals.

This view is bolstered by the fact that, although a referral can relate only to a “situation”, the ICC

Prosecutor can prosecute only a case. As Morten Bergsmo and Jelena Pejić explain, “an investigation involves action that may be taken with respect to a situation and/or an individual, whereas a prosecution involves only actions taken with respect to a specific person.”<sup>3</sup> The language of Article 16 (referring to an investigation or prosecution), and the change that reflects from the wording of Article 13 was not accidental.<sup>4</sup> The drafters of Article 13(b) intended the term “situation” to exclude individual cases being sent to the Court.<sup>5</sup> Article 16, on the other hand, was intended precisely to permit the Security Council to, if required, defer prosecutions that relate to one person. Hence, it is not necessarily inconsistent for the Security Council to determine that the referral of a situation is in the interests of international peace and security, and later take the view that those interests require a temporary deferral of a particular case.

Turning to the question of whether the Security Council’s authority under Article 16 extends only to the period before an investigation or prosecution has begun, it is important to note that Article 16 states that “no investigation or prosecution can be commenced *or proceeded with* [emphasis added]” for a year when the Council has made an Article 16 request. It seems difficult, given the reference to proceeding with an investigation or prosecution, to maintain that Article 16 is thus limited to stopping either before it has begun.

It is possible, on examining the facts, to agree with Scheffer that the Security Council should not defer the case against al-Bashir, while accepting that it might be lawful to do so. The fact that the situation in Darfur has been ongoing for around five years and peace seems a long way off might imply that a request to defer action by the ICC is ill-advised. It is also questionable whether a body such as the Security Council is an appropriately objective forum for determining such sensitive matters (although it might also be questioned if there is any other body that could do so wholly objectively. The UN General Assembly, for example, is hardly apolitical). However, the Council is the body that has been legally

entrusted with such a decision. Therefore, at least until an arrest warrant is issued (a decision that has been put off, for the moment, by virtue of the decision of the Pre-Trial Chamber dealing with the matter, to request more information from the Prosecutor) the Security Council may lawfully issue a deferral request to the ICC under Article 16.

1. Available at <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>
2. The controversies over both resolutions related particularly to the fact that the Security Council did not determine a threat to international peace and security, as is required for Chapter VII action. Furthermore, the Resolutions were both advance, blanket, requests for deferral of all possible cases against peacekeepers from non-State parties to the ICC Statute, rather than one based on a specific case or investigation.
3. Morten Bergsmo and Jelena Pejić, "Article 16", in Otto Triffterer (ed.), *The Rome Statute of the International Criminal Court*, 2nd ed., Oxford: Hart, 2008, p.600.
4. *Ibid*, pp.600-601.
5. Lionel Yee, "The International Criminal Court and the Security Council: Articles 13(b) and 16", in Roy Lee (ed.), *The Making of the Rome Statute*, The Hague: Kluwer, 1999, p.148

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## Ocampo's Darfur Strategy Depends on Congo

Phil Clark

20 August 2008

The 14 July application by the Prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, for an arrest warrant against Sudanese President Omar al-Bashir represents a key moment for the nascent and increasingly embattled Court. Many commentators have questioned why the Prosecutor is pursuing Bashir, given the unlikelihood of ever arresting him. To understand what the Prosecutor hopes to gain from this move, we should interpret it in the wider context of the ICC's prosecutorial strategy to date. In particular, we should focus on how the Prosecutor's intentions in the Bashir case hinge on his handling of cases from the Democratic Republic of Congo (DRC).

The application to indict Bashir represents a major gamble by the Prosecutor who believes that, even though Bashir may never face trial, indicting an incumbent head of state will inherently bolster the ICC where it is currently weak: on issues of international legitimacy and problematic relations with the UN Security Council and key states, principally the US. The gamble is separate from the most common criticisms of the Prosecutor's strategy in Sudan. The move against Bashir is unlikely to provoke instability or violence in Darfur and southern Sudan, as some commentators have argued. The Sudanese government's withdrawal two weeks ago of troops from Abyei, the most recent flashpoint in the north-south conflict, highlights the unpersuasive nature of those predictions. Similarly unconvincing have been the self-serving accusations by the Sudanese and other African governments – several of them with their own citizens' blood on their hands – that the ICC's moves constitute nothing more than neo-colonialist meddling in Sudan's domestic affairs. Even though the Prosecutor can easily side-step such criticisms, the success of his strategy in Sudan will rely heavily on his ability to convict the four Congolese suspects currently in ICC custody (Thomas Lubanga, Germain Katanga, Mathieu Ngudjolo and

Jean-Pierre Bemba) and thus produce tangible judicial results in order to give full force to the symbolic value of the Bashir case. Meanwhile, as long as Bashir remains at large, the pressure will increase on the Prosecutor to secure those results in the DRC situation.

The Prosecutor believes that he has sufficient evidence to convince the three Pre-Trial judges to issue the warrant against Bashir, which they are likely to do within the next month – possibly as early as 1 September. The Office of the Prosecutor (OTP) has had to rely on investigating crimes in Darfur via testimony from Sudanese exiles and other distanced sources because of Khartoum's refusal to allow ICC investigators on the ground. Nevertheless, the Prosecutor would not risk approaching the judges without strong evidence of systematic crimes in Darfur – including of genocide – that are feasibly traceable to the highest levels of the Sudanese government.<sup>1</sup> The Prosecutor is still smarting from two embarrassing exchanges with the Pre-Trial judges involved in the DRC situation. First, on 29 January 2007 when handing down their decision on the confirmation of charges in the Lubanga case, the judges criticised the Prosecutor for charging Lubanga only with domestic crimes committed in Ituri province and for failing to recognise the international dimension of the Ituri conflict, implying the role of Uganda and Rwanda in funding and training local rebel groups, including Lubanga's *Union des Patriotes Congolais*. Second, the judges criticised the Prosecutor on the eve of the Lubanga trial on 16 June 2008 for failing to make key evidence available to Lubanga's defence team; a move that threatened the collapse of the trial. Following these difficulties, the Prosecutor would not approach the judges in the Darfur situation unless he believed he had a watertight case for the issuance of the Bashir warrant.

The Prosecutor recognises that few national or international actors will be willing and able to arrest Bashir – the same problem he has faced since indicting leaders of the Lord's Resistance Army (LRA) in the Uganda situation. Khartoum will not hand over

its leader, just as it has refused to surrender the two middle-ranking Sudanese officials currently indicted by the ICC, Ahmed Mohamed Haroun and Ali Mohamed Abdel Rahman 'Kushayb'. The two relevant peacekeeping missions – the joint UN-African Union mission in Darfur (UNAMID) and the UN mission in Sudan (UNMIS) – are also unlikely to actively pursue Bashir. Neither mission is mandated to enforce ICC warrants, and both suffer severe personnel and logistical shortages and constant obstruction by Khartoum.

Nonetheless, the Prosecutor is using the Bashir case to pressure the UN Security Council into greater peacekeeping cooperation on the ground in Sudan and more generally in situations under ICC investigation. As the Darfur situation was referred to the ICC by the Security Council – the first such referral in the Court's history – the Prosecutor is lobbying the Council to help enforce the warrant against Bashir. If such support is not forthcoming, the Prosecutor will argue that the OTP has done its job as effectively as possible but suffered from a lack of political will in the Security Council. This is a likely outcome, given the improbability of China and Russia supporting cooperation between the ICC and UN peacekeeping missions in Sudan.

While Washington is still opposed to the existence of the ICC, it may cautiously support more active Security Council involvement, given the importance of the Darfur situation for US domestic constituencies, particularly conservative Christians, who were instrumental in George W. Bush's rise to the presidency and are central to John McCain's prospects in November. The US abstained from the 31 July renewal of UNAMID's mandate, in protest against the inclusion in the resolution of a paragraph noting some Security Council members' concerns over the OTP's investigations. This implicit US support for the ICC in the Darfur situation is vital in pressuring the peacekeeping missions to enforce the Court's arrest warrants. The Prosecutor may also hope that a Barack Obama victory in the presidential race ushers in an era of greater US – and consequently Security Council – support for the ICC. However, opposition to the ICC

in Congress remains severe, and the fact that Obama has so far avoided all discussion of the Court during the presidential campaign highlights how politically fraught the subject remains in the US. Nevertheless, successful diplomacy by the Prosecutor on the Bashir issue could lead to stronger relations with the Security Council and establish precedents for future UN peacekeeping missions, which will be crucial for the ICC's ability to transfer indictees to The Hague.

The Prosecutor recognises that the ICC – and the OTP in particular – currently requires a major boost in international legitimacy. When the Prosecutor opened investigations into LRA crimes in northern Uganda in 2004, he stated that the rebel leaders would be brought to trial within six months and, as a result, the twenty-year conflict would soon end. Four years later, the LRA indictees are still at large (or dead) and the OTP does not anticipate their arrest any time soon. The Prosecutor may be tempted to write those cases off unofficially – claiming that the threat of prosecution of the LRA leadership helped drive them to the (ultimately unsuccessful) Juba peace negotiations with the Ugandan government – and divert the OTP's limited resources toward other cases, either in situations where investigations are already underway or in new situations, such as Colombia and Côte d'Ivoire, which the ICC has been monitoring for several years, or its latest country under analysis, Georgia.<sup>2</sup> Compounding the LRA problem, in both the Uganda and DRC situations, the OTP has been criticised for failing to pursue government actors complicit in serious crimes – preferring to go after relatively 'small fish' such as Lubanga, Katanga and Ngudjolo.

The move against Bashir is intended to show that the ICC is willing to pursue difficult cases of high-ranking officials and to regain some of the legitimacy that the Court has lost in Uganda and the DRC. The Prosecutor's strategy is to secure results by convicting the four Congolese suspects currently in custody – cases he believes are relatively straightforward, given the extensive evidence gathered against them by the OTP and the DRC and Central African Republic (CAR) governments.<sup>3</sup> Successes in these cases will secure

the OTP's legitimacy among the ICC states parties that have been demanding for several years that it produce tangible legal results. Convictions of the Congolese suspects, the Prosecutor expects, will allow him to use the Bashir case symbolically to gain international legitimacy by pursuing a sitting head of state and to build stronger relations with the Security Council and key states such as the US. As the difficulties with the Lubanga case so far highlight, however, the Congolese cases may not be as straightforward as the Prosecutor expects. Failure to secure convictions in any of these supposedly 'easier' cases will increase international pressure on the OTP to achieve the highly unlikely result of a trial – and conviction – of Bashir. Without success in the Congo cases, the Prosecutor's calculated risk in pursuing Bashir could backfire badly.

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1. Whether the evidence is sufficient to ultimately convict Bashir is an entirely separate question; the key for the moment is that the Prosecutor is convinced that it justifies a warrant for Bashir's arrest.
  2. Office of the Prosecutor, "ICC Prosecutor confirms situation in Georgia under analysis", ICC-OTP Press Release, ICC-OTP-20080820-PR346 ENG, 20 August 2008, <http://www.icccpi.int/press/pressreleases/413.html&l=en>.
  3. While a Congolese national, Bemba is charged with crimes committed in CAR.
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## Head of State Immunity and the ICC: Can Bashir be Prosecuted?

Pondai Bamu

1 August 2008

The ICC Prosecutor's request for an arrest warrant for the President of Sudan, Omar al-Bashir, raises important issues for transitional justice scholars and practitioners. One important issue concerns the extent to which the ICC should operate strictly in the interests of justice to the detriment of the interests of peace. The view of the ICC Prosecutor, as stated in his office's policy paper on the interests of justice, is that the ICC is not concerned with the interests of peace but justice.<sup>1</sup> However, my main concern here is not whether the case actually will take place and nothing will happen, as adequately addressed previously in this debate by Phil Clark. Rather, I explore here what might happen if the ICC judges grant the arrest warrant and the trial proceeds.

In the first instance, the ICC must determine whether the immunity of a head of state constitutes a defence at all. Article 27 of the Rome Statute establishing the ICC holds that neither the immunity of a head of state nor the official position of a suspected international criminal will bar the Court from exercising its jurisdiction. Even though this position is laudable, it can face practical and pragmatic difficulties, as highlighted in the Sudan situation. This position also differs significantly from the traditional international legal position on immunity. Customary law on the immunity of heads of state and government stipulates that a head of state has immunity, which includes personal inviolability, special protection for his or her dignity, immunity from criminal and civil jurisdiction, and from arrest and/or prosecution in a foreign state on charges concerning all crimes, including international crimes. The Rome Statute therefore constitutes a break from traditional international law.

The *Arrest Warrants* case at the International Court of Justice (ICJ), as well as the *Tachiona* case in the US courts, are informative on this. In the *Arrest Warrants* case, the ICJ held that Foreign Affairs Ministers enjoy

full immunity from criminal jurisdiction and inviolability while in office since this immunity is important for the exercise of their duties. This immunity ensures that Foreign Affairs Ministers can travel without hindrance in the performance of their duties. Heads of state are by nature of their office representatives of the state wherever they are and also enjoy this immunity. Even though the case being dealt with in the *Arrest Warrants* case concerned a Foreign Affairs Minister, the same immunities would be accorded heads of state. This immunity is only functional, since it accords heads of states free exercise of their duties in representing their state. The *Tachiona* case in the US courts dealt with torture and civil action against the Mugabe regime for having tortured Tachiona's family in Zimbabwe. Following the precedent in the *Arrest Warrants* case, the US courts held that a sitting head of state has immunity from criminal and civil proceedings abroad. However, the *Arrest Warrants* case dealt with criminal or civil prosecution in a national court, not an international one.

Should the same principles apply to an international court? On any reasonable interpretation of the Rome Statute, the same principles do not apply to the ICC. What are the consequences therefore of such a policy of prosecuting even sitting heads of state and government and stripping them of their immunity, which is regarded as important for the exercise of their duties? If the ICC Prosecutor had sought the arrest warrants when Bashir had left office, that would have been a different issue. But right now Bashir is still in office, and notwithstanding the repercussions for the Darfur peace process, is such a gamble likely to succeed even if the warrants are issued and Bashir is taken to the ICC?

Many practical difficulties exist. It is doubtful whether any state can arrest Bashir without violating the international law on immunity, which means that the support of other states in arresting Bashir will be unlikely. The ICC relies on states to enforce and implement its warrants. The failures in arresting the Lord's Resistance Army leader Joseph Kony are instructive here. The ICC has not been able to bring

Kony to The Hague because of the failure to physically arrest him. One wonders if it would be easier to arrest Bashir. It seems the ICC has learnt little from its experiences in the Uganda situation. The ICC itself is based in the territory of another state. Whether the Netherlands, where the ICC is housed, would violate its international legal obligations by allowing the ICC to go ahead and prosecute a sitting president who has immunity within its territory is also yet to be seen. Even though scholars and commentators have challenged this position on immunity, in terms of law and the precedent set by the *Arrest Warrants* case, for the time being the position stands that a sitting head of state is immune from prosecution and/or arrest in the territory of another state. The ICC often overlooks that, even though it is an independent court, it operates within the comity of states, which have rules that pre-date the ICC.

Most likely, the ICC Prosecutor did consider all of these eventualities. If so, then, why did he seek the warrant for Bashir's arrest and also publicise the fact? One is tempted to arrive at the conclusion that the ICC Prosecutor is playing politics rather than law – in an attempt to intimidate Bashir into faster negotiation of a peace deal and resolution of the Darfur conflict and possibly handing over the other two suspects from Sudan. The ICC is also playing politics by trying to force the Security Council into engaging fully in Sudan to end the conflict. The Security Council has so far exhibited very little political will to involve itself wholeheartedly in resolving conflict in Sudan – hence, the referral to the ICC, the mere support role played by the UN in assisting the African Union force, and the continued debate over whether the violence in Darfur constitutes genocide. This is a gamble by the Prosecutor, and whether it will trigger the Security Council's full engagement remains unclear. It is instructive that while the ICC includes genocide on its list of crimes allegedly committed in Darfur, the UN has not considered the crimes as genocide on the grounds that there is no genocidal "intent". Even though some members of the UN, particularly the US, have publicly referred to the crimes committed in Sudan as genocide, there has not been in the UN

Security Council or General Assembly a response worthy of the crime of genocide. The Security Council has not invoked its powers under Chapter VII of the UN Charter to protect a people in danger from its own government and to maintain peace and security in Sudan. There has not been the sense of urgency that a response to genocide necessitates.

Clark is right in saying that nothing will happen, if "nothing" refers to "nothing judicial". If the ICC Prosecutor's gamble is to yield results, then something political will have to happen. Bashir will have to seek a quick end to the conflict by expediting the peace process, and the Security Council will have to move faster than it has so far. That is hoping that both Bashir and the Security Council take the Prosecutor seriously – otherwise, one can conclude that nothing political will happen either.

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1. International Criminal Court-Office of The Prosecutor, *Policy Paper on the Interests of Justice*, September 2007

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## The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?

Dapo Akande

30 July 2008

If the Sudanese President Omar al-Bashir is indicted by the International Criminal Court, it will not be the first time that an international tribunal has indicted and issued an arrest warrant for a serving head of State. The International Criminal Tribunal for the former Yugoslavia (ICTY) indicted Slobodan Milosevic whilst he was still the head of State of the Federal Republic of Yugoslavia. Likewise, the Special Court for Sierra Leone (SCSL) indicted and issued an arrest warrant for Charles Taylor while he was President of neighbouring Liberia. However, in both of these cases, custody of the accused was only secured after they had been removed or stepped down from power. Thus their trials commenced when they were former heads of State.

The question arises whether an international criminal tribunal can indict, issue arrest warrants for, or prosecute a serving head of State. It is generally accepted that under international law, serving heads of State are immune from the jurisdiction of other States. Therefore, they are not subject to arrest or the criminal processes of other States. This immunity for serving heads of State is a right which accrues not to the individual but to his or her State. The reason for the immunity is that the effective conduct of international relations requires that those senior officials charged with the conducting of those relations be able to travel freely and without other States' harassment. The International Court of Justice (ICJ) has ruled that this immunity is absolute and that serving heads of State, heads of Government and foreign ministers may not be prosecuted in foreign national courts or arrested abroad even when charged with international crimes. This was the decision in the *Arrest Warrant case* (2002) which concerned whether Belgium could issue an arrest warrant for the then foreign minister of the Democratic Republic of Congo with respect to war crimes and crimes against humanity. However, in that same case, the ICJ went

on to say that immunity does not mean impunity and suggested that serving heads of States may be prosecuted before "*certain international tribunals*", referring to the ICC as well as other tribunals. In particular, the ICJ referred to Article 27(2) of the ICC Statute which provides that:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Whether or not a serving head of State has immunity with respect to prosecution by the ICC has significance for the Bashir case at two levels. First, the competence of the ICC to issue the arrest warrant and to actually prosecute depends on a finding that Bashir is not immune before the ICC. Second, and perhaps as importantly, whether or not Bashir is immune affects the obligations of States parties to the ICC to arrest him and surrender him to the ICC if he were to come within their territory. If Bashir retains his immunities under international law then other States are not entitled to arrest him if he is on their territory. Indeed Article 98(1) of the ICC Statute provides that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

However, one may not read too much into the decision of the ICJ in the *Arrest Warrant case* when it spoke of prosecutions before certain international tribunals. There is no general principle that serving heads of States possess immunity only before national courts and that they do not have immunity before international tribunals. The statement that international law immunities do not apply before *international tribunals* must be read subject to the

following conditions. (i) The instruments creating or conferring jurisdiction on the tribunal must expressly or implicitly remove the immunity of the head of State or other official. (ii) The State concerned must be bound by that instrument removing the immunity. The argument that as a general matter international law immunities only apply before national courts and not before international tribunals is unpersuasive. It suggests that two States may combine to create, by treaty, an international tribunal to prosecute the head of State of another State. That would be regarded as untenable as those States would simply be getting around a constraint that would exist if they acted individually, in order to override rights conferred on a third State. It is difficult to see why it makes a difference if there are 60 States (as required for the entry into force of the ICC Statute) or 106 (as are currently parties to the Statute). The Appeals Chamber of the ICTY (in *Prosecutor v. Blaskic* case) accepted that international law immunities can be pleaded before an international tribunal. The Chamber was not talking about immunity from the criminal charges in question but rather about production of documents and other official acts. Nonetheless, the point is that they accepted that individuals can be immune from the jurisdiction of international tribunals; hence the immunity issue arises there.

The second condition stipulated above suggests that Article 27 of the ICC Statute which removes immunity of serving heads of States is only effective regarding heads of States that are parties to the Statute. Non-parties remain entitled to the immunities that they would possess under customary international law. This is because the immunity is a right of the State and not that of the individual. Other States cannot remove that immunity or affect the right of that non-party by a treaty to which the State possessing the immunity is not a party. Sudan is not a party to the ICC Statute and the Court has jurisdiction over the situation regarding Darfur by virtue of a Security Council resolution (SC Res 1593).

Does all this mean that Bashir is immune from ICC jurisdiction? No, it only suggests that there is a

serious issue to be discussed. Under customary international law as well as under Article 98 of the ICC Statute, the immunity of non-party States is to be respected both by the ICC and by ICC States parties seeking to carry out arrests. However, the question is what happens when the head of State of that non-party is sought by the Court as a result of a Security Council referral. Neither the ICC Statute nor the particular resolution by which the Security Council referred the situation in Darfur to the ICC explicitly deals with this question.

It is generally accepted that the Security Council in the exercise of its powers under Chapter VII of the UN Charter is competent to remove the immunity of serving heads of State. This follows from the fact that the Security Council may affect the rights of States when taking measures under Chapter VII which it deems to be necessary for the maintenance of international peace and security. Ultimately that removal of immunity is based on being a party to the UN Charter and accepting the binding authority of the Security Council under Chapter VII. The question is whether the Security Council has removed the immunity in the Bashir case. When Milosevic was indicted it was assumed that the Security Council resolutions which embodied the Statute of the ICTY and which required cooperation by the Federal Republic of Yugoslavia had removed any immunities.

There are three possible ways of arguing that Bashir is not immune despite the fact that Sudan is not a party to the Statute of the ICC.

- (i) There is a good argument to be made that whenever the Security Council refers a situation to the ICC, the State concerned is bound by the provisions of the Statute as if it were a party to the Statute. This argument suggests that the provisions of the Statute (including Article 27) operate in the same way regardless of how the Court acquires jurisdiction over the case;
- (ii) It may be argued that when the Security Council decided in Resolution 1593 (operative para. 2) that the Government of Sudan must cooperate

with the Court that this provision includes a lifting of the immunity.

- (iii) It could be argued that in cases where an accused before the ICC is charged with genocide (as Bashir is) and the case comes by referral from the Security Council, the Genocide Convention 1948 lifts immunity. This argument draws on Articles IV and VI of the Genocide Convention. The former provision says that persons committing genocide shall be punished even if they are constitutionally responsible rulers. The latter provides that such prosecutions are to take place either before the national courts of the country where the genocide occurred or before an international penal tribunal with respect to which the State has accepted jurisdiction. Although Sudan has not accepted ICC jurisdiction, the ICJ has held in the *Genocide Convention case (Bosnia v. Serbia)* that the ICTY (which was created by Security Council resolution and not by treaty) falls within the scope of Article VI of the Genocide Convention because of the obligations that States have accepted under the UN Charter. Precisely the same argument could be made regarding the ICC in cases where the Security Council has referred the situation to the Court.

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PART  
THREE

## The Politics of Violence and Accountability in Kenya

### The Normalisation of Violence

Daniel Branch

17 July 2009

Writing more than twenty years ago about Idi Amin's Uganda, Ali Mazrui observed that:

Everyone was talking about the tyrant. I suggested that more people had died in the second half of the Amin years as a result of anarchy than as a result of tyranny. Many of the killings were not orchestrated orders from the top. Soldiers perpetrated them in night clubs, at road-blocks, in the villages. Yet the cases due to anarchy were not conspicuous political significance. They were cases of a basic moral collapse among those who wielded weapons.<sup>1</sup>

While the labels of 'anarchy' and 'tyranny' do not apply to the Kenyan case, Mazrui's underlying argument does. Much of the attention of the media, civil society and donors has focused on the behaviour of elites in the run-up to, and the aftermath of, the 2007 elections. Too little time has been spent examining why it was hundreds of 'ordinary' Kenyans, be they police, members of militias or simply members of the public, perpetrated acts of violence against other Kenyans.

Until sustained fieldwork or investigations are undertaken during which the motivations and actions of perpetrators of the violence of 2007-8 are discussed with the perpetrators themselves, then any inferred motives remain mere speculation. However, recent research into participation in civil wars suggests that any attempt to impose upon a wide and diverse body of individuals singular explanations for their actions is myopic. Participants in political violence, such studies suggest, act for very many more reasons than simply their membership in particular social groups. Indeed, there can be as many

combinations of causes of violence as the number of individual perpetrators.<sup>2</sup> Identifying just one cause of the violence, be it corruption, ethnicity, inequality, demography or political ideology, is unlikely to capture the complexity or reality of the nature of the violence witnessed after the 2007 elections.

Any debate about political violence and its prevention in future must go beyond a simple discussion of formal politics and state institutions. The emphasis given to the prevalence of violence within the realm of high politics misses a broader point about the prevalence of violence within society more generally. To return to Mazrui's arguments about Uganda, he said that in the aftermath of Idi Amin's downfall, 'we were not, as yet, thinking at all about how to deal with the society's moral collapse. We kept on thinking about how to deal with bad governments. At some stage one has to begin to worry about alternative ideas for the self-discipline of the country.'<sup>3</sup> While again Mazrui's exact terminology may not sit comfortably in this case, his argument should provide cause for thought on the part of any individual interested in contemporary Kenya.

Put simply, Kenyans have become accustomed to endemic social and political violence. In the weeks and months prior to the 2007 elections, significant violence occurred on Mount Elgon and in Molo. Similarly, the state and Mungiki became embroiled in a bitter conflict in Nairobi and its periphery. Yet such incidents were generally treated as localised phenomena and caused little of the more general introspection and alarm that greeted the violence that was to come. In this way, the public reaction to the pre-election violence of 2007 resembled that to the long-running insecurity in the borderlands to the north and west. Incidents of violence there are given barely a second thought by most residents of the more densely populated areas of the country's highlands. They do, however, worry a good deal, and

have reason to, about the high rate of violent crime. In 2004, Kenyans respondents to the Afrobarometer were more fearful of crime than any of their counterparts from 14 other countries. Kenyans (with Zambians) were the most likely to have experienced property theft. Moreover, after Nigerians, Kenyans were the most likely to have experienced physical violence.<sup>4</sup>

That violence is often suffered in the home and frequently in the form of sexual violence. According to Kenyan government statistics published in 2003, half of all Kenyan women were thought to have been victims of sexual violence during their adult lives.<sup>5</sup> And violence is clearly visible in other social settings, such as schools, which experienced their most recent bout of recurrent rioting a year ago, and universities.

Generally considered to be distinct from one another, these different forms of violence need to be considered collectively alongside political violence if Kenyans are to enjoy a more peaceful future. Derived from a range of historical causes, which certainly include colonialism, violence has become a well-established means by which power and authority in Kenya is contested in a variety of settings. That it should have been used to dispute or assert the claims to presidential office is not then surprising. Efforts to prevent future recurrences of political violence must then also address the wider prevalence of violence within society at large.

Despite the tone of this piece so far, returning attention to the grassroots provides reasons for optimism as well as alarm. Policy-makers and representatives of civil society should speak to the thousands of Kenyans who chose to not participate in the violence of 2007-8. It is easy to lose sight of such individuals in the rush to establish what happened in those tumultuous weeks. Yet it should not be forgotten that unknown numbers of Kenyans chose not to take up arms against their neighbours and offered assistance of all kinds to those in peril. By a whole range of actions, from donations to the Red Cross through to providing shelter to those made homeless, ordinary Kenyans acted in a fashion that

should shame their political leaders into constructive measures to avoid a repeat of the bloodshed in 2012.

1. Ali A. Mazrui, 'Is Africa Decaying? The View from Uganda', in Holger Bernt Hansen & Michael Twaddle (eds), *Uganda Now: Between Decay and Development* (James Currey, London: 1988), 352-3.
2. Stathis Kalyvas, *The Logic of Violence in Civil War* (Cambridge University Press, New York: 2006).
3. Mazrui, 'Is Africa Decaying', 353.
4. Michael Bratton et al, 'Afrobarometer Round 2: Compendium of Comparative Results from a 15-Country Survey', Afrobarometer Network working paper no.34, 25 (available at <http://www.afrobarometer.org/papers/AfropaperNo34.pdf>).
5. IRIN, 'Kenya: Sexual and Domestic Violence Prevalent', 27 October 2005 ( <http://www.irinnews.org/Report.aspx? ReportId=56856>).

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## DIY Violence is Corrosive of Nationhood

Daniel Waweru

17 July 2009

It is not often that participants in ethnic cleansing confess to it openly, but William ole Ntimama has managed it twice: in a 1996 interview, and more recently. The brazenness of the impunity is revolting: it is natural to want accountability and reform, and equally natural to think we can have both. This, unfortunately, is a bit of a farce: stable reform and calling the violent to account are incompatible. The key is to see that the main strand of political violence in multiparty Kenya is unified by a stable and clear set of aims: *majimboism*, understood to mean the Kenyan form of exclusive ethnic federalism which finds its most fervent advocates in Rift Valley Province's political class. In the 1990s, the violence was driven and supported by the majimboist-controlled state; it didn't require mass mobilisation. 2007 was a genuine departure because the extent and intensity of majimboist violence demonstrated that communal mobilisation for violence is an effective substitute for state support. The beneficiaries have no incentive to give it up, and every incentive to avoid the consequences of past violence by holding onto power. Since their participation is necessary for reform, we can have either reform or accountability but not both.

My first task is to show that despite appearances (diversity of actors) the violence was actually unified in aim. The argument is simple: Rift Valley province is the centre of political violence in multi-party Kenya. The easy metric is deaths: even in 2007, when the violence is supposed to have been much better spread, 65% (744/1133) of recorded murders happened there (Waki: 309). We're now eighteen years into the violence: it has broken out intermittently since 1991. Prolonged violence of this sort – locally specific, ethnically targeted, lethal, and carried out by a number of coordinated small groups – is organized and backed by some sort of ideological structure. That follows from the fact that most unplanned violence is difficult to start or maintain,

tends to be brief, and is usually non-lethal (Collins 2008: 14-16). The exceptions to the rule of brevity (for small-group violence) occur where:

either (a) the fight is highly circumscribed, so that it is not really "serious," or it is clearly understood that there are safeguards to limit the fighting; or (b) the type of exception described by the expression "hitting a man when he is down" (although the victim may well be a woman or a child), where in effect there is no real fight but a massacre or punishment (Collins 2008: 16).

Repeated bouts of this kind of sustained lethal violence require planning and preparation; planning and preparation for violence require coordination and justification, and hence institutionalisation. The justification is fairly clear: a middle-aged man interviewed by Al-Jazeera in Kibera, and Jason Kosgei in the Christian Science Monitor, gave almost identical answers: the violence was to end state-backed Gikuyu domination, which had begun with Kenyatta and never ended. As Lynch 2008 reports (Lynch 2008: 567), a significant portion of Kalenjin backed the violence, and have fairly specific reasons for doing so. Those reasons aren't significantly different from those reported in *Multiparty Politics in Kenya*: In 1992, Biwott promised that non-Kalenjin trading licences would be revoked, and Lotodo demanded that all Gikuyu leave West Pokot (Throup and Horsnby 1998: 543). Then, as now, the immediate aims of the violence – to remove non-Kalenjin from the Rift Valley, and to place the remainder, if any, in a subordinate and dependent position – were clear.

The state *did* outsource violence in the 1990s; much less so afterwards. Why? In the face of the state's significantly increased capacity for repression (Branch and Cheeseman 2008: 20), why was the violence so much worse in 2007? And why was violence much better controlled in the 1990s than it was later? Most analyses of the violence have proceeded by identifying the actors, on the reasonable assumption that pinpointing the actor is a good proxy for pinpointing the motive. Going directly to motives,

however, has some explanatory advantage: it promises informative answers to each of those questions.

Susan Mueller's *The Political Economy of Kenya's Crisis* may be the most comprehensive analysis of the underlying causes of the post-election violence. Her argument is pretty much that three factors – privatized, diffused, extra-State violence; ethnic clientelist parties; and the high-stakes prize of the Imperial Presidency – conjoined (with a very close election) to blow things up in 2007. The obvious response is to ask why nothing similar happened in 1997, and why all the factors she mentions are structural: the explanation, as given, would still work if the agents were switched. Every factor she lists was present then – if anything, the Presidency was even more imperial, the ethnic clientelist parties even more intensely ethnocentric. Yet there was relatively little violence around election time in 1997: most of the violence came well before or well after polling day. In particular, the announcement of the results in 1997 – results which in several cases were known to be entirely fraudulent – passed without incident.

This lack of specificity leaves the analysis less compelling than it might be; nowhere more so than her analysis of the state's cession of its monopoly of violence. It is one thing to observe that the *state* outsourced violence; quite another to ignore the fact that the first Kibaki administration sought, very crudely, to re-establish the monopoly of violence. It is more accurate to attribute the cession of the state's monopoly of violence to the Moi state – the state in the hands of the majimboist faction. That move – appeal to the motives of the faction in control of the state, rather than the state itself – explains why the state acted so differently either side of 2002, and it offers a direct explanation for the state's *choice* and method of outsourcing violence. Moi's outsourcing of violence in the 1990s is often explained as a pragmatic choice: irregular gangs and militias are untraceable; in employing them, the state got its extra-legal coercion done while minimizing its exposure. This is utterly unconvincing. A quick flick through the Akiwumi report demonstrates that civil

servants openly participated in the violence. Nicholas Mberia – then the District Commissioner in Kericho – and 29 APs in his command violently evicted tenants from Buru farm on the morning of 13 December 1993. Not long after, he was promoted to Provincial Commissioner, Rift Valley Province. Several witnesses to the evictions in Enoosupukia testified that the Narok County Council wildlife ranger Johnson ole Punywa shot dead three residents. He too was later promoted. (Klopp 2001: 496). If the point of outsourcing violence was to conceal the state's hand, then the state made a fearful mess of it. It's likelier that the outsourcing of violence was driven, at least in part, by *ideological* motives – the drive to weaken and personalize the centre of the state, while strengthening the majimboist periphery.

Branch and Cheeseman account for the upsurge in violence by appeal to elite fragmentation. That's a necessary rather than a sufficient condition. Remember that what's wanted is an answer to why the violence crossed a certain threshold – why it escaped control of the state.

Without an underlying capacity for violence, elite fragmentation need not have violent consequences, and it certainly need not have consequences so violent that the state struggles to control them. Appeal to a generalised diffusion of violence is nearer the mark, but it still underdetermines the quality of the violence in the Rift Valley: if elite fragmentation were sufficient to explain the escape of the violence from state control, then that would have happened in more than one place. It didn't, so it isn't. Capacity for violence matters; appeal to majimboist motives is sufficient to predict it.

After nearly 20 years or so of intermittent ethnic violence with zero consequences, with and without state support – and since much of the Kalenjin political class (and William ole Ntimama) is on board with the violence – it is difficult to avoid the conclusion that the violence has communal approval and support (Lynch 2008: 566-7; Ashforth 2009: 16). Some significant proportion of Kalenjin opinion leaders outside the political class – the rural middle



classes, in particular – have been radicalised. That has been a necessity: when the violence had state support, it did not need communal mobilisation, and there was no need for the ideological backing. Absent state support, communal backing is necessary: the violence has become more ideological as it has become more popular. The balance of power is such that Kalenjin opinion leaders who support ethnic violence, and the majimbo project which justifies it, lack effective internal constraints.

The view that majimboist violence is driven by elite incitement is false: rather, majimboist aims are now widely popular outside the political class, and are captured by it (Ashforth 2009: 18-19). Majimboists willing to resort to violence are well-mobilised because they've had to be: without state patronage, the fervour of their cause has had to cover for the organizational goodies the state would have brought. The underlying strategy of reform-by-coalition-government in Kenya is to get the big beasts of the political jungle into government, so that they're all bought into the new constitutional order. If they are to feel invested, they must be free to manoeuvre; for majimboist politicians, that freedom of action is directed, as it must be, to avoiding accountability for the violence. There can be no new constitutional order without majimboist involvement; since most of the violence has been in majimboist areas, accountability and reform are incompatible.

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## Kenya Post-2008: The Calm before a Storm?

Gabrielle Lynch

17 July 2009

Nineteen months have passed since Kenya's contested 2007 election, when the rapid re-inauguration of President Mwai Kibaki heralded an outburst of post-election violence – characterised by targeted attacks on ethnic 'others', an overzealous state security response, and retaliatory attacks on 'aggressor' communities – which left over 1,000 people dead and more than 350,000 displaced. The violence ended in February 2008, when a coalition government was formed, but 'deep peace' remains elusive and reforms unlikely. What is left is only rhetoric differentiating this administration from post-Mau Mau amnesia and investigative committees without reforms, as after the 'ethnic clashes' of 1991-1993.

Bloated, divided, racked by corruption scandals and lacking a clear policy agenda, the coalition's response to the immediate humanitarian crisis was inadequate. IDPs were moved to unmanned 'satellite camps' without concerted efforts to reconcile them with former neighbours, amid threats of violence and corrupt distribution of a paltry KSHS 10,000 'compensation'.

The government has responded to underlying causes by establishing four commissions: an Independent Review Commission to examine the electoral process (Kriegler Commission); a Commission of Inquiry into Post-Election Violence (Waki Commission); a Constitutional Review Commission (CRC); and Truth, Justice and Reconciliation Commission (TJRC).

In theory, such inquiries can play an important role, providing a public account and acknowledgement of the past, which may be cathartic and provide some solace. Thus, the Waki Commission has been commended for its criticism of state security services and politicians, and attention to underlying issues of impunity, poverty, underemployment and the 'land issue'. Much more importantly, commissions can make recommendations – yet, while Kenya has held many commissions, successive governments have usually

failed to introduce any suggested reforms.

Unfortunately, this record continues. The most notable absence is of a Special Tribunal – recommended by the Waki Commission to investigate 10 individuals who may have incited, organised and/or financed the violence – with the threat that the 'list' would go to the International Criminal Court (ICC). However, in June 2009 the government agreed to a tribunal by July 2010, which renders any high-level prosecutions prior to the 2012 election campaigns extremely unlikely, while few citizens or police officers have been charged or even investigated.

Unfortunately, the CRC seems set to suffer a similar fate to its predecessor; especially its continued unwillingness to address why Kenyans are divided on certain issues, such as the benefits, dangers and meaning of devolution. Consequently, there is heavy reliance on the TJRC to solve underlying issues. However, the TJRC suffers from a paucity of resources and a massive mandate, which includes the need to establish an accurate, complete and historical record of violations of human and economic rights inflicted by the state between December 1963 and February 2008, a picture of possible causes, and investigate corruption and irregular acquisitions of land. The danger is thus that the TJRC will add little to the 'truths' established by earlier commissions, while their collective recommendations are delayed until after the next election or indefinitely. Added to this is a deteriorating security situation – with the police and military increasingly acting as a law unto themselves and spread of the *mungiki* model of gang crime and terror – while politicians seem blissfully unaware of seething resentments or, more likely, believe that they can use them to their own advantage.

The unfortunate consequence is that violence, while far from inevitable, seems increasingly likely. At the heart of the problem lies a corrupt and tarnished political system characterised by an 'ethnic logic' of political mobilisation and support. To understand local potential for violence one must recognise the interplay between: a highly centralised system in which real power lies with the Office of the President; a lack of faith in key institutions (such as the anti-

corruption and electoral commissions, parliament, judiciary and security services); a perception that the post-colonial state is (and has been) ethnically biased; communal discourses of past injustice and marginalisation regarding 'lost lands' and political patronage; pressure on elites to present and further ethnic claims; the use of inflammatory and chauvinistic or defensive ethnic language by political candidates and local opinion formers; the use of violence as a political and economic strategy; a culture of impunity for corruption, ethnic incitement and organisation of violence; the subsequent normalisation of violence; and finally, but not least, high levels of poverty, inequality, and un- (and under) employment especially among the youth.

Given this litany of interwoven factors and long-standing issues it is clear that far-reaching reforms are required. The most important of these are:

- (i) Institutional and constitutional reforms to reduce presidential powers and increase faith in key institutions. The colonial administration bequeathed a highly centralised system, which respective presidents have used in the name of unity and development. This has encouraged an obsession with personalities as the problem and potential salvation, and created a zero-sum game with all eyes on the presidency.
- (ii) The government needs to end the culture of impunity for participation in violence by police and citizens, and the use of violence as a political strategy. Despite evidence that KANU politicians incited, organised and financed 'ethnic clashes' in the early 1990s, no investigations took place. This history has encouraged a normalisation of violence, such that it is increasingly part of political and socio-economic strategies, and has spiralled out of control – as the growth of ethnic militias (such as *mungiki*) prompts an increasingly violent state security response, and yet more militia activity.
- (iii) Finally, the government must look beyond economic growth to realities of poverty and

inequality along with perceptions of state bias and historical injustice. This requires much more than donor rhetoric of 'poverty reduction' and praise for impressive growth rates without noticeable trickle-down, but also a deep understanding of the link between perceptions of past and present injustice and the politicisation of ethnicity and the ethnicisation of politics. At present, there is a tendency to explain African politics by a simple 'politics of patronage', or the notion that politicians use ethnicity to mobilise support and reward supporters with state largesse. While important, this narrative ignores bottom-up pressures and the broader base of political accountability, and encourages a simplistic dichotomy between 'bad' politicians and 'good' citizens. More specifically, this approach ignores ways in which narratives of 'shared pasts' – of displacement, injustice, marginalisation and/or achievement – provide people with a means to lay claims to ownership and control of space, and rights to assistance. Too often ignored, this dynamic produces a complex political terrain in which politicians use ethnicity to mobilise support, and ordinary citizens use communal discourses to further claims to rights and resources.

To tackle all of these areas in a coherent and aggressive manner is clearly no small task, especially given the unwieldy coalition government, the worldwide recession, and competing claims to resources and representation. Nevertheless, the urgency for reform renders the government's lacklustre performance in all these areas a source of considerable concern, as failing to deal with underlying problems and new layers of grievance raises numerous reasons to worry about future electoral cycles.

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## The Spectre of Impunity and the Politics of the Special Tribunal in Kenya

Tim Murithi

17 July 2009

On 9 July 2009, Kofi Annan the former chief mediator in the aftermath of Kenya's post-electoral violence, transferred an undisclosed list of senior politicians to the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo. These politicians are alleged to have committed crimes against humanity during the post-electoral violence between December 2007 and February 2008. What prompted Annan's actions?

The Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide (OSAPG) has developed a framework of analysis which includes indicators regarding the proclivity to genocidal acts in a particular country. Among these indicators are the prevalence of atrocities and extra-judicial executions, the presence of illegal arms, armed elements formed around a particular identity group, a break-down in inter-ethnic relations and exclusionary political practices. However, the most salient issue that the OSAPG framework of analysis identifies is the persistence of impunity for atrocities committed, particularly those targeting particular ethnic groups. As far as this framework of analysis is concerned, Kenya's political situation, especially following the post-electoral violence of 2007 and 2008, contains all of these indicators and more. The question is therefore whether the current climate in Kenya can be described as one in which the proclivity towards genocidal acts remains high.

In order to remedy this predisposition and the legacy of the crisis, the National Accord and Reconciliation Agreement was signed on 28 February 2008 between the Party of National Unity (PNU) and the Orange Democratic Movement (ODM), following the Annan-led mediation effort. This Agreement identified a range of measures that were necessary in order to prevent the future outbreak of inter-ethnic violence. The Commission of Inquiry into Post-Election Violence (CIPEV) also known as the Waki Commission produced

a series of 'recommendations concerning measures to be taken to prevent, control, and eradicate similar violence in the future; bring to justice those responsible for criminal acts; eradicate impunity and promote national reconciliation'.<sup>1</sup> The Waki Commission also recommended the establishment of a Special Tribunal of Kenya to try suspected sponsors and organisers of the post-electoral violence. This would serve as an in-country legal framework for the adjudication and administration of justice for the alleged suspects and thus confront the spectre of impunity which threatens to foster future violence.<sup>2</sup>

Specifically, the Waki Report insisted that 'it is imperative to guard against further encouragement of the culture of impunity by granting blanket amnesty to all and sundry in the post-election mayhem'.<sup>3</sup> Astutely, the Waki Commission ensured that the recommendations in its report were accompanied by sunset clauses that would initiate consequences for inaction or intransigence. The Report stated that if 'an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted', then 'a list containing names of, and relevant information on, those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court'.<sup>4</sup> This list was in the hands of Annan who has now delivered it to the Prosecutor of the ICC in The Hague.

The Grand Coalition Government failed to establish a Special Tribunal when the proposed Constitution of Kenya (Amendment) Bill 2009 was defeated by 101 to 93 votes in the Kenyan parliament, on 12 February 2009. The deadline that the Waki Commission stipulated had passed, but the Grand Coalition Government did not seem capable of re-visiting the issue. A number of senior political figures in both the PNU and ODM camps have allegedly been implicated in organising and instigating the post-election violence. Specifically, this included Kalenjin leaders from the Rift Valley Province who allegedly financed and organised pogroms against supporters of the PNU. It also included leaders in the Central Province

who in retaliation allegedly organised and financed revenge attacks on Kalenjin, Luo, Luhya and other pro-ODM communities in the province. According to analysts, Kenya politicians on both sides were concerned that the local tribunal would be open to manipulation and therefore preferred the Hague option.

The OSAPG framework of analysis also notes that a trigger event, such as an election, is often necessary to unleash political tensions and to foment violent acts between people and ethnic groups. The impending Kenyan presidential and general elections of 2012 may turn out to be the trigger event that unleashes political violence on a scale not witnessed before in the country. Regrettably, a number of the country's politicians believe that by frustrating the implementation of the provisions of the National Accord and Reconciliation Agreement and the specific recommendation to establish the Special Tribunal, they would improve their chances or those of their co-conspirators to capture the presidency. However, there is still time to avert this scenario. In particular, the issue of impunity has to be addressed as a matter of urgency.

The failure of the Grand Coalition Government to establish a Special Tribunal forced Annan's hand. The Coalition had continued to pay lip service to the need to end impunity without any genuine commitment to punishing those who were guilty of crimes against humanity. Several politicians argued that it was necessary to promote healing and reconciliation through the proposed Truth, Justice and Reconciliation Commission rather than pursuing judicial persecution. Others argued that the prosecutions would threaten the stability of the country, but this revealed a lack of understanding that the short-term neglect of justice for the victims would lay the foundation for future violence and instability in the Kenya.

4. The Waki Commission Report, p.473.

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## Watu Wazima: A Gender Analysis of Forced Male Circumcisions during Kenya's Post-Election Violence

Wanjiru Kamau-Rutenberg

17 July 2009

Stories of men being forcibly circumcised and even castrated peppered news accounts of the madness that overtook Kenya in the aftermath of the December 2007 elections.<sup>1</sup> According to the Waki commission that investigated the Post Election Violence (PEV), by January 2008 the ethnic militia of the Kikuyu ethnic group, Mungiki, used blunt objects such as broken glass to forcibly circumcise at least eight men, some as young as eleven and five years old.<sup>2</sup> While exact numbers are hard to come by, one can deduce that tens of men endured genital mutilation during the first three months of 2008. Forced circumcisions were not new in Kenya. There had been previous reports of high school boys being forcibly circumcised at school and the now infamous Mungiki sect had made their mark on the Kenyan psyche by forcibly circumcising Kikuyu women. But this seemed the first time that forced circumcision was being used as a political tool. It was being deployed as a weapon of inter-ethnic war.

How can we understand the forced circumcisions in the context of gendered and ethnic politics in Kenya? Better yet, what would a gendered exploration of Kenya's PEV that placed these forced circumcisions at the center of analysis look like? This question does not pre-suppose that others have not offered a gendered analysis of those gory months in 2008. Indeed, many brilliant authors have written incisive reports focusing a keen eye on the varied forms of brutality that women especially endured.<sup>3</sup>

Still, I find that much of gender analysis today still leans too heavily towards a discussion of women's experiences. While a focus on women has yielded enormous insight into the ecology of gender, the way society's power is distributed among the genders, we stand to gain even more if we also pay attention to men's experiences. It is with this critique of the field that I offer what I hope is a different kind of gender

analysis to Kenya's PEV. Mine is a gender analysis centered on men's experiences.

If we are to take seriously that gender is a social construct that assigns different power values to the masculine while usually devaluing the feminine then there are some very serious gender implications for what happened in Kenya on those fateful days in early 2008. I argue that a gendered analysis of Kenya's PEV that centers on men's experiences reveals why all Kenyans, even men, should care about, and struggle for gender equality. Indeed, the Kenyan experience shows how, in a moment of political tension, anyone, even men, can be feminized, and once that is achieved, brutalization and violation is an easily justified next step.

December school holidays bring with them a wave of circumcision ceremonies across many of Kenya's ethnic communities. Young men mark the verge of adolescence with the cutting of their foreskin often in elaborate ceremonies. Often the rite of passage from childhood to adulthood begins with a sequestering where the initiates are taught 'how to be men' and climaxes with the ceremonial cutting. From the elaborate ceremonies in rural Kenya to the sterile surgical cuts in genteel urban Nairobi, circumcision is a Kenyan institution with those few communities that do not practice it excluded in certain ways. It is important to note that among the first wave of rioters during PEV in January were young Kalenjin men, who had just completed their initiation rites in circumcision camps in Eldoret that December. Infused with a newfound sense of male identity, these young men rampaged through the Rift Valley province attempting to cleanse it from 'outsiders' from other ethnic communities.<sup>4</sup>

Circumcision in Kenya is more than a cultural act. The practice has a long political history. A quick glance at Kenyan political history from colonialism onwards shows that circumcision, both male and female, has been wielded as a political tool during moments of intense conflict. Circumcision, especially female circumcision, was deployed as a weapon of anti-colonial struggle. The country's founding father, Mzee

Jomo Kenyatta, wrote about it in glowing terms, deriding those communities that did not make men of their boys. Meru women hid and circumcised each other when the practice was banned by the colonial British. President Moi's insistence on banning female circumcision only served to drive it further underground and throughout the cutting of genital flesh has served as an act of resistance.

Then Mungiki came. They wore dreadlocks, invoked Mau Mau, inhaled tobacco snuff, and agitated for a return to what they saw as the pristine original state of Kikuyu natural identity. Kikuyu women became the targets. They were not to wear trousers and those who did were stripped naked and beaten publicly. Stories began emerging of Mungiki forcibly circumcising Kikuyu women.

Strangely, few spoke up. Some women's rights activists protested, but within the larger public sphere, in those early days, Mungiki was a Kikuyu problem and only a menace to Kikuyu women.

Then came those shocking days in early 2008 when Kenyans took to crude knives, seeking to make men of each other. Mungiki was at it again, only this time the Kikuyu militia were circumcising Luo men, accusing them, as Kenyatta had alluded long before, of being mere boys. Circumcision was supposed to render them men. These circumcisions, of course, were torturous acts of violence that often turned out to be castrations calculated to kill their hapless victims.

Why did these Kikuyu men deploy the rhetoric of circumcision? What social context rendered circumcision a resonant frame within which to articulate their actions as part of the ethnic warfare that was going on? It is here that gender analysis helps us understand that Mungiki were able to kill by circumcision by first feminizing their victims.

The construction of Luo men as feminine was a process that had begun long before in Kenya's ethnic politics. This construction ranged from Kenyatta's rhetoric in newly independent Kenya to the murmurs,

whispered under Kikuyu breaths during the referendum on the Draft Constitution, that Kenya could not be led by *mtu mzima*. The Kiswahili term, meaning whole person or adult, was used euphemistically to refer to ODM's leader Raila Odinga. The term was used as a double entendre in deriding Odinga, who, by virtue of being Luo, was uncircumcised hence anatomically 'whole' while at the same time pointing to the contradiction that he could not be adult because he was uncircumcised.

Interestingly, rather than challenge the discursive privilege accorded to circumcision as a measure of manhood, Odinga has continued to insist that he is himself circumcised. He has also become one of the staunchest advocates of circumcision as a method of preventing HIV/AIDS transmission in line with recent scientific findings.

Once the construction of Luo men as feminine was firmly entrenched, there was almost no defense needed for brutalizing them. Gender theory and analysis has shown that feminization comes before brutalization. For so long Kenyan society has failed to protect its feminine dimension. Mungiki had brutalized Kikuyu women with forced circumcision with impunity for years. Society as a whole had never spoken up. Not even those Kikuyu men who were not Mungiki had seriously challenged Mungiki on the issue. The police barely acted on reports of women being forcibly circumcised. Emboldened, it was only a matter of time before Mungiki wielded this weapon of terror on other targets.

The forced circumcisions were not just acts of violence; they must be understood as occurring within the context of Luo feminization. This feminization fit within the context of a biased history that tells Kenya's story as that of brave Kikuyu warriors, the Mau Mau, who rescued the state from its colonial masters. From this biased Kikuyu perspective, Kenya's history has been told as a story of Kikuyus as more hardworking than all the rest. Other ethnic groups are constructed as weaker, belonging less, having less of a stake in: as feminine. The forced circumcisions represented Kikuyu men



declaring that they wield a masculine power over the feminized Luo men whose flesh they mutilated.

When Mungiki started by forcibly circumcising Kikuyu women, men, especially Luo men, hardly thought they had a stake in the issue. Gender is about the ecology of power. The economy of gender functions in ways that devalue the feminine even as it simultaneously empowers the masculine. That was at the heart of the forced circumcisions. The Kikuyu men were, at the moment of violence, rendering their Luo victims feminine. Unless we understand how this process works, how the feminine is automatically weaker and of less value, we remain a long way from achieving true gender equality. This is why, all Kenyans, even men, should care about issues of gender.

These issues of the gendered ecology of power in Kenya's ethnic politics remain as urgent today as they were in 2008. Kenya's ethnic politics continues to feminize some ethnic communities while simultaneously casting others as more masculine. In the absence of justice for the victims and perpetrators of the violence, the same ecology of gender power not only remains but is getting further entrenched. The continued silence around the forced circumcisions and castrations speaks to our collective acceptance that the practice is a relevant weapon of ethnic war which bodes ill for the 2012 elections.

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## Kenya: Our Possible Futures; Our Choices

Sisule Musungu

17 July 2009

We knew or should have known that it was coming. But somehow we believed, as the most corrupt country in the region, that we could bribe our way out of catastrophe. That was the 2007 post-election violence in Kenya. Then, as now, we knew what our possible futures could be and what choices we had to make. We made bad choices or refused to make real choices at all. To avoid the recurrence of the 2007 events and to reach true and full reconciliation, Kenyans will have to make real choices about what future they want individually and as a community; as a nation. We have powerful insights and tools, but will we use them?

### OUR POSSIBLE FUTURES: THINKING THROUGH SCENARIOS

On 14 April 2000, the Society for International Development (SID) and the Institute of Economic Affairs (IEA) launched “*Kenya at the Crossroads – Scenarios for our Future*” (<http://www.kenyascenarios.org/default.html>). This work, the result of intense research, analysis and workshops of Kenyans from various ages, backgrounds and professions, presented four possible futures for Kenya. While this was during the days of the KANU regime, Kenya remains, more or less, at the same crossroads. Following the violence of 2007/2008, the stakes are even higher. We had the tools, we had the insight but we didn’t act or acted too late. We have a second chance at modelling a prosperous future – will we take it?

While scenarios are not predictions of the future, they are challenging, relevant and plausible stories about the future. They are concerned with the historical, political, economic, societal, ethical, technological and environmental pressures that could affect Kenya, as a country, and the way it functions. As we look at the future of Kenya, thinking through scenarios offers a tool to generate constructive policy dialogue. They offer realistic outcomes with which Kenya might be faced and can therefore help Kenyans

make more informed decisions about their actions today.

*Kenya at the Crossroads – Scenarios for our Future* examined four possible scenarios of Kenya’s future, namely:

- *El Nino* – a future characterised by maintaining the status quo leading to heightened tensions and, ultimately, a country fractured into regional and ethnic enclaves. It is a future of decline and disintegration.
- *Maendeleo* – a future where transformation concentrates on reordering the economy while postponing agreements on needed political reform. It is a future of rapid gains but full of inequalities and instability.
- *Katiba* – a future where the focus is on institutional reorganisation and creation of democratic and locally accountable institutions. It is, however, a future of responsive institutions with little economic transformation and heightened poverty.
- *Flying Geese* – a future defined by a departure from destructive politics; reorganised institutions that improve representation and participation reflecting the diversity of Kenya’s people; and radical economic transformation. It is a future of inclusive reforms of both the major political and social institutions and the economy.

The choices Kenyans are making today, as they argue about a local tribunal versus the International Criminal Court (ICC) to try post-election violence suspects; a new constitution; truth and reconciliation and a myriad other issues under Agenda Four of the National Accord will determine whether we can hope for a Kenya at peace with itself, a regional leader and a constructive player on the international stage.

### OUR CHOICES

There are many forces and pressures that will impact Kenya going forward. These include historical, political, economic, social, environmental and technological forces and pressures. Kenyans might not have full control of these forces or pressures. But, by clearly identifying the main drivers of these

key forces and pressures; the key actors; and the early signals for each scenario, as is done in the *Kenya at the Crossroads* booklet, we can start to think more clearly about the future and prepare for what might happen. Most importantly, we can make decisions now that are painful and costly but which would save us from an *El Niño* scenario.

Kenya's possible paths into the future are fairly well articulated in *Kenya at the Crossroads*. In addition, the possible paths of East Africa, as a region, have now also been articulated in "*What do we want? What might we become? Imagining the future of East Africa*" (<http://www.sidint.org/Content.aspx?IdArea=15&IdCat=47&IdScat=45&Type=S>), the outcome of a scenario project on the future of East Africa.

There is no doubt that the *Flying Geese* scenario offers the most desirable outcome for Kenya. Equally, however, judging by the political actions of the Grand Coalition government and the general focus of Kenyans today (mainly political and institutional), steering Kenya's path towards the *Flying Geese* scenario will require new leadership, new thinking and an ability to dare to think and live differently on the part of the majority of Kenyans. Since 2000, we have made choices that resulted in some form of combination of the *El Nino* and *Maendeleo* scenarios. We know where those decisions took us in December 2007.

Our choices as Kenyans, if we are to avoid what we saw after the 2007 elections or worse, will have to be those that lead us away from the path of decline and disintegration and towards the path of inclusive democracy and growth. We cannot hope to ignore history (in its fullness) and make bad choices in political leadership, economic stewardship, social, environmental and technological policies and think that we can always bribe our way out.

How can thinking through scenarios help Kenya make the right choices in the future? To address the challenges that Kenya faces, we have to be able to navigate through the complexity of the problems and the underlying drivers, build a shared understanding

of these problems, and develop a coherent strategy. Scenarios can make three contributions. First, they can help Kenyan decision-makers explore the country's problems by combining knowledge from many perspectives. In this way, scenarios help us recognise uncertainty: both the known unknowns and the unknown unknowns. Second, scenarios can provide a platform for discussing different worldviews more constructively. This is because the process of projecting into the future and examining multiple possibilities can help transport people out of their worldview that is only based on the knowledge they have about today. Finally, by asking the question "what if", we can better frame the challenges we face and prevent critical mistakes.

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## Accountability Debate in Kenya Unfolds in a Near Policy Vacuum and Ethnic Tension

Godfrey M. Musila

2 November 2009

There seems to be consensus around the need to deal with injustices – gross human rights violations, economic crimes and abuse of power – perpetrated in Kenya over the last 35 years. However, Kenya lacks a coherent policy on the broader question of transitional justice: which institutions should be used (Special Tribunal for Kenya,<sup>1</sup> Truth, Justice and Reconciliation Commission<sup>2</sup> [TJRC] or criminal courts), how these mechanisms should be deployed, how they would relate to each other, and how such mechanisms would fit within the ongoing constitutional and institutional reforms proposed under Agenda Four of the Kenya National Dialogue and Reconciliation (KNDR) process that produced the current Government of National Unity (GNU).<sup>3</sup>

While Agenda Four of the KNDR<sup>4</sup> prescribes several measures including broad institutional reforms, transparency, accountability and ending impunity – measures usually associated with transitional justice approaches in their broadest conception – it cannot be regarded as a transitional justice policy. Other than the resolution adopted by the KNDR for the establishment of a TJRC that prescribes the granting of amnesty for crimes against humanity and attempts to enunciate broad ‘principles’ on the operation of the TJRC,<sup>5</sup> Agenda Four lacks specificity on any of the crucial questions relating to transitional justice. Further, since the decisions to establish a Special Tribunal and the TJRC were taken, the government has made no attempt to enunciate such a framework. While recent crisis talks in the Cabinet on the role of the International Criminal Court (ICC) yielded varying suggestions from different Ministers on what should be done,<sup>6</sup> it was not intended as a policy forum. The President convened the meeting in order to fashion a response to the handing over to the ICC Prosecutor of the list of key suspects (prepared by the Commission on Post Electoral Violence) by Kofi Annan, the mediator of the KNDR. The tense and rancorous

exchanges reported to have happened in the meeting were perhaps not conducive to sober reflection.

Moreover, the sharp disagreements within Cabinet over how to deal with post-electoral criminality have not been conducive to a coherent approach. Nowhere is this more evident than in the government’s approaches to the Special Tribunal and the TJRC. Government démarches relating to the two mechanisms seem to proceed in isolation from each other. As a result, discussions on the questions of transitional justice itself remain largely impoverished, focusing – even in this case indecisively – on only on a select number of politically contentious issues such as amnesty and the ICC, and exclude ‘alternative’ mechanisms such as ‘ordinary’ criminal courts.

A number of reasons can be proffered for the lack of an official transitional justice policy – in whatever form – and the resultant incoherence in approach.

First, the decisions to establish both mechanisms were taken in the middle of a national crisis. The immediate purpose of the KNDR was to bring an end to violence and to install a broad-based GNU. Such circumstances were clearly not conducive to a reasoned articulation of a transitional justice policy. Second, the debate on transitional justice – to the extent that it exists within government – is taking place within a polarized political environment. Beyond the convergence of views on the need to address past injustices, the GNU partners do not seem to agree on much. As elaborated in the discussion of various mechanisms, there are competing notions of justice that dictate different approaches. Lack of agreement also stems from the fact that the President, the Prime Minister and those who readily do their bidding are engaged in a vicious power struggle. For the President, who has previously enjoyed unfettered executive power inherited under a draconian constitution, the idea of sharing such power does not seem to have sat well with him. For his part, the Prime Minister has been keen to assert executive power – albeit for the most part ill defined<sup>7</sup> – vested in the new office by the national accord that created the GNU. In an event that underscored the

nature of these struggles in government, in April 2009, the Speaker of Parliament was forced to enter the fray by deciding in a historic ruling on whether the President was entitled to appoint the powerful Leader of Government Business in Parliament (which comes with potential control over the government's legislative and reform agenda) without consulting the Prime Minister in terms of the KNDR Act; and whether in fact the Prime Minister, rather than the Vice President (affiliated to the Party of National Unity [PNU]) should assume that position.<sup>8</sup>

Third, the apparent attempt by one side of the government – the PNU – to shape the course of transitional justice seems to have reduced the chances of what should be a cooperative effort, especially in the context of a government of national unity.<sup>9</sup> From the author's discussions with a number of stakeholders, it emerged that the then Minister of Justice, Ms Martha Karua (PNU), had drafted the first TJRC Bill without sufficiently involving coalition partners, civil society or other key stakeholders. Heated parliamentary debates relating to key provisions of the bill reflected dissatisfaction with this approach. The few members of civil society who were contacted by the author suggest that it was too late for them to provide any input, having been given less than two days to respond before the bill was presented to Parliament.<sup>10</sup> Similarly, the defeat in Parliament of the bill aimed at entrenching the Special Tribunal law in the Constitution can be attributed in part to the failure by government to engage with relevant actors, including MPs across the political party divide. Some MPs have suggested that they did not have enough time to familiarize themselves with the contents and voted against the bill because of their suspicion of the government's true intentions.<sup>11</sup> It is noteworthy that President Kibaki and Prime Minister Odinga have lobbied their constituencies in Parliament to pass the law after the two principals came under sustained pressure from international actors. No sooner had President Kibaki named the commissioners and chair of the TJRC (22 July 2009) than they (the commission and its chair) came under attack from various quarters. The credibility crisis<sup>12</sup> that has engulfed the TJRC reflects at least one of the

pitfalls of a government-driven transitional justice process (real or perceived): the possibility that the institution could lack total legitimacy, a necessary ingredient for a successful transitional justice process.

Fourth, while most Kenyans want justice in one form or another, an interesting dynamic has developed in the context of ethnic-based contestation within the current political sphere.<sup>13</sup> Those clamouring for justice on occasion recede into ethnic constituencies where action against particular individuals is invariably seen as a witch-hunt. Since questions of accountability seem inextricably linked to political succession and reorganization of the state, at a certain level, justice has an ethnic dimension whose contours must be internalized and acknowledged. Few can deny that this renders the task at hand even more complex and difficult to realize. For one, the result of this ethnic dimension is the dilution of civil society pressure on government and subsequent lack of incentive for timely and appropriate government action to drive accountability processes forward.

Apart from the lack of agreement on how the past should be reopened for scrutiny, and whether any penal consequences should apply as one of the prescriptions, post-Kibaki succession scenarios and broader issues of institutional and constitutional reforms also underpin the actions of various actors in the transitional justice debate. When one dissects the transitional justice debate – itself inseparable from the wider context of constitutional and institutional reforms – it emerges that transitional justice questions invariably rally 'reformist forces' against an illiberal, pro-status quo group that does not favour the dissolution of the oppressive post-independence political and economic order that has operated to the benefit of a few.<sup>14</sup> The forces opposed to institutional reforms seem by extension inimical to any accountability process that would open and in a transparent manner scrutinise the numerous closets of historical injustice. Together with this historical legacy, the dynamics of a coalition government and succession battles that come with it are defining not only the 'kind' of justice that Kenya might pursue but also the roles of various actors in that process.

1. Recommended to try those who bear the greatest responsibility for alleged crimes against humanity committed between 27 December 2007 and 28 February 2008 by the Commission of Inquiry into Post Electoral Violence (Waki Commission) appointed by President Kibaki. See Government of Kenya, Report of the Commission of Inquiry into Post Electoral Violence (2008).
2. To be established in terms of the Truth Justice and Reconciliation Act 2008.
3. For the National Accord and Reconciliation Act 2008, and other documentation related to the Kenya National Dialogue and Reconciliation, see <<http://www.dialoguekenya.org/agreements.aspx>>
4. Agenda Four of the National Dialogue and Reconciliation process relates to 'Long-Term Issues and Solutions'.
5. See Kenyan National Dialogue and Reconciliation Truth, Justice and Reconciliation Commission. The 'principles' are: independence [of TJRC]; fair and balanced inquiry; [grant of] appropriate powers; full cooperation [from government and all concerned]; strong financial support [from government and donors].
6. Cabinet Meeting, July 14 2009. It is reported that Cabinet is divided into various camps: between those who favour prosecutions (before the ICC, the Special Court or before national courts); and those who oppose prosecutions and favour an expanded role for the TJRC to deal with postelection Kenya National Dialogue and Reconciliation, see <http://www.dialoguekenya.org/agreements.aspx>
7. S4 (a) of the National Dialogue and Reconciliation Act, 2008 provides, without elaboration that the PM 'shall have authority to coordinate and supervise the execution of functions and affairs of the Government of Kenya including those of Ministries'. While this suggests a parliamentary system in which the PM should run government while the President maintains a backseat, the NDR Act leaves intact other powers of the President that undercut those vested in the PM. While ODM has favoured this wide construction, PNU has sought to limit the PM's functions as much as possible. The struggle has pitted the PM and the head of the Civil Service and Secretary to the Cabinet (a Presidential appointee, who under the old dispensation supervises ministries), with the latter accused of undermining the PM.
8. See Decision of the Speaker of Parliament on the Interpretation of the Constitution and the National Dialogue and Reconciliation Act (Speakers Communication') of April 28 2009 available at <<http://www.bunge.go.ke/parliament/>> (accessed on 12 July 2008).
9. A number of civil society representatives working on issues of justice and victims had expressed concern over their exclusion from the legislative process, both for the Special Tribunal Bill and TJRC Bill. At the height of controversy over the amnesty question (against which the Justice Minister Martha Karua, (PNU), stood vehemently opposed), it emerged that the ODM – supposedly an equal partner in terms of the National Accord – had not been involved in the formulation of the draft law.
10. See for instance, Amnesty International, 'Concerns about the Truth Justice and Reconciliation Bill' May 21, 2008 at 11-12 raising concerns over limited CSO involvement in the preparation of the TJRC Bill.
11. Standard Reporter 'Bill: What went wrong with the big guns?' The Standard (Nairobi) February 15 2009.
12. See author's comments on this issue at: <http://rethinkingjustice.blogspot.com/>
13. On the lingering role of ethnicity in the political discourse in Kenya see various in George Wachira (ed) in *Ethnicity, Human Rights and Constitutionalism in Africa* (2008).
14. On historical injustice and the nature of the post-independence state see generally See generally Makau Mutua, Human Rights and State Despotism in Kenya: Institutional Problems, 41 Afr Today 5 0 (1994) and Republic of Kenya, Report of the Commission of Inquiry Into Land Clashes (Akiwumi Report), 1999.

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## Truth, Justice, Reconciliation, and... Land Tenure Reform?

Chris Huggins

29 July 2009

The Kenyan Truth, Justice and Reconciliation Commission (TJRC) is mandated to enquire into human rights violations, including community displacements, settlements, evictions, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. Disputed access to land is often cited as one of the key structural causes of violence in Kenya. However, political figures have manipulated and misrepresented the 'land issue' in the country, to the extent that it often seems to be an excuse, rather than a valid grievance. How should the TJRC address the land issue, which is so easily instrumentalized and so deeply linked to problematic conceptions of ethnicity? In order to answer this question, we first have to ask: why is the land issue relevant today?

The British colonial regime in Kenya caused significant disruptions to landholding patterns in many parts of the country, which still reverberate today, at the level of 'high politics' as well as 'folk politics'. Land held under customary tenure by Kenyan communities was treated as 'vacant' by the colonial regime and appropriated for ranching and farming by white settlers. Even when the colonial government created 'native reserves,' land remained under the control of the Crown and hence vulnerable to alienation by the state at any time. Large parts of the central highlands, historically home to the Kikuyu and other communities, were appropriated for settler agriculture. Former inhabitants of these areas were forced into farm labour elsewhere in the country. Parts of the Rift Valley were also greatly affected. During the war of resistance, the members of the Land and Freedom Army fought for a restoration of land rights as part of a wider liberation from colonialism.

Under the terms of the independence agreement negotiated at Lancaster House, the administration of President Kenyatta pledged to respect 'private

property', without regard to the ways in which land had been acquired. Rather than returning the areas appropriated by white settlers to customary tenure, the government accepted a 'willing buyer, willing seller' approach. Former farm workers, many of them Kikuyu, took advantage of the land-buying schemes offered by President Kenyatta to purchase plots in areas which remain a focus of discontent and periodic violence today.

Like the colonial Governor before him, the President held great powers over land distribution, with few checks and balances. Land owned under custom remains the private property of the government, and pastoralist land is supposedly held 'in trust' for local communities by the government. However, in practice Trustland is often sold-off, whether or not the sale is in the public interest. Official policy has always been to replace customary tenure with a freehold title system. This has left many communities, particularly pastoral groups in the Rift Valley, feeling that land customarily held 'in common' by their communities was vulnerable to alienation. Public land has been illegally distributed by the political elite in order to buy the loyalties of their 'clients'. Prominent families amassed huge farms and ranches under both Kenyatta and Moi. Government resettlement schemes were affected by corruption, leading to further inequality in landholdings. More generally, corruption became entrenched in the surveying and cadastral services, casting doubt on the validity of titles and creating serious land tenure insecurity which persists today.

Grievances over land access have regularly been manipulated by politicians in order to foment political violence. In 1992, KANU politicians organized violence against Kikuyu communities in ethnically mixed areas to displace potential opposition voters. Some 1500 people died in 1992. Land-related grievances were used to mobilize mobs and justify violence, often wrongly described in the media as 'land clashes'. Following incitement by KANU politicians during the 1997 elections, hundreds of thousands of people were forced from their homes. However, little was done to find long-term solutions



to the resulting internal displacement problem. The Akiwumi Commission of enquiry into the violence recommended that the role of specific individual administrative and political figures in planning the killings be investigated. However, these recommendations were ignored.

Land issues are multidimensional: at the micro level land is an economic asset which benefits individuals, and land access becomes an increasingly important political issue as land-scarcity increases. At the meso level it represents an intangible 'community territory,' which perhaps explains why major land-owners are able to publicly articulate 'communal' grievances over land. It is undeniably linked with the calls for Majimbo, discussed by Daniel Waweru in his paper. However, it is not just about 'sons of the soil' controlling land. When land uses change – for example, when pastureland is converted to farmland, or vice-versa – there are real social and environmental repercussions for neighbouring communities.

So, land issues are clearly important, in the sense that they are both deeply-felt, and have been used to mobilize violence. How then has the government of Kenya addressed these problems? The National Rainbow Coalition (NARC) came into power on an anti-corruption platform. The new government expressed early support for a truth commission; however, it failed to establish one. Some of the alleged perpetrators of violence in the 1990s were incorporated into the NARC government. NARC also failed to adequately provide for those who had been displaced in political violence, and who continued to live in terrible conditions. The government created a Task Force on Displaced People, but its work has been very heavily criticized. President Kibaki's government did establish the 'Ndung'u' Commission into illegal allocation of land, which recommended that ultimate responsibility for land rest with a National Land Commission, rather than the president, and that a review of land titles be initiated. The findings of the Commission were largely welcomed by Kenyan land specialists. However, few of the report's recommendations were implemented. While the

fundamental and systemic aspects of the land problems identified by the Commission's report have been left to fester, evictions of communities from 'gazetted' (protected) forest areas such as the Mau Forest and Mt. Elgon Forest have been implemented with excess force and without resettlement of many of those evicted. In some cases, evictions exacerbated local ethnic and political tensions. Gains from illegal land acquisition have since been utilized to fund election-related violence.

The government also formed a Committee of Eminent Persons in 2006 to report on the key concerns of Kenyans and their implications for constitutional reform. This report was written, but has never been released. To date, the establishment of ad hoc commissions of enquiry appear to have served as useful diversions, tying up the resources of government and other stakeholders in the development of recommendations which are rarely implemented. Despite these disappointments, the existence of those reports in the public domain does represent a basis for advocacy and debate. The issues are out in the open, and the major land-grabbers and the flashpoints of conflict are known.

Therefore, if the TJRC is to address land issues, will it just produce more empty recommendations, destined to be ignored? Several truth commissions in other parts of the world, such as Timor-Leste, have identified land-related inequality and human rights abuses as a root cause of conflict, but their calls for further action have not always been implemented. Those implicated in land-grabbing and other injustices are typically amongst the political elite, and able to block reforms.

However, despite Kenya's history of 'paper tiger' commissions, there are glimmers of hope that the TJRC could go further than that: First, the national Land Policy, drafted in 2006, was finally approved in June 2009. The policy is seen by many as a progressive document providing protection for those communities using land under communal tenure systems, and calls for compensation and reparation for historical injustices. The country now has a

practical framework for the implementation of the TJRC's recommendations regarding land. Second, the Chair of the TJRC, Ambassador Bethuel Kiplagat, is an expert on the causes of conflict in Africa and is no doubt well-aware of the socio-economic dimensions of violence in Kenya, including land issues. He should be able to guide the TJRC towards the development of practical and far-reaching recommendations. Third, there are a sufficient number of skilled people, in government and civil society, who are committed to land tenure reforms. They should ensure that the TJRC does not turn into a gravy train for land experts, but results in clear outcomes. Fourth, it is reasonable to expect that international donors, who have supported the Land Policy development process, will use their leverage to ensure that land reform happens. Donors were united in the face of the 2008 violence; they should unite on the land issue, and refrain from letting their own ideological positions get in the way of Kenya's much-needed reforms.

There are compelling reasons to address the land issue in a comprehensive way. Reform will reduce popular grievances, and take away one of the most effective rallying cries available to those inciting violence. Seizing 'grabbed' land will remove a source of revenue from corrupt politicians and businessmen who are willing to pay unemployed youth to engage in violence. Punishing those who have committed land-related crimes will be a concrete step towards reinforcing the rule of law for all and doing justice on behalf of all those who have struggled, since the pre-independence days of the Land and Freedom Army, to claim their rights. Applying legal sanctions against the major land-grabbers will also defuse the perceived 'ethnic' aspects of the land question. Those guilty of injustices around land are not, after all, entire ethnic communities, but specific members of the elite who abuse their economic and political power. The TJRC should prevent them from doing so, through recommending effective land tenure reforms.

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## **Special Tribunal Enactment: Why Cabinet, MPs, are Misleading Kenyans**

**Ndung'u Wainaina and Pamela Chepngetich**

*31 July 2009*

Kenyans are very suspicious of the rare unity between the Cabinet and the Parliament as they jointly dismiss calls for the prosecution of the perpetrators of post-election violence atrocities. This unscrupulous behaviour is not coincidental, but a well crafted strategy: the Cabinet and Parliament are distorting facts on the requirements for a local tribunal, in order to escape accountability. Politicians are satisfied that they are now sharing the spoils and that it is business as usual. They prefer to push the issues that contributed to the crisis under the carpet in order to focus on efforts to capture power in 2012. While we commend the Kenyan government for renewing efforts to enact the Special Tribunal to try those responsible for the 2007 election violence, we believe that nothing short of momentous symbolic shock therapy to the political elite would incentivize formation of an effective, independent and impartial Tribunal locally. Here, we believe the International Criminal Court (ICC) continues to have a major role.

In order to expose the devious political maneuvering of the Cabinet and Parliament in opposing the enactment of an effective, credible and independent local Tribunal, we note that there is tremendous improvement on the current Bills being debated by Cabinet compared to the ones defeated in Parliament in February 2009. We are happy to observe that the current Bills, which we have seen and scrutinized substantively, reflect the recommendations of the International Center for Policy and Conflict (ICPC) and other civil society groups.

Following demands made by civil society groups on how to ensure independence and credibility of the Tribunal, major progress has been made: for instance, the Constitution Amendment Bill 2009 (amendment of section 3A of the Kenyan constitution) protects the Statute and the Tribunal from constitutional challenge, and ensures that the majority of judges, as well as the prosecutor, registrar and investigators,

are foreigners. The Special Tribunal Statute and the bodies that it establishes respect human rights including the right of suspects to a fair trial; they observe principles of equality and non-discrimination and the issue of retroactivity (section 77) and time limitation do not apply. Where any law is in conflict with the Special Tribunal Statute, the Tribunal provides that the provisions of the Statute shall prevail: no Act, including an Act to amend the Special Tribunal Statute, may alter any decision of the Tribunal or relieve any person of any penalty imposed by the tribunal; no executive act, whether under the authority of current Constitution or any other law, may alter any decision of the tribunal or relieve any person of any penalty imposed by the tribunal, except as provided by the Special Tribunal Statute; and that No Kenyan Court including the High Court of Kenya shall interfere with proceedings or the work of the Tribunal (section 60). Further, the bills provide that no powers under sections 26 (Attorney-General), or 27–29 (Presidential Prerogative of mercy and pardon) shall be exercised with respect to the tribunal; independent funding shall be provided; and watertight victims' and witnesses' protection will be provided. Moreover, the Tribunal has the primacy and exclusive jurisdiction powers on all matters relating to post-election violence atrocities; the president does not enjoy immunity under section 14 (Protection of President in respect of legal proceedings during office). Finally, The Bills define the crimes, address, individual criminal responsibility, command responsibility, and resignation of the suspects from public office.

With these provisions, it is our view that a Special Tribunal with major international representation is the best option for justice for the victims of violence and preferable to a transfer of jurisdiction outside of Kenya.

Regrettably, the enactment of the Tribunal has begun on the wrong footing, failing the most basic test of its independence and credibility. The Cabinet is turning into a hub of impunity, horse trading in the full sight and knowledge of the two principals, President Kibaki and Prime Minister Odinga. Kenyans

strongly condemn the Cabinet for allowing political considerations to block the raising of the bar of the Special Tribunal in order to meet the mandatory international standards. It is our expectation that the Cabinet and Parliament will act in a sense of sobriety and responsibility in the pursuit of national goals and objectives. No efforts should be spared in confronting their insidious game of self preservation at the expense of the wheel of justice and accountability efforts against impunity. Kenyan legislators are among the highest paid in the world; the least they should do is to deliver quality legislation. Their ability to deliver an effective Tribunal should be the test of their legislative competence.

We believe that bringing the perpetrators of post-election violence and gross human rights violations to justice will contribute greatly to preventing future human rights violations in Kenya. However, the fragmentation and absurd protection rackets in the Cabinet and Parliament are likely to be the single biggest impediment to the crucial exercise. For this reason, we emphasize that the ICC and Special Tribunal are not mutually exclusive but rather complementary: if the local tribunal is not enacted as seems increasingly likely, the ICC should pursue the prime suspects. If the Tribunal is enacted, the ICC should still continue its monitoring role, as Kenyans do not want 'show' trials; they want fair trials. The Tribunal cannot bring justice to the thousands of post-election violence victims if it tries only a handful of the most notorious individuals, while scores of top officials and other prime suspects remain free. No court, including the proposed Tribunal, should fall short of the international standards which the Kenyan government is bound to uphold. The ICC must bear the burden of responsibility in ensuring that all the international standards that form the basis of other international and mixed criminal processes are explicitly incorporated in any process of accountability for Kenya.

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## Incremental Judicial Reforms in Kenya

**Charles A. Khamala**

*2 August 2009*

Judges deal in fear, pain and death. However exercised, judicial power has a tremendous impact on the socio-economic, political and cultural systems of a nation. Kenyan masses remain alienated not merely by the foreign language and condescending demeanor of courtrooms but also the centralization of justice. Consequently, we must ask: is the quality of justice determined by the performance of an incumbent occupant of a judicial position? If so, who should appoint judges? What is to be done when the actions of a politically partisan Chief Justice cow an entire judiciary to bow to executive whims?

These questions have come to focus among the Kenyan legal fraternity following recent appointments of High Court Judges in April 2009: Joseph Nyamu and Alnashir Visram gained appellate status; Chief Magistrates Aggrey Muchelule and Maureen Odero and Senior Principal Magistrate Florence Muchemi became judges; as did Abida Ali-Aroni, former chair of the Constitutional Review Commission, and Said Chitembwe, Cooperation Secretary of The National Social Security Fund. Rife speculation and intense lobbying ensuing among prospective candidates re-opens the old debate regarding deficiencies afflicting the appointment process. As legal power is derivative of judicial power, the Law Society of Kenya (LSK) at its 2009 Annual General Meeting passed three resolutions. First, the LSK proposed the establishment of transparent criteria to guide the Judicial Service Commission (JSC) in its recommendations of suitably qualified individuals. Second, the LSK resolved to re-compose the JSC so as to include two of its own members. Third, members mandated their Council to petition President Kibaki to convene a tribunal to inquire into the conduct of the Honourable Chief Justice Evans Gicheru whom they consider unfit to hold that lofty office. Such radical stance is predicated on the grounds that the Chief Justice is *perceived* to have directly compromised the independence of the bench by centralizing justice and by swiftly swearing-in President Kibaki for a second

term, thereby precipitating the degeneration of widespread post-election violence.

In justification of LSK's first resolution, the common law training and JSC's confidential appointment criteria lends loyalty to the President as appointing authority and should be reformed. Repeal of jury-trials in 1967 and gradual replacement of lay magistrates both Africanized and professionalized the judiciary. The constitutional qualification of appointing judges with at least seven years of legal practice effectively standardized the culture of appointees to persons assimilated into middle-class values who are not only well-connected among lawyers but also politically and ethnically representative. Recently, a Ministry of Justice task force suggested that the minimum qualifications be raised to advocates of 10 and 15 years standing for high court and appellate judgeship respectively. No mention was made to institutionalize gender-parity, ethnic or religious balance considerations reflected in recent appointments. Given Kenya's volatile post conflict heterogeneous society, there is clear need for broad political and ideological diversity. To secure the *appearance* of justice, it is not sufficient to merely resolve disputes *objectively*, according to primary rules prescribed in advance. Our constitution must also ensure that laws are democratically made. John Rawls' justice as fairness therefore encompasses tolerating *subjective* values which condition experiences perceived by the most vulnerable social classes. Significantly, the Kenyan struggle for independence from colonial rule was waged partly to remove a sense of injustice emanating from the *appearance* of a discriminatory judicial system which restricted Supreme Court access to minority Whites only. One alternative would be to take the path of the US and elect judges; however, such a process promotes political acumen over constitutional interpretation. A middle ground could work in Kenya; requiring parliamentary vetting of proposed nominees.

In answer to LSK's second resolution, criminologist Clive Walker would argue that the vital role of judiciaries is to guard against majoritarianism and its

crude impact on individual rights and unpopular minorities. Human rights violations are primarily caused by the criminal justice machinery. Adjusting public perceptions of the JSC currently constituted by the Chief Justice, an Appellate Judge, the Attorney General, the head of the Public Service Commission and a High Court Judge, may restore public confidence in our courts. Reconstitution of the JSC may widen the pool from which potential judges are selected so as to include liberal judges.

The LSK's third resolution aims to dislodge Chief Justice Gicheru ostensibly partly for rendering opposition candidate Raila Odinga's genuine post-2007 election complaint *fait accompli*, which ultimately contributed to over 1000 deaths and the forcible displacement of 350,000 people. Further complaints against the Chief Justice include the fact that in early 2007, he directed that all cases lodged to question administrative action, be heard exclusively in Nairobi, requiring all up-country litigants to travel to the capital city and engage expensive lawyers. This is unconstitutional. Obviously, every judge has equal powers to hear any dispute. In February 2009, following a two year stand-off, the Chief Justice suddenly but sullenly reversed his irrational decree thus re-diverting judicial review cases to their original locations. Yet much damage was already done. He has inflicted irreparable hardship on up-country litigants who were alienated from obtaining prerogative orders during the post-election violence. Further, the Chief Justice declined to allocate any judge to listen to the LSK's application challenging his illegal centralization order. Instead, policemen tear-gassed protesting lawyers inside Nakuru courts. In retaliation, Mombasa practitioners boycotted *pro bono* services traditionally rendered in capital murder cases. Yet in *reality*, even LSK's three resolutions preferring incremental "quality control" through *apparent* piecemeal constitutional amendments preceding the awaited *real* maximalist overhaul, are conservative. Such interim reforms represent well-intentioned attempts to circumvent anticipated political obstacles presented by contentious comprehensive constitutional review issues.

While the Chief Justice may not be personally responsible for the *reality* of corruption and bribery in our courts at individual magisterial or para-legal levels, his leadership personifies the *appearance* of the judicial institution as a whole, yet he publicly dismissed the new Grand Coalition Government's plan to compel judges to sign performance contracts, as unconstitutional. Nonetheless, members of his Kikuyu ethnic group within the LSK published a double page advertisement in the Daily Nation seeking signatures defending the Chief Justice's security of tenure. His track record? Since appointment to the bench in 1982 Justice Gicheru has delivered one memorable judgment. His dissenting ruling in the 1994 case of *Republic v The Post on Sunday* where, to his credit, out of seven appellate judges he disagreed with the government's attempts to silence a publisher through contempt of court. That case ironically involved an editor, Tony Gachoka's, allegations that the then CJ, Zacheus Chesoni, received a Kshs. 30 million bribe from Goldenberg Scandal architect Kamlesh Pattni. An unfortunate precedent was subsequently set by the Kibaki administration in 2003 which forced the resignation of Gicheru's predecessor Chief Justice Bernard Chunga for his association with the infamous Nyayo House torture chambers during his reign as the Director of Public Prosecutions. Gicheru subsequently appointed an *ad hoc* Committee into Judicial Corruption chaired by Judge Ringera to conduct a purge. In October 2003, 18 High Court and five Appellate Judges, 82 magistrates and 142 subordinates resigned upon being publicly named and shamed in the Report. Following this "radical surgery," Ringera's majority decision in the *Njoya* case deflated the Bomas Draft constitution which threatened devolution of Kibaki's power. Worse still, on the eve of the 2005 national constitutional referendum, the *Referendum* case instead validated the executive-driven "Wako Draft New Proposed Constitution."

The failure of the judiciary to cope with election petitions has led former UN Secretary-General Kofi Annan to act as our receiver-manager. Former Justice and Constitutional Affairs Minister Honourable Martha Karua, in a scathing attack on the judicial corruption

conceded that appointments are predicated on favouritism, cronyism and incompetence. Upon her swift rebuff by the President's mysterious appointment of seven new judges recommended by a conservative JSC, she resigned in a huff. The president unceremoniously trashed all three LSK resolutions. Now, a Truth, Justice and Reconciliation Commission has been established to supplement the failed judiciary, alongside a range of other prosecutorial arrangements. The legal profession should urgently provide a lead not only on how to deal with real intransigent institutions and *apparent* individual impunity so as to inspire accountability and personal responsibility in the attitudes of incumbents but also to infuse *real* transparency into our structures.

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## Decreeing and Establishing a Constitutional Order: Challenges Facing Kenya

Yash Ghai

10 August 2009

There is a renewed interest in a new constitutional order in Kenya. A bad constitution is blamed for the post-election crisis, allowing the president to pack the electoral commission with his cronies shortly before the election; a largely unaccountable electoral commission declaring presidential election results without proper counting or reliable records; enormous powers vested in the office of, or illegally appropriated by, the president; the centralisation of power in Nairobi; the lack of public participation; the lack of autonomy, effectiveness and legitimacy of state institutions, particularly those for accountability and justice, principally judges, police, prosecution and the attorney general; opportunistic political parties and unprincipled politicians; and resulting corruption and widescale impunity.

People often ask: would Kenya have been a better place today if the Bomas draft had not been sabotaged? This essay argues that a good constitution, while critical, is not equivalent to constitutional order. Enactment of a constitution is distinct from the adherence to its values, institutions and procedures. A constitution by itself makes no difference. Kenyan society determines the extent to which the constitution will be observed, manipulated, or disregarded, and therefore the extent to which constitutional reforms will have meaning.

The notion of a constitutional order is broader than merely the text of the constitution. It represents a fundamental commitment to the principles and procedures of the constitution and therefore emphasises behaviour, practice, and internalisation of norms. A central feature is the depersonalisation of power. Power belongs to state offices, not to individuals, however exalted. The purpose for which power must be used and the mode of its exercise are set out in the law. The holders of even the highest state offices are subject to the law, not above it. This

aspect of constitutionalism has proved extremely hard to realise in Africa, where public office has its own aura, and expectations of the people merely encourage the whimsical, or capricious and biased, exercise of state power.

Most elements of the framework of constitutionalism are unacceptable to those who gain access to state power, for they interfere with their primary objective of accumulation. This has been the essence of the Kenya experience. Constitutionalism has been rejected, and constitutionally sanctioned power has been exercised or abused in the name of ethnicity but in practice deployed for personal aggrandisement. The politics of the 'Bomas' process demonstrate this rejection of the values of the constitution: a professional phase where independent experts consulted with the people in accordance with national goals and prepared a draft constitution, and a deliberative and consensus-building phase with the representatives of the people, regions/communities, and civil society, were followed by a parliamentary phase where, against logic and democracy, politicians had a veto. It was illogical because all the Members of Parliament (MPs) were automatically members of Bomas where they had ample opportunities to have their say and to persuade others of the rightness of their positions. It was undemocratic because MPs could override a decision of a much larger, and more democratic and legitimate body than Parliament.

While the Bomas process afforded Kenyans for the first time ever the chance to decide on the values and rules by which they wished to govern themselves, politicians held a narrow interest in the constitution, focusing on access to state power, and their own personal prospects of securing that access. During the Bomas, most politicians, including ministers, about half of whom barely ever entered Bomas, showed little interest in human rights and social policies, including environmental and land policies. But they were passionately opposed to popular participation in and controls over the exercise of state power. They had little time for fair administration and public accountability of state officials.



As the analysis in the Waki Report on Post Election Violence in Kenya so vividly demonstrates, the process of accumulation cannot easily be secured within the parameters of a democratic constitution through mechanisms and procedures for accountability. Indeed the point that emerges with sharp and sad clarity is that it is only by constant and systemic violations of the constitution and the law that this political class is able to accumulate and establish its control over society, and its opponents. The horrendous consequences of these violations are graphically described in the Waki Report: corruption, institutionalisation of violence, the extensive use of militias, and the loss of the state monopoly of force (with weaknesses and divisions in state security forces). In particular the Report emphasises the role and prevalence of violence in Kenyan politics and society. It attributes many failings of the state to the personalisation of power in the president (and with it the absence of the separation of powers). The economy has become closely intertwined with state patronage and ethnic politics, and leads businesspeople to become architects of violence, and to collude in other violations of the law. There is little accountability for the exercise of public power. Impunity for the friends of the regime and for compliant state officials is rampant, and indulged despite public outcry. All these demonstrate the absence of the rule of law. The way successive presidents have misgoverned Kenya is proof that these violations are in fact the norm.

Serious consequences follow from this, not least the loss of state legitimacy. The state is not perceived as a social and political force for the common good. It is regarded, accurately, as partisan, throwing its weight behind specific communities and interests. The subordination of the electoral commission, the police, and the judiciary to the executive has resulted in their inability to resolve national problems, though this is why they are set up, with independent powers. The police are particularly singled out by the Waki Commission for their failure to ensure Kenyans' security, and consequently are held responsible for numerous murders, rapes, and the displacement of the people. They are no longer able or willing to

protect the people against violence and plunder by private and politically sponsored militias. The judiciary is so discredited that no one believed that it was capable of impartial adjudication of election disputes. The Waki Commission doubts the veracity of the statements of the attorney general about his attempts to enforce the law. The Waki Commission concludes, "Over time, this deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish perpetrators, has led to a culture of impunity and a constant escalation of violence." The government and politicians have not only sanctioned violence, but they have also ethnicised politics and violence. Consequently the state has failed to perform functions intimately connected with the exercise of public power, indeed major reasons why we establish a state in the first place.

Despite the emphasis placed on constitutional reform by Kofi Annan, other eminent Africans, Kenyans and the international community, there is no guarantee that many of the reforms proposed by them and the Kriegler and Waki Commissions will help to get Kenya out of the hole in which successive regimes have placed it. I have said enough to indicate how vested interests, among politicians, businesspeople, and the bureaucracy will sabotage reforms (as they have done ever since Kenya's independence). Despite the ravages wreaked upon the state, it still remains the primary means to accumulate wealth and power – and those who are in control of it will fight to maintain their control, regardless of the rules of the constitution.

It is hard to provide the answer to this dilemma, that the very sponsors of reform are its principal saboteurs. What we know is that constitutionalism cannot be willed; it must be established by deep commitment and sustained activity. The constitution cannot achieve anything by itself: like Marx's commodities, it does not have arms and legs. It must be mobilized, acted upon, used, etc. This idea is also expressed by Granville Austin (2000), in his monumental study of the working and impact of the

Indian Constitution, in which he says that a constitution, however living, is 'inert'. A constitution does not work, it is worked. He says his book is 'about those who acted upon the Constitution, how and why they did so, and about those the Constitution acted upon, or neglected. It is about Indians working their Constitution...'

One way to understand the potential of a constitution to impose its imprint on state and society is to examine two key factors. One is internal to the constitution, and the other, external (society). The internal concerns the ways in which the constitution distributes power, the institutions it sets up for different tasks, modes of accountability, and methods for the enforcement of the constitution, including respect for and protection of human rights. The balances within the constitution can do something to guide state institutions and empower the people. It is safe to say that constitutions may succeed in setting up institutions and giving them authority, but they often fail in the fulfilment of national values or directive principles – for the paradoxical reason that those who accede to these institutions may have little commitment to the values. It is interesting to note in this context that at Bomas, politicians paid almost no attention to values, but were obsessed about institutions – knowing well that if they got hold of institutions, they would be able to ignore values. As we know, most African constitutions contain excellent values and procedures, but, for the most part, they have failed to produce excellent states. In Kenya, even the essential pre-conditions of a constitutional state are missing: an independent judiciary, honest electoral commissioners, absence of impunity, policies that are inclusive, the rule of law – and most importantly, ethical and moral standards in public life. These difficulties are compounded by many unresolved historical injustices.

They have failed in substantial part because of the second factor, which is external to the constitution, namely society. The constitution operates within society and seeks to influence its development. The distinguished Indian sociologist, Andre Beteille, believes that a constitution can provide directions for

the national development and self-realization, but whether, and the pace at which the development takes place depends on society. The constitution may set out guidelines for the exercise of power and the aspirations that the state must fulfil. But society also affects the constitution, sometimes pushing policymakers to uphold the principles enshrined in the constitution and sometimes negating those principles. I have already indicated that in Africa we have placed unjustified reliance on the capacity of the constitution to influence society. I have also indicated that the political order intended to be set up by the constitution competes with other models and realities – and in the end it is society that determines the extent to which the constitution will be observed, manipulated, or disregarded.

The African constitution not only fails to mould civic values or the behaviour of key political actors, it also fails to generate a state that is capable of sound social policies and fair and honest administration. Andre Beteille's brilliant insight needs to be supplemented by a consideration of the obstacles to progress placed by the inherited, pre-constitution bias of the state apparatus. Perhaps inadequate attention has been paid to these obstacles, as opposed to societal obstacles, because it is assumed that the constitution, par excellence, designs and structures the state. However, as I have mentioned above, it may structure institutions, but may fail to infuse them with values and principles. The constitution tends to structure macro institutions but often says little about values and procedures of the administration of the state (which may persist from one constitution to another).

The implication of this is that political reform has to go beyond the constitution. It is one thing to make a constitution. It is quite another to breathe life into it, making it a living, vibrant document which affects, and hopefully improves, the reality of people's lives. A living constitution is one that citizens use in their daily existence, that governs and controls the exercise of state power, and promotes the values and aspirations expressed in it.

For these reasons, implementing a constitution is not about this or that provision, or even the totality of the constitution, important as these are. It is about the inculcation of a culture of respect for and discipline of the law, acceptance of rulings by the courts and other bodies authorised to interpret the law, giving effect to judicial decisions, acceptance of the limits on the government, respecting and promoting human and collective rights, the participation and empowerment of the people. Ultimately the people have to be guardians of the constitution.

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## **A Radical Proposal to Deal with our Prejudices**

**Lukoye Atwoli**

*21 August 2009*

The truth about the beliefs and perceptions of the majority of Kenyans is not to be found in erudite forums and debates such as this one. To really understand the Kenyan mind, one needs to visit the marketplaces and the pubs in ethnically homogenous regions of this beautiful country. A recurring theme in many marketplace and bar-room debates is the need for 'foreigners' who have settled in other people's 'territory' to learn to respect the 'indigenous' people. In this view, the 'foreigners' must not compete for political power with the 'locals', and whenever a national issue requires a vote, they must vote with the 'host' community or face dire consequences. Below, I suggest a radical measure to deal comprehensively and transparently with the hidden and overt prejudices that fan periodic eruptions of 'political violence' in Kenya.

Views expressing a preference for ethnic homogeneity may be forgiven if expressed only by ignorant village folk. Unfortunately these views are held by individuals who are expected to be opinion leaders in their communities, and actively reinforced by the most educated and urbanized Kenyans. It must also be noted that this view prevails not just in the Rift Valley, but across the entire country. Sayings such as 'blood is thicker than water' have taken on new meanings, often suggesting exclusion of ethnic others and the promotion of narrow supposedly ethnic interests that often benefit only a few (mostly) political elite. This reality raises fundamental questions about the honesty behind public protestations of patriotism and Kenyanness, particularly when many proponents of these divisive perspectives are received as heroes in their communities.

Taken to its logical conclusion, this thinking seems to suggest that what needs to be done to rid this country of the periodic orgies of bloodshed

associated with electioneering and politics would necessarily include radical legislative measures.

If Kenyans prefer ethnic homogeneity, then a law should be urgently enacted in parliament barring anyone whose ethnic origin cannot be traced to a particular area from vying for a post in that location. Everybody should be compelled to contest electoral posts only in the areas from which they can trace their ancestry. Thus, all elected leaders in Central Province will only be Kikuyu, in Western, Luhya, in North Eastern, Somali, and so on. As to what to do with relatively de-ethnicized urban centers like Nairobi, this question would be left to the proponents of this ethnocentric thinking to resolve as they partition the country into 'comfortable' ethnically homogenous zones. Such a law would protect innocent voters from the ambitions of foolish Kenyans who still hold that democracy means that one can contest a post anywhere, every vote counts, and that the winner is decided by the vote. As this is indeed the current practice in most of this country, such legislation would only be formalizing what many Kenyans think is the best approach.

Indeed, the law should go further and enact a form of governance that does not require people to vote directly for the national leadership, because this is another area of contention. When the so-called foreigners vote for a candidate of their choice who happens not to be the favorite of their 'hosts', it often results in animosity and chaos. Therefore, legislation that ensures that a president or prime minister is elected or selected far away from the voter would safe-guard the poor citizens who go into polling booths thinking that their vote is truly free of coercion and strikes a blow for democracy.

These suggestions are not just the idle musings of a disturbed mind. They are informed by opinions and activities that have taken root on the ground. The country has already been secretly zoned into tribal enclaves, and the enclaves have identified their champions and leaders who are busy fighting for their 'rights'. Indeed, at every constitutional review attempt over the last fifteen years, intelligent debate on devolution has been contaminated by a pedestrian

definition of *majimbo* whose very thrust has been 'our region for our people', and assertions that 'outsiders' must go back to their 'home' areas.

Pretending that a different course is possible would be a waste of valuable national time that could be spent more productively pursuing real development and change in the lives of individual citizens. A solution such as that proposed above would go a long way in eliminating the use of elections and politics as an excuse for murders and rapes that has been deployed since the advent of multi-partyism.

Legalization of our secret prejudices would thus expose the criminals among us who take advantage of politics and elections to commit heinous crimes that are then labeled 'political violence' and left unpunished. In one fell swoop, we would have addressed the twin issues of violence and impunity, and hopefully Kenyans would become more honest in their speech and intentions.

Finally, this move would expose the true nature of the Kenyan Republic, and invite those like myself who disagree with this sort of arrangement to actively seek another place to call home. Attempting to deal with this ogre of ethno-political balkanization in conventional ways of exhorting patriotism and nationalism will only end in more loss of life and property, since the citizens would remain deluded that they can practice their freedoms of association and assembly anywhere in this land.

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## Misconceptions I – The ICC and the Truth, Justice and Reconciliation Commission

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21 August 2009

The Kenyan Cabinet recently resolved to put forward the Truth, Justice and Reconciliation Commission (TJRC) as a way to address the post-election violence. In this first of three essays looking at some of the misconceptions in the transitional justice debate in Kenya (the next two contributions will consider domestic and international prosecutions respectively), I evaluate whether the establishment of the TJRC makes the Kenyan situation inadmissible before the International Criminal Court (ICC). Given the state of the debate about whether non-prosecutorial measures can demonstrate “an intent to bring the person concerned to justice”, and the increasing delegitimisation of the TJRC, the commission is unlikely to be seen as fulfilling the complementarity criteria of the ICC.

The debate about “credible” independent processes that “meet international standards” that has dominated Kenyan discussions about accountability options is in part a debate about complementarity – the idea in the Preamble of the Rome Statute of the ICC that the Court “shall be complementary to national criminal jurisdictions”. The complementarity principle preserves the primacy of domestic prosecutions for those responsible for international crimes. Assuming “sufficient gravity” (an important consideration I do not address in this essay), the Court can only act under Article 17(1)(a) if Kenya is “unwilling or unable genuinely to carry out the investigation or prosecution”. Unwillingness is defined in Article 17(2) as the initiation of proceedings created “for the purpose of shielding the person concerned from criminal responsibility”, or in a context where proceedings are unduly delayed or conducted in a manner “inconsistent with an intent to bring the person concerned to justice”. Inability is defined under Article 17(3) to include a lack of institutional capacity, as well as the “availability” of

the national judicial system – in the sense of enabling legislation, for instance – to carry out proceedings.

Does the TJRC meet the complementarity criteria? Put differently, can a non-prosecutorial mechanism conduct “genuine” investigations with the “intent to bring the person concerned to justice”?

The dominant perspective is that non-criminal proceedings generally are inconsistent with the complementarity doctrine. Under Article 17(1)(a), a country can argue that a case is inadmissible before the ICC on the grounds that “the case is being investigated or prosecuted by a state which has jurisdiction over it”. As Scharf offers, because the Article “requires an investigation but does not specify a criminal investigation...a state could argue that a truth commission (especially one modeled on that of South Africa) constitutes a genuine investigation” (Scharf 1999:525). However, he proceeds to show why this could be a difficult line of argument to sustain, particularly because the Article further states that investigations should be consistent with “an intent to bring the person concerned to justice”, and this phrase can be interpreted as requiring criminal proceedings. Similarly, under Article 20 which provides that a person who has been “tried by another court” shall not appear before the ICC, a country can argue that a person who has appeared before a truth commission is ineligible to stand before the Court. However, this argument would still have to demonstrate an intention to bring a person to justice. Besides, a truth commission is not a “court” (Scharf, 1999:525-526).

The view that prosecution is essential to complementarity was held by many in the anti-impunity community in the situation of Northern Uganda. Here, it is worth noting the exchange between those who suggested that in a context where prosecutions were thought to have the potential to derail a critical peace process, the Court could, within its complementarity provisions, defer to alternative justice processes, and those who argued that such a deferral would amount to an abdication of the Court’s core obligation to prosecute. While this discussion was mostly appealing to prosecutorial

discretion under Article 53, where the Prosecutor can determine to halt proceedings if they would not serve "the interests of justice", the views expressed against non-prosecutorial measures were general to the conduct of the Court. According to Human Rights Watch (2005):

the prosecutor may not fail to initiate an investigation...because of developments at that national level such as truth commissions, national amnesties, or the implementation of traditional reconciliation methods, or because of concerns regarding an ongoing peace process.

Leading advocacy organisations (including Amnesty International, Human Rights Watch) argued that to make determinations about the merits and legitimacy of alternatives to prosecution would amount to the Prosecutor making a political judgment, which would open the Court to potential manipulation. From this view, the complementarity language of the statute does not distinguish democratically demanded amnesties (such as those of the South African TRC) from the illegitimate amnesty of the Pinochet regime in Chile, viewing them both as unacceptable (Rodman 2009: 103). This position was also confirmed by Judge Richard Goldstone, the former prosecutor at the International Criminal Tribunal for the former Yugoslavia, who argued that if the South African TRC were implemented in this age of the ICC, it would not be acceptable. He argued that countries must prosecute, political feasibility notwithstanding.

Despite the dominance of this narrow view of complementarity, a competing view argues for a role for non-prosecutorial processes in the age of the ICC, and advocates for a broader understanding of the notion. This second view starts from the perspective that the Court was not established to overturn and contradict the decisions of democratic states where, for instance, victims may decide to set up credible non-prosecutorial processes, or, as in South Africa, pursue prosecutions only against those who do not receive amnesty. Further, this argument goes, a case can be made that the "interests of justice" pursued by the Court could be broadened to include the restorative justice pursued by institutions like TRCs by

showing that such alternative mechanisms are not "just a way of protecting the guilty from prosecution" (Roche 2005:568-569), but rather valid avenues through which to address calls for truth, reparation and reconciliation. Further, given that the participation of perpetrators in TRCs is thought to be critical to the success of these mechanisms, the ICC could target those who have not received amnesty through this process, thereby providing an incentive for such perpetrators to participate in national TRCs. Another suggested approach for collaboration between the ICC and a TRC could be one in which the ICC collaborates with it to address those most responsible for violations (rather than just those who do not receive amnesty). Here, cooperation of the perpetrator with the TRC "could be a mitigating factor taken into account by the ICC Judges in sentencing" (Roche 2005: 575).

The call for collaboration between the ICC and legitimate non-prosecutorial measures positions itself as being pragmatic and principled. The argument is pragmatic in the sense that in a context of scarce resources, it would suggest that collaborative relationships with mechanisms like TRCs can be useful in ensuring as many victims as demand alternative processes can receive them. Further, in a context where scholars on the ICC are suggesting that the Court should offer assistance to states to carry out their domestic prosecutions in a policy of "proactive complementarity" (Burke-White, 2008) even where it is clear that national processes in many resource-poor countries with weak justice systems will most likely fall short of "international standards", this broader conceptualisation of complementarity may be timely. The argument also tries to shield itself against attacks of politicisation by proposing a principled process of determining legitimate non-prosecutorial processes: those with the broadest support possible in a society, and that are inclusive, supportive of victims, and complementary to other political reforms. Further, it suggests, credible alternatives are those whose merits would be vouched for by the broadest level of civil society (Roche 2005: 574-579).

The debate between the narrow and broader interpretation of complementarity continues part of a broader ongoing discussion about politics and the ICC: while the Prosecutor remains firm that his duty is to “apply the law without political considerations”, one set of critics tell him that this position ranges from unhelpful to dangerous, and another set argue not all non-prosecution amounts to a breach of international legal obligation. But serious shortcomings remain unaddressed in both the narrow and broader view of complementarity – the former can be antidemocratic, while the latter can underestimate the agenda-setting power of international civil society in supplying empirically unproven “universal” models to local communities.

Nonetheless, even if the Court were to find a symbiotic relationship with institutions like TRCs, the Kenyan TJRC in its current form would be unlikely to meet the proposed principled criteria in the broader interpretation, in part because those whose support is necessary for the TJRC to be legitimate – mainly the victims and civil society – have withdrawn their support from the institution. Gravity aside, an increasingly delegitimised, non-prosecutorial mechanism is unlikely to keep the ICC away; domestic prosecutions can.

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## Leashing Kenya's Dogs of War: A Theoretical Assessment

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9 September 2009

From the standpoint of constitutional law, the handing over of the Waki envelope to the prosecutor of the International Criminal Court (ICC) represents the ceding of judicial autonomy of the state to an 'exceptional court'. The establishment of a domestic special tribunal which supplants the supervisory jurisdiction of the High Court and strips the president and attorney general of constitutional powers and immunities has a similar effect. What would motivate a country like Kenya – by all indicators an authoritarian regime – to delegate judicial powers? This essay reviews some of the key literature on why states delegate judicial processes to auxiliary courts, interrogates some of the constraints, and provides possible pointers to successful trials in the Kenyan context.

At one end of the spectrum, Tamir Moustafa's research on judiciaries in transitional contexts suggests that even though courts are often transformed into spaces for reinforcing the role of legal norms in mediating politics, authoritarian regimes generally use courts for at least five reasons: social control, legitimation, controlling administrative agents, creating credible commitments in the economic sphere and delegation of controversial reforms (Mustafa & Ginsburg 2008:1). While some of these reasons may not hold in the Kenyan context, some could. For instance, it is possible to imagine that 'disciplining' political elites otherwise untouchable by the political system could secure elite cohesion. Similarly punishing the perpetrators of the violence would reinforce commitment to the rule of law; an important ingredient in the stability of property rights and an incentive to economic investments. This position seems to find support from transitional justice scholars such as Bronwyn Anne Leebaw, who argues that law (and by extension, courts) can be 'utilized to obfuscate and legitimate abuses of power' (Leebaw 2008:97). The offshoot of

this position is that it is possible to have trials of suspects of the post-electoral violence without any corresponding attainment of their transformative intent. Consequently, Kenyan civil society should be alive to this possibility.

A view opposite to Mustafa's would be that Kenya is genuinely keen on meeting its international obligations under both the Rome Statute and the Genocide Convention as evidenced by its willingness, albeit unsuccessful, to establish a national mechanism for the trial of post-electoral violence perpetrators. In this sense, Kenya can be said to be committed to ensuring adherence to international criminal law. Kenya's attempted judicialization of political differences through an international criminal process can be seen as compliance with such norms (Downs et al. 1996: 389). This argument is however unconvincing given the glib manner with which proposals at the cabinet level have been made to the effect that Kenya should withdraw from the Rome Statute in order to deny the ICC jurisdiction over the Kenyan situation. A country buoyed by aspirations to comply with international standards would be unlikely to propose such actions. Instead, what emerges from this position is that the Kenyan state will not pursue normative compliance if the associated political and social cost is, in the short term, onerous. Any cost-benefit analysis is likely to centre around the succession of President Kibaki: the cabinet's latest decision to abandon the pursuit of a local special tribunal stems largely from the perceived impact of any such trials on the strategic and vote-rich Rift Valley province. Indeed, Prime Minister Raila Odinga appears to have lost the support of Rift Valley political barons due to his enthusiastic support for such trials.

The most common justification currently advanced in support of international trials for Kenya's war crimes suspects is based on the desire to end impunity. What this means, among other things, is that by punishing perpetrators, retributive justice is effected for the victims, and an increase in likelihood of punishment of political elites will ensure that such crimes do not recur. Deterrence theory in criminology, on which this proposition is based, does not anticipate that officials who have already committed human rights violations

will be stopped from committing further violations. Rather, the concern is how sanctions will affect the future behaviour of other actors. Of particular relevance is the finding that beliefs about the likelihood or probability of arrest and punishment in human rights cases, rather than the severity of punishment, have a greater deterrent effect (Bueno de Mesquita 1995: 485). Deterrence research also suggests that deterrence is more effective for individuals who have higher stakes in society (Nagin 1998), which would seem to include the kinds of state officials complicit in Kenya's killings. Sikkink's latest research on the effects of human rights trials at the domestic level provides quantitative support in favour of the deterrence effect of such trials. One of her hypotheses is that countries that have held human rights trials will see greater improvements in human rights practices than those countries that have not held human rights trials. Her research, based on a survey of 192 countries, including a good number of African states, suggests that those states with more accumulated years of trials after transition are less repressive than countries with fewer accumulated years of trials, and that truth commissions are associated with improvements in human rights practices, but that trials have a stronger effect than truth commissions (Sikkink & Kim 2009). Similarly, Roht-Arriaza (2005) argues that human rights trials, either domestic or international, are both legally and ethically desirable and practically useful in deterring future human rights violations.

Although deterrence and compliance theories may converge at the level of impact, the latter looks more at state conduct in the international sphere while the former considers social transformations engendered at the domestic level by targeted criminal proceedings. Both deterrence and compliance theories are further consistent with rational choice thinking on this issue which suggests that state officials and politicians choose impunity and repression because the benefits of such action exceed the cost (Poe et al. 1999).

Realizing deterrence in the Kenyan context, however, will be problematic if the current collectivization of

culpability or victimhood is not halted through both coercive and persuasive means. By ascribing blanket guilt or innocence to ethnic groupings, it is likely that collective mobilization of communities will dull the anticipated deterrent effect of such trials. Instead, the outcomes of such trials will be rationalized away from justice and towards vindictiveness. Deterrence can be nurtured, however, if prosecutions are seen to apply across ethnic cleavages so that the sting of victors' justice is stayed. Nonetheless, this approach may not be practical, especially if aggression continues in a particular community more than in others, a most likely scenario in the Kenyan case.

In contrast to deterrence and compliance supporters, realist scholars problematize trials as a vehicle for attaining social cohesion. For instance, some scholars of this persuasion argue that trials or threats thereof could destabilize new democracies and lead to coups. They hold that 'fragile states' that undertake such trials could 'commit suicide' by dramatizing high-profile persons' arrests and incarcerations. They further argue that the threat of prosecution could cause powerful dictators or insurgents to entrench themselves in power rather than negotiate a transition from authoritarian regimes and/or civil war (Goldsmith & Krasner 2003:49). Snyder and Vinjamuri posit that 'Policies and institutions of humanitarian justice are destined to fail' and that 'recent international criminal tribunals have utterly failed to deter subsequent abuses in the former Yugoslavia and in Central Africa' (Snyder & Vinjamuri 2003:40). In the same line of thinking, Mahmood Mamdani has disputed the efficacy of indicting Sudan's President Omar al-Bashir on the grounds that such attempts will neither secure stability in Sudan nor halt the blood letting in Darfur. In this regard, he called for the subordination of criminal accountability to the larger pursuit of political reforms. While no coup is likely to happen in Kenya, the salience of this theory is obvious, and could explain the cabinet's decision to shelve the pursuit of a local tribunal. Indeed, many calling for justice to be tempered with reconciliation have argued that the pursuit of justice should not come at the expense of the survival of the state. However, proponents of this view have failed to show

how such trials will imperil the Kenyan state. Unlike Iraq, Sudan, the Democratic Republic of Congo or even the former Yugoslavia, Kenya has stronger institutions, notably an independent military, that can provide relatively apolitical, even if sometimes heavy-handed, security arrangements. The assumption here is that pressure emerging from high-profile international criminal trials could re-ignite ethnic bloodletting and trigger a military intervention. Be this as it may, what is certain is that without the political commitment to the impartial use of such institutions, it is possible for state action to be misjudged as serving partisan interests.

This paper has presented a diverse body of knowledge that could be deployed in the assessment of Kenya's decision whether or not to try the lead perpetrators of the post-electoral violence. Such an assessment must be alive to emerging empirical evidence in favour of the deterrence effect of trials. The success of the Kenyan trials will depend largely on the extent to which ethnic mobilization is checked *ex ante*. A comprehensive and sophisticated outreach strategy is an important coefficient to this, as is a framework for prosecutions or other forms of transitional justice that is consultative, accountable and above reproach. Kenya's fractured politics would undoubtedly be tested most severely by a local tribunal whose proceedings Kenyan and international media cover extensively. Consequently, a responsive media able to provide balanced and sensitive reporting that would give dignity to the victims of violence and hate will be important. In the end, Mamdani's assertion that deterrence may result from prosecution only when the same rules apply for all war criminals, regardless of national origin or political orientation, is appropriate for the Kenyan cases as in Sudan's Darfur.

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## Misconceptions II – Domestic Prosecutions and the International Criminal Court

Lydia Kemunto Bosire

11 September 2009

This is the second of three essays on misconceptions in debates over transitional justice in Kenya. The first essay considered complementarity and the Truth, Justice and Reconciliation Commission (TJRC), and argued that, *if* Kenya's situation was otherwise admissible to the International Criminal Court (ICC), the TJRC in its current form is unlikely to satisfy the Court's complementarity test. This essay considers the discussion on domestic prosecutions in Kenya. It points to some challenges in the proposed relationship between the Imanyara Bill for the Special Tribunal for Kenya (STK) and the ICC, and argues that the Bill envisions a relationship with the ICC which is both outside the Rome Statute and the current, narrow practice of complementarity. Kenyan victims and anti-impunity advocates depending on the ICC to give the STK teeth are likely to be disappointed unless the Court embraces a broader, more politically conscious engagement with Kenya. The next essay in the series will make the case for such an engagement.

The Waki Report recommended the STK as the institutional response required to prevent the ICC's involvement in Kenya. That initial coercive tactic failed to catalyse domestic prosecutions when the Kenyan Parliament rejected a constitutional amendment Bill brought by former Justice Minister Martha Karua in February 2009. Subsequently, in what appeared to be "promises as usual", the government agreed by the end of September to give the ICC Office of the Prosecutor (OTP) a summary of progress towards investigations and proceedings conducted "through a special tribunal or other judicial mechanism adopted by the Kenyan Parliament". In the event of a failure to institute domestic proceedings, the Kenyan government would refer the situation to the Court in accordance with Article 14 of the Rome Statute.

If the initial failure of the Waki envelope to trigger a domestic judicial response resulted in part from the fact that domestic actors perceived the ICC to be a remote threat, that perception was expected to change when the Waki list of suspects was given to the ICC. The ICC's opening of the Waki envelope became the second (bigger) "stick" in the hands of prosecutions advocates. This stick served to frame all political struggles in the language of "impunity" v "justice", as NGO statements cautioned that Kenya's failure to institute "genuine" proceedings that meet "international standards" – terms whose meanings were assumed to be objectively understood – meant that the ICC would now "step in" and "take over". Nonetheless, the coercive force of the Court receiving the list (and the accompanying headline photographs of the Prosecutor scrutinizing the names of suspects on the list) turned out to be overestimated, and the Cabinet resolved to reject the STK, cooperate with the ICC, strengthen the domestic judiciary, and revisit the mandate of the TJRC.

But the direct involvement of the OTP was not without effect. It provided the background against which the use of the apolitical discourse of "genuine" proceedings in accordance with "international best practices" by the Minister of Justice in his push for his vision of the STK within Cabinet meetings resonated. This, combined with the unrelenting international focus on the desirability of domestic trials, contributed to shifting domestic anti-impunity advocates from a perspective which primarily endorsed ICC-only action, to one which included the possibility of robust domestic prosecutions. This is how Imanyara explained his personal change in preference from "The Hague option" to the STK: an independent domestic process obviated the need for an ICC-only position. Accordingly, the Imanyara Bill (of 24 August 2009) proposed a two-tiered structure where the ICC and the STK would operate concurrently in a division of labour: the ICC would prosecute authors of crimes, and a domestic process would take charge of lower perpetrators. When asked about the Bill in an interview with *The Nation*, Imanyara summarised the relationship as follows: "In our revised Bill, we have introduced a clause to

leverage on the International Crimes Act, which domesticates the ICC, to have the ICC try the masterminds while the tribunal goes for the small fish." In this innovative partnership, Imanyara concluded, "Serious crimes will just have to go to The Hague." This does not intend to give an historically efficient reading of the process – at the governmental level, a cynic might represent what happened as simply a case where sections of a fractured elite who were politically unhappy about domestic prosecutions for a number of reasons unrelated to "international standards" suddenly found in the ICC and subsequently the STK a justificatory framework for their uncompromising political positions and a possibility of refashioning themselves as reformists. Instead, it sketches one version of how the ICC was eagerly woven into the narrative of what accountability in Kenya must look like, and how it found its way into Imanyara's STK and into civil society discourse.

Leaving aside the discussion about the accuracy of the analogies upon which Imanyara's team draw in structuring the STK ("Remember, the Sierra Leone government worked with the United Nations to set up their tribunal. The Rwanda tribunal was set up by a resolution of the UN Security Council. We'll work with the ICC"), this proposed relationship is captured in two sections of the Bill. Section 3(a)(2) of the Constitutional Amendment Bill provides that the ICC will maintain,

*concurrent jurisdiction to investigate, indict and prosecute persons bearing the greatest responsibility and the Tribunal may at any stage, make a referral to the International Criminal Court as set out in Article 14 of the Rome Statute... if it deems it expedient....*

Further, Section 7(5) of the proposed STK statute outlines the jurisdiction of the Court, and states that the

*Tribunal may invoke Article 14 of the Rome Statute if deemed necessary and for avoidance of doubt it is declared that the person or*

*persons on the list submitted to the International Criminal Court by the Chair of the Panel of Eminent African Personalities shall be deemed to have been referred to the International Criminal Court.*

While some commentators hail this proposed relationship as one that "cleverly marries the ICC and the tribunal routes to justice" and "leaves opponents of justice without any credible arguments against it" (see Human Rights Watch), both these sections articulate a relationship with the Court that goes beyond the confines of the Rome Statute. Article 14(1) of the Statute provides that "a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed...." The referral provided for by the Statute is from a "State Party", not an independent institution such as the STK (not even if the STK is mandated by the Kenyan Parliament). It is such an official state referral that the minutes of the ICC Prosecutor's meeting with the Kenyan Ministers envisioned, in which they stated that Kenya will demonstrate its progress towards ending impunity and "in the alternative...the *Government of Kenya* will refer the situation to the Prosecutor" (emphasis added). The head of the Jurisdiction, Complementarity and Cooperation Division of the ICC was also quoted in the *Sunday Nation* stating that the OTP expected to meet with the *government* at the end of September over the referral. It is because of developments such as these that Adam Branch has labelled the Court "anti-democratic" because, he argues, in Uganda, the Court served the unilaterally expressed interests of President Museveni against the wishes of the Ugandan people and their Parliament.

Further, contrary to what the Bill suggests, the submission of the Waki list cannot constitute a referral, but rather is a transmission of "communications" to the Prosecutor; the list constitutes one more piece of information to be consulted (alongside the reports from NGOs, etc) in the Prosecutor's determination regarding whether there exists a reasonable basis to open an

investigation. These procedures are explained in great detail in the ICC paper, 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications'.

A further challenge to the STK's proposed structure is that it pays little attention to the contingent nature of the ICC's involvement in a situation. Even in instances of sufficient gravity, the determination of whether as a state is "unable" or "unwilling" to conduct "genuine" investigations can only be made by the Court. In Kenya, "gravity" will also have to be determined. Given the nebulous nature of all the definitional terms and the conditions under which they are sufficiently satisfied to give the Prosecutor reasonable basis to proceed, there is an arguable risk that Kenyan civil society and other pro-prosecutions forces that rely on the ICC for the prosecution of those most responsible will be disappointed. In a 2007 policy address in Nuremberg, the Prosecutor clarified the role of the Court:

*My duty is to apply the law without political considerations. I will present evidence to the Judges and they will decide on the merits of such evidence. And yet, for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on the ground, to indict or withdraw indictments according to short term political goals. ...These proposals are not consistent with the Rome Statute.*

While what was most relevant at the time of this address was the peace process between the Lord's Resistance Army (LRA) rebels and the government of Uganda (where many advocates argued that the LRA would not sign the peace agreement unless the ICC arrest warrants were deferred, and the ICC Prosecutor reminded them that his mandate did not extend to such 'political' considerations), the spirit of the assertion remains the same for Kenya: it is the sufficiency of the evidence, not the special political situation of Kenya nor the role scripted for the Court

in the STK that will determine whether and how the Prosecutor will proceed.

Whereas the legal issues raised above can be amended in a future version of the Bill, the STK's broader challenge of proposing a relationship outside the current (narrow) practice of complementarity remains. To date, the Court's practice of complementarity has involved attempts to catalyse domestic prosecutions through threatening judicial intervention using the *proprio motu* powers of the Prosecutor; setting standards for "genuine" domestic proceedings whose disregard can trigger a judicial intervention by the Court; and acting as the platform of last resort in cases where the national authorities are unable or unwilling to prosecute (Perrin 2006). Given this practice, what the Imanyara Bill calls "concurrent jurisdiction" requires a much wider interpretation of complementarity.

To be sure, the Bill derives its strength mainly from the proposed changes in domestic power structures that are not addressed in this paper: among other things, it seeks to remove the potential influence of the executive on the judiciary, makes the STK independent of the Kenyan High Court, and requires the resignation of officials who are under investigation. However, critical aspects of its performance – such as the prosecution of the "big fish" – appear to depend on a collaborative relationship with an unpredictable ICC. Given the current practice of complementarity, this proposed structure may be mistaken. This is not to advocate for a particular prosecutorial platform, nor to suggest that prosecutions secure particular social outcomes; such assertions would require an analysis that goes beyond the technical processes that are the focus of this paper. Rather, it is to point out that, if domestic prosecutions through the STK are thought to require external coercive force in order to be successful (in themselves, quite apart from the social impact they may or may not have), the current practices of the Court make it an unpredictable source of such coercive force.



The STK Bill – with the ICC written into it – constitutes another attempt at coercing the Kenyan government to institute domestic proceedings. This time, the OTP (and the ICC by extension) is directly implicated in the Kenyan narrative, and is likely to be affected by both the success and failure of Kenya's anti-impunity project. Consider one likely scenario: if Kenya *fails* to establish "genuine" domestic proceedings by the end of September, it has agreed to refer the situation to the ICC in accordance with Article 14 of the Rome Statute. If the government makes the referral (rather than trying to prove the complementary nature of any measures that may be underway by that point, including the TJRC), paradoxically, such a referral would signal a failure of the Court in catalyzing complementarity, and would allow the government to outsource to the Court the financial and political costs of domestic prosecutions (Burke-White, 2008). Further, if, following such a referral, the Prosecutor analyses the Kenyan evidence, finds no reasonable basis to proceed, and communicates such a finding back to the state, the Prosecutor can find himself in a moral hazard of potentially emboldening domestic perpetrators. Such a determination is also likely to reduce the probability of successful domestic prosecutions. Consequently, the Court could lose further legitimacy in the eyes of victims and civil society (even despite the fact that the Prosecutor can always revise his decision not to proceed in light of new information), who may question, as victims elsewhere have, whether the Court serves their interests. Under these circumstances, and against the background where important constituencies of the Court are increasingly engaged in public withdrawals of consent to the institution, the ICC must engage in Kenya in a politically conscious manner. In this spirit, the Imanyara Bill may offer the beginnings of a model for operationalising a broader understanding of complementarity, or perhaps revisiting the ICC's neglected vision of "positive" complementarity. It is such a politically aware engagement that will be the focus of my third essay.

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## Kenya's Economic Crimes: Can a Conditional Amnesty be Meaningful?

Kisiangani Emmanuel

18 September 2009

When a Kenyan Cabinet minister suggested in early 2007 that perpetrators of corruption be pardoned if they confessed their guilt and returned the spoils, there was surprisingly little public reaction. This was perhaps taken with a pinch of salt given that Kenyan politicians are good at talking but then doing nothing. But when former anti-corruption chief John Githongo (accused by some of behaving like a drama queen and self-appointed high priest), made a similar statement in mid August 2008, his view made headlines that drew sharp reactions. One opinion piece employed the headline, "Kenya to become a Looters' Paradise." Githongo, who fled to Britain in 2005, claiming he feared for his life after accusing senior members of President Mwai Kibaki's government of massive looting, had observed that past inquiries to establish culpability in Kenya had not only delayed justice but often made accountability much more difficult. As the government's permanent secretary for ethics and governance, he exposed the notorious Anglo-Leasing scandal, which involved state contracts worth more than \$1bn being secretly awarded to phantom firms. The exposure forced the resignation from Cabinet of several ministers closely associated with President Kibaki, including Chris Murungaru, David Mwiraria and Kiraitu Murungi, although the last two were later reinstated, after inquiries failed to find them guilty.

Interestingly, Githongo's amnesty call received support from the then Justice and Constitutional Affairs Minister, Martha Karua, who observed that granting amnesty was the only sure way for the government to win the war against corruption. Karua promised to have the Cabinet approve laws to grant amnesty in exchange for the stolen wealth. Previously considered a member of Kibaki's inner circle, Karua resigned in April 2009, before the amnesty law could see the light of the day, citing frustrations in discharging her duties. The question that emerges is: what are the prospects for corruption prosecutions in

Kenya? This paper argues that while corruption is one of the most significant contributors to structural inequalities, extreme levels of poverty, and the decayed state of Kenya's economy, there are a number of legal and political constraints that make prosecutions unproductive. Instead, the country should consider using conditional amnesty to recover the stolen property and public funds.

In the course of debates on the amnesty-for-economic crimes proposal, members of civil society accused those behind the call of disingenuity and being motivated by vested political interests. Mwalimu Mati of Mars Group Kenya, an anti-corruption pressure organisation, opposed the proposal, arguing that the Kenyan government had consulted no one about abandoning its duty to investigate and prosecute crimes of corruption. He maintained that by supporting Githongo's proposal, the government was acting as if "Kenyans had nothing to do with decisions on their own resources which were stolen from them." Mati argued that the amnesty provision would give economic criminals and looters of public funds "a get-out-of-jail-free card while hungry chicken thieves continue to be automatically sent to jail to pay for their petty crimes". Writing in the *Business Daily* newspaper, Jim Onyango likewise observed that the plan to offer amnesty to the architects of past corruption could wipe out the taxpayers' hopes of recovering more than KSh200 billion (about 2,909,937,160 USD) lost to plunderers in the past two decades. Githongo's suggestion was also dismissed by another columnist as laughable: "If I steal a mobile phone but could be let off the hook if I make restitution, then we make a mockery of the judicial system. Theft has to be punished no matter what."

While prosecuting perpetrators of past economic crimes remains appealing to the majority of Kenyans, several past and present factors pose monumental challenges to this strategy. Many of the cases involving influential individuals have often ended up in acquittals due to technicalities or insufficient evidence, as evidence is normally destroyed or corrupted beforehand. Indeed many past cases of grand corruption in Kenya remain unresolved, with

little to show from the myriad of government anti-corruption initiatives. This is certainly not a problem unique to Kenya: in most developing countries with weak institutions, attempts to use the judiciary and ordinary criminal law to fight large-scale corruption have often failed due to procedural technicalities employed by defence lawyers, lethargic prosecutions, and ingratiating judicial systems.

In Kenya, the problem is illustrated by one of the Commissions of Inquiry set up by the Kibaki administration to investigate the 'Goldenberg scandal', a case in which the Moi government lost billions of Kenyan shillings through compensation for faked export of gold. The Commission's inquiry was held in public, and uncovered the intricate web surrounding the looting of public funds from the Central Bank of Kenya. However, in the report, Commission Chairman Justice Samuel Bosire observed that while massive sums of money had been siphoned out of the country by the Goldenberg scheme, the Commission was unable to trace it.

In 2003, the Kenyan government sought recourse to asset-tracing and recovery of looted funds and spent well over Ksh 20m (approximately 273,973 USD) to track the stolen billions in foreign accounts, with little success. Apparently, those who stashed this money in offshore accounts were not only able to hire the best defence lawyers around, but actually frustrated the tracking effort by using third parties to transfer the money to other accounts once they realised they were being followed. The difficulties in pursuing investigations were compounded by foreign banking laws, which in some cases impeded investigations. Albert Mumma, a lawyer, argues that assets allegedly acquired by means of corruption can only be confiscated in Kenya, once a myriad of legal processes has been followed, and that the state needs to prove beyond doubt that the cash or property concerned was obtained through graft. He adds, "This would take a long, long time to prove. We would be sitting in court hearings for years." In a similar vein, Patrick Kiage has argued that during Kibaki's time in power, there has been no flood of cases dealing with the past economic crimes being

filed in the Criminal Division because there is just "not enough time or resources to re-open files long-closed or open new ones in pursuit of trails long cold and dead." To him, were the Kibaki's Government to pursue many of the past economic crimes through criminal proceedings, the government "may long have been shunted out of power before the first batch of cases is complete." Indeed, it would be just as difficult to trace illegally acquired money deposited in Kenyan banks, as there is currently no law that supersedes the confidentiality clause binding these banks to their customers. In addition, legislation is required to define how to treat persons who unknowingly bought property from those who obtained it through graft, as this would certainly invite possible costly lawsuits.

So while members of the civil society continue to rightly accuse the Kenyan government of lacking political will and commitment to uproot graft in the country, there is also need to appreciate the inherent difficulties in pursuing the prosecutorial approach against perpetrators of economic crimes. While corruption has been endemic and even threatens to tear apart the entire country's socio-economic and political fabric, there is a need for prudent and pragmatic measures that would promote both accountability and social reconstruction. Eventually, the overriding consideration should be to secure the stolen assets. This is where the amnesty suggestion can be meaningfully applied. A similar approach was adopted this April 2008 in Kazakhstan, allowing those who wanted to come clean to put their money in special accounts, which would then not be subject to penalty or taxation. Kazakh officials said some 500 million USD was brought in while the law was in effect.

How can the provision of conditional amnesty in Kenya be meaningfully and creatively applied to recover stolen property or public funds and under what conditions? One suggestion would be to carry out detailed investigations in order to gather sufficient information about those past corrupt practices and, if possible, freeze the related accounts and assets. Subsequently, with a damaging dossier, it

would be imperative to ask the suspected corrupt individual to voluntarily return the money and receive amnesty or be prosecuted. This way, corrupt individuals are more likely to cooperate. The amnesty provision can therefore be used as a leverage or credible threat to have individuals cooperate in the repatriation of stolen national assets. Those who fail to cooperate should then be threatened with prosecutions and such other measures like prohibition from holding of public office.

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## **When Truth-Seeking Efforts Face Challenges of Credibility**

**Lydia Kemunto Bosire**

*25 September 2009*

When Prof. Makau Mutua suggested that the Liberian Truth and Reconciliation Commission (TRC) may have lessons for Kenya, he focused on the robust recommendations of the Commission. He did not explore another reason why Kenya might look to Liberia: the crisis of credibility that plagued the beginning of Liberia's TRC process. This essay argues that there are good reasons to take seriously the challenges to credibility, because they often denote a shortcoming in institutional legitimacy, itself thought to influence the effectiveness of transitional justice processes. The essay does not intend to suggest that credibility causes, or can be equated to, effectiveness; while credibility can be thought of as necessary, it is only one of a broad range of factors that affect the capacity of an institution to achieve the goals it pursues. Rather, this essay shows how TRC procedures in Liberia, the Democratic Republic of Congo (DRC) and Serbia affected the manner in which the institutions were perceived and draws some lessons for Kenya.

In Liberia, the Comprehensive Peace Agreement of 21 August 2003 recommended the establishment of a truth commission as one of the institutions of transition. Soon after, Gyude Bryant, the Chairman of the National Transitional Government (NTGL), appointed nine commissioners to a truth commission in January 2004 – before there was even a TRC Act. This immediately created a significant challenge to the credibility of the Commission, namely the lack of selection criteria for the commissioners, public consultation, or clarity regarding the Commission's goals. Civil society pointed out that the Commission “lacked set objectives, mandate, jurisdiction or legal status” (TRC Report, Vol.2 p140, 8.1.1). Following a series of civil society consultations and workshops, a TRC Act was drafted and presented to the Chairman in August 2004. More pressure resulted in the Chairman forwarding the TRC Act to the Legislative Assembly in

April 2005. After further lobbying by civil society, the TRC Act was finally signed into law on 10 June 2005. The TRC Act Section 9 (b) summarized the problem:

Recognizing that the Chairman...appointed commissioners before the enactment of legislation establishing the Commission...[and] affirming the need for the TRC process to be credible and legitimate and accepted by the nation...the Commissioners appointed by the Chairman...will be vetted.

Accordingly, the first set of commissioners appointed by Chairman Bryant were vetted in accordance with the guidelines of the Act to ensure that no member of the Commission would be "known or perceived as human rights violators or members of groups involved in human rights violations; and without prior conviction for a crime" (Section 11, Liberian TRC Act). Only two of the initial nine commissioners were retained by the new selection panel. Indeed, the initial chair of the initial Commission, Dr. Canon Burgess Carr, did not survive the vetting (TRC report, Vol.2, p142). The vacancies created allowed for seven new commissioners to be selected by a representative panel. It was this "second" TRC, inaugurated by President Ellen Sirleaf Johnson in January 2006 – two years after the "first" TRC – that delivered the report to which Prof. Mutua referred.

However, not all commissions with credibility challenges have recovered. Here, the examples of the DRC and Serbia are worth mentioning. Similar to Liberia's initial process, in the DRC, seven members of the TRC Bureau were appointed directly by the warring parties following the peace agreement, before the TRC law was promulgated. The seven had formal relations to the groups implicated in the crimes of the war, thereby leading to civil society protest about the integrity of the Commission. According to some observers, commissioner competence and human rights records were also questioned. The government eventually passed a TRC Law that appointed 13 additional commissioners (without removing the first set of commissioners), but this action did not change the negative

perception of the Commission. Neither did the appointment of Reverend Jean-Luc Kuye-Ndondo as the president of the Commission: while he was a member of the church, he was presiding over an institution whose moral authority was in question, and besides, some thought he lacked the "stature and charisma needed to provide symbolic unity" to the DRC. Consequently, the TRC was criticized and marginalized, becoming by some accounts a "stinging failure".

In Serbia, the TRC project faced credibility challenges from which it never recovered. In March 2001, President Kostunica instituted the Yugoslav TRC. The TRC was announced a day before the US was due to certify continuation of financial support, and was therefore seen by *some* as aimed at appeasing the US. The Commission was lacking on many fronts. First, it was neither consultative nor inclusive: of the initial 19 members appointed, there were "mostly nationalist conservative academics" (Subotic 2007: 96), only two were ethnic minorities, and other civil society groups were under-represented. Second, its mandate was seen as an attempt to attribute blame for the war rather than an attempt to grapple with the consequences for victims. Further, the Commission sought to shed light on a broader Yugoslav crisis from an ethnic Serbian perspective. Consequently, some commissioners resigned from the TRC, further affecting the credibility of the exercise. The TRC could not even organize a public hearing on the Srebrenica massacre. It was disbanded in 2003 when the office of the federal presidency was abolished. The conclusion of observers is that in Serbia, the truth commission "brand" is "utterly devalued" (Subotic 2007: 98).

There are significant differences between Kenya and the other TRC projects mentioned above: while Musila points out that in Kenya there was minimal consultation with NGOs during the drafting of the TJRC Bill, the law nonetheless seemed to contain reasonable procedures for commissioner selection. Section 9 of the Kenyan TJRC Act provided for a selection committee that was constituted by then Justice Minister Martha Karua, and it consisted of nine

individuals: seven representatives from different social groups and two representatives from a list of six Kenya-based religious organizations. The role of the selection committee was to nominate the persons for the Commission, in accordance with given selection criteria. The committee selected 15 names in April 2008, from whom the president appointed six commissioners. However, upon the appointment of the commissioners on 22 July 2009 under the guidance of Ambassador Bethuel Kiplagat, prominent survivors of past state violence protested, citing Kiplagat's prominent role in the Moi regime. They launched a law-suit against him. In this context, some observers called for the deputy Chair, Ms Betty Murungi, to resign lest she tarnish her reputation.

Given the detailed nature of the selection process, how could controversial individuals have been picked to the Commission? One answer may lie in a minor change in the criteria for Kenyans to serve on the Commission. While an earlier version of the Bill stated in Section 10(5)(c) that commissioners must not have been "involved, implicated, linked or associated with the perpetrators or supporters of the acts, crimes or conduct under investigation", the final TJRC Act states that the commissioners must not have been "involved, implicated, linked or associated with human rights violations of any kind". With this change, it was possible for possible actors *associated* with "perpetrators or supporters" of human rights violations within in the Kanu regime to become commissioners. Another reason why controversial commissioners were picked despite a seemingly rigorous selection process may be simply mathematical: the nature of real compromise required for nine individuals to select 15 names can be negligible.

Perhaps a bigger challenge to the TJRC has been the vilification of its mandate, as "reconciliation" is increasingly seen as a dirty term, synonymous with "impunity". While these terms have flexible, politically contextual meanings, the current negative perception of the TJRC may stem in part from the possibility that the opportunity cost of the Commission is significantly higher in 2009 than it was in 2003, when Kenyans initially advocated for the TJRC: in

2003, the alternative to the TJRC was the continuation of the status quo. In 2009, in light of the Waki report and the subsequent public debate, the alternative to the TJRC is seen as prosecutions. This higher cost makes compromise harder to accept. Consequently, erstwhile advocates of the TJRC such as the National Council of Churches of Kenya (NCCCK) state that they "shall neither recognize [the TJRC's] work nor engage with it when it commences its proceedings unless the cabinet reverses its decision [to expand the TJRC's mandate and representation] and either refers the matter to the International Criminal Court at The Hague or establishes a credible and effective local tribunal."

Is there a risk that the TJRC brand may become "utterly devalued" or a "stinging failure" in Kenya, as was the case in Serbia and the DRC? From the three cases above, it appears that truth commissions can succeed, underperform or fail depending on how credibility challenges are addressed. Further, these three contexts highlight that "credibility" is often used as a synonym of "legitimacy". If a legitimate institution is one that, among other things, pursues the general interest as understood by citizens (rather than by power-holders) and whose authority is consented to by relevant constituencies (Beetham 1991), the Kenyan TJRC faces a legitimacy gap. And to the extent that legitimacy has a reciprocal relationship with effectiveness (of the institution in itself, outside any claims it may make about broader social impact and consequences), this gap ought to cause concern. Prominent Kenyan victims, whose cooperation is thought to be critical for the success of the TJRC, have publicly withdrawn support from the institution, and cast into doubt the ends it seeks. Such a withdrawal can affect the quality of collaboration the institution receives from such stakeholders, and can result in the institution expending more time and resources counteracting the effects of legitimacy gaps, rather than on the difficult task of historical clarification. It is for this reason that the concerns about credibility should not be dismissed lightly.

Yet the official response to these challenges has been weak and uncertain, suggesting that the government hopes the questions will soon disappear. The government suggested (then discarded) a revision of the mandate of the TJRC. It also suggested expanding the number of commissioners, a suggestion that was broadly rejected because it was read as having ethnic implications. The latter proposal may have been useful: for instance, on the list of rejected potential commissioners were two clergymen – Archbishop Benjamin Nzimbi and Reverend Timothy Njoya. Given the centrality of Christianity in Kenyan life, the absence of religious representation in the Commission may be an oversight whose consequence has been the Church's rejection of the TJRC. However, there has not been a comprehensive suggestion of how to address the matter of the credibility of the individuals already on the Commission. If the DRC has any lesson to offer the Kenya case, it is that leaving this issue unaddressed can undermine the TJRC's moral authority. Nor has any measure been taken to respond to the conflation in people's minds of reconciliation and impunity in the absence of prosecutions.

Before making recommendations of potential avenues for relegitimation for the TJRC, it is important to note that while the basic argument of this essay is that it may be necessary for a commission to be credible in its initial set-up, it does not imply that such credibility is sufficient for the exercise to be successful in giving robust recommendations. Neither does it suggest that such robust recommendations actually make any difference for reconciliation, human rights and democracy (or other goals of transitional justice), as such an assertion would require an analysis of the interplay among broader political and social conditions beyond the scope of this essay.

Nonetheless, it is reasonable to think that identifying and addressing current and potential credibility challenges can increase support for the TJRC. If dissatisfaction about some TJRC office-holders is changing to disaffection towards the institution as a whole, a procedurally transparent replacement of those commissioners whose integrity is in real question may help the project regain its moral

authority. While it is impossible for the Commission to please everyone, the language of reconciliation is often invoked in a moral register, and it would seem foundational that the TJRC's office-holders are held up to the same standards that the people it is created to serve deem appropriate. Procedurally, the TJRC selection committee has the authority under Section 9(2)(b) of the Act to "consider an application for the removal of the chairperson or a commissioner". To date, there are no reports of the selection committee convening to address these concerns expressed by sections of the population. However, if compelling reasons make a revision to the institutional infrastructure of the TJRC undesirable to policy makers (even after they take into account the potential costs of embarking on the institution without moral support), then alternative avenues should be explored through which to give the relevant constituencies opportunities to shape and "own" the TJRC process. As experts of Liberia point out, the "new" Liberian TRC had to endure further credibility challenges in the course of its work, including disputes over how to hold public hearings, disagreements over which victims would testify, and tense relationships between the commissioners and their advisors. The Kenyan TJRC can anticipate these potential future challenges to its credibility and establish appropriate participatory procedures. For instance, the TJRC could consult with victims on different ways to conduct public hearings, as models range from Ghana (formal court-room reproductions where perpetrators could cross-examine victims) to Peru (more informal sessions where victims could narrate their stories as they pleased). Finally, for Kenyans more broadly, the cost of supporting the TJRC may be perceived differently (and the flexible meaning of reconciliation adjusted accordingly) if other judicial measures are also implemented.

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## The ICC and Moreno-Ocampo are also on Trial

**Gabriel Dolan**

*9 October 2009*

I don't envy Louis Moreno-Ocampo in his position as chief prosecutor of the International Criminal Court (ICC). However, that is not to suggest that I will be either sympathetic or forgiving if he botches the investigations of Kenya's high-profile suspects. This article argues that Kenyans must monitor the approach and performance of the ICC in the country.

When the Rome Statute was enacted in 1998, human rights advocates everywhere enthusiastically gloated over the prospect of a World Court that would finally confront the demon of impunity. We began to believe that leading perpetrators might run but they could no longer hide. Indeed, we thought that prosecuting 'those bearing the greatest responsibility' for war crimes, genocide and crimes against humanity, meant that never again would the world witness atrocities on the scale of the twentieth century.

However, seven years after the ICC's establishment, there is much more scepticism than delight over its capabilities and performance. For most of that time, the Court has lacked staff, resources and international support. Paper pledges and political indifference have characterised most of its tenure.

Beginnings are always difficult and admittedly, much time and effort have gone into establishing the Court and enlisting member states. Currently, 110 states have ratified the Rome Statute. Missing in that list, however, are such superpowers as India, China, Russia and the United States. No wonder then that US Ambassador to Kenya, Michael Ranneberger, could issue only puerile threats about the reform agenda, and have nothing of substance to say about impunity and support for the ICC. Regrettably, this point was missed by most commentators in their debate on the letters sent by the US to blacklisted Kenyan politicians.

Lacking support from the major powers, Moreno-Ocampo has spent most of his time acting more like a

diplomat than a criminal prosecutor. His strategy has focused on persuasion and co-operation rather than enforcement of the Rome Statute. In fairness, he has had little option as the ICC mandate may well be clear and precise but it lacks enforcement powers. In other words without its own police force, the Court is totally dependent on international co-operation to apprehend suspects.

As a result, he has been reduced to going about his work by trial and error. However, we have witnessed more errors of judgment than court trials in the last seven years. Indeed the only trial currently proceeding in The Hague is that of little known Thomas Lubanga of the Democratic Republic of Congo (DRC), and that case is moving at a snail's pace.

Moreno-Ocampo hardly got off to a dream start in 2004 with his handling of the conflict in neighbouring Uganda. Instead of using his prerogative powers, he sought an invitation from the Uganda government to investigate atrocities in northern Uganda. President Museveni gladly accepted the opportunity to co-operate, since he believed the ICC would focus only on atrocities committed by Joseph Kony's Lord's Resistance Army (LRA) with no investigations of atrocities committed by the Ugandan army. To date, the ICC's prosecutorial strategy has mirrored Museveni's expectations. The ICC got its first state referral case and Museveni got another weapon to attack the LRA. Moreno-Ocampo was thereafter widely accused of reluctance to prosecute government officials.

However, in fairness, the indictments against Kony and four of his rebel leaders did have an impact on the war in the region. The LRA became increasingly isolated as Sudan could no longer grant it a safe haven, and with the signing of the Comprehensive Peace Agreement in 2005, Khartoum was obliged to disarm all militias and maintain peace. Consequently, Kony and company were forced to the negotiating table. Their arrests have remained elusive but the atrocities have considerably reduced.



The ICC has also been accused of targeting African states. However, the cases of Uganda, DRC and Central African Republic have all been state referral cases. The case of Sudan, however, represents a serious change in approach. The Sudanese indictments came as a result of a 2005 UN Security Council Resolution, as Sudan has not ratified the Rome Statute. A UN resolution ostensibly has world backing and Moreno-Ocampo used that leverage to remove his kid gloves and openly indict current state officials for the first time in the ICC's history.

The first warrants of arrest for Sudan were issued for Minister Ahmed Haroun and Janjaweed leader Ali Kushayb in 2007. On 4 March 2009, the Pre-Trial Chamber granted Moreno-Ocampo's request to issue a warrant of arrest for President Bashir. That marked the most significant achievement of the ICC to date as a sitting head of state was indicted for the first time. It sent shock waves across the continent and brought world attention to the ICC and Moreno-Ocampo, who had accused Bashir of 'exterminating his own people'.

At the African Union (AU) summit in Libya in July, continental leaders said they would not co-operate in the arrest of Bashir. In reality the political leaders wanted to protect their allies and worried they could be the next ones arrested.

So the Kenyan case comes at a very significant moment in the ICC's development. The Chief Prosecutor appears to have grown in confidence and is anxious to have a high-profile case to garner international support for the Court. The question is whether he can perform and deliver. The Kenyan case has the potential to make or break the ICC and Moreno-Ocampo knows that.

To date, the ICC has at best operated as a deterrent. The stigmatisation of naming and shaming sitting government officials has spread trepidation everywhere. Arrest warrants have considerably reduced the likelihoods of atrocities and that is a considerable achievement. Yet, the Court was established to prosecute and punish and in that

respect it has failed to do justice to victims. Moreno-Ocampo himself has stated that 'arrests are essential for the ultimate efficiency and credibility of the court'.

The ICC cannot be allowed to fail in Kenya. More investigators and professional staff need to be employed while a regional office must be established as a matter of urgency. The International Criminal Tribunal for Rwanda (ICTR) is scheduled to wind up its hearings in Arusha at the end of this year. Would the Tanzanian city not be an excellent venue for ICC regional offices and local tribunal chambers? Elaborate plans for witness protection are also essential if we recall that after a commission of inquiry into the assassination of Dr Robert Ouko, 42 witnesses 'died' in a few years.

Kenyans have great faith in the ICC's ability to prosecute the principal perpetrators of the post-election violence. Those who suffered and survived, the internally displaced persons (IDPs) and the families who lost lives and livelihoods deserve the best justice the world can offer. However, when the ICC begins its work, we must not let the virtual court of the world's political powers allow political expediency to take over at a critical stage in the proceedings. That is why we must treat with suspicion European, American and UN pledges to end impunity. This case is about Kenya, and Kenyans must not sit back passively and wait for the ICC to set the pace for investigations and prosecutions. They must be pro-active on every front to ensure that we have a satisfactory outcome. Kenyan civil society must monitor Moreno-Ocampo's performance from the outset and remind him and the ICC that they are also on trial in this country.

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## Why Kenyans Must Embrace and Support the TJRC

Godfrey M. Musila

2 November 2009

The debates over transitional justice in Kenya have been largely silent on the issue of the Truth, Justice and Reconciliation Commission (TJRC). It is evident that beyond the initial commentary at the TJRC's inception – when the appointment of some commissioners was vigorously queried – much of the attention has focused on possible prosecution of key perpetrators either in The Hague or by the Special Tribunal for Kenya. One could attribute this fixation with The Hague, Special Tribunal and the envelope delivered to the Prosecutor of the International Criminal Court (ICC) to the contentious nature of the process, and the fact that the Prosecutor's sights are trained on some Kenyan principals. However, I suggest that this sole focus on prosecutions – and in particular the ICC – is somewhat misguided. Here, I consider, based on the strength of several legal, policy and practical considerations, why Kenyans need to embrace and own the TJRC.

First, we need a comprehensive view of justice. While prosecutions are necessary, international law requires that we prosecute *at least* the most serious crimes and those who bear the greatest responsibility. But justice is not complete by only jailing a handful of perpetrators. We need approaches that will attend to the concerns of victims such as reparations, rehabilitation and truth telling. We also need approaches that address the broader national questions that foster inter-ethnic rancor, impede peaceful coexistence and national reconciliation.

Second, the ICC can and *will only* prosecute a few individuals. Even locally, a Special Tribunal and national courts cannot prosecute all of those who wielded machetes, stones and homemade guns. We must find other options of accountability. This is what the recent endorsement by the ICC Prosecutor for a 'three-tier approach' is about.

Third, we must internalize the fact that trials will only yield *judicial truth*: truth relating to whether a particular individual is guilty or not for a particular crime. Trials will not tell us enough about context and history. Trials reveal little – and will leave unopened the closets of Wagalla, Likoni, Molo, Burnt Forest, Elgon and other places. Crucially, the law will prevent us from prosecuting most – if not all – crimes committed decades ago because of the problem of retroactivity. But at the TJRC, we can open those closets and ensure that the victims of Wagalla at least know the truth, and have an opportunity to receive reparations. We may know who perpetrated the violence, and find ways of ensuring they account for it: for instance we can ban the public figures among them from running for public office.

The TJRC's process should not be equated to impunity. One of the key functions of the TJRC is to ensure this global truth comes to the fore, is recorded and committed to national memory. It will ensure that no one re-writes history to suit their own beneficial narrative. It will ensure that we come to terms with the past and begin to find ways of moving forward. The events of 2007 occurred partly because we have too many unaddressed instances of injustice.

Fourth, we must embrace the TJRC because we as a nation called for it. We must support it because we need it. The TJRC is not a foreign imposition. It is not even an imposition by politicians or the Kofi Annan talks. The TJRC has deep roots in battered communities around the country. Since at least 1992, Kenyans thirsted for truth. The Mutua Task Force in 2003 said as much. When Kenyans spoke to the Ghai Commission on constitutional reforms (CKRC), many said the same. It is safe to conclude that in 2003, the TJRC's creation was merely *suspended* because of political games.

Fifth, truth commissions – unlike trials – operate flexible procedures that allow for the widest possible opportunity for victims to participate, tell their stories and confront their tormentors in a less adversarial and friendly forum. Access to justice is of paramount importance. Few victims can locate The Hague on a

map. Even fewer will participate in The Hague or receive reparations should trials commence. The TJRC can – and should – bring a keen listening ear and justice to a town they know near them.

Sixth, as the cases of South Africa, Sierra Leone and others demonstrate, truth commissions have their flaws. While we may want as many people as possible – if not every perpetrator – to be prosecuted for crimes, this may not be possible for some of the reasons suggested above. Further, insisting on prosecutions may not foster truth telling. That is why the Truth, Justice and Reconciliation Act that creates the TJRC provides that those who testify before the Commission will not incur criminal or civil liability. I remain convinced that without a TJRC, where people can talk without fear of prosecution and other harm, we are bound to repeat the murderous folly of 2007–2008. Truth can set Kenyans free.

The TJRC can only succeed if we want it to succeed. We may not like some commissioners for a range of reasons, but we can make the process our own. We must publicly and critically ask piercing yet constructive questions of the TJRC. Sometimes the sheep know best where the grass is greener, and the shepherd must follow.

However, truth searching must be managed in a transparent and accountable manner. The hunter must have the right tools, and must know their craft. It is important that the Commissioners, especially those inexperienced in matters related to truth commissions, gain a deep understanding of the relevant issues. The TJRC must have the right gear that will enable it not only to open, scrutinize and record what lies within closets of historical injustice, but to commence a process through which at least some of its key consequences can be addressed. It matters what you do with the truth you have unearthed. For these reasons, the TJRC must be supported, but it cannot stand alone. The ICC is relevant, as are the Special Tribunal and the national courts. Moreover, this comprehensive process must be supported by other related measures.

We must address the concerns of victims. This requires different forms of unwavering government and civil society commitment. Those currently grappling with matters of constitutional and other institutional reforms must act diligently and with a sense of historic responsibility. They must consider themselves part of, rather than separate from, the broader transitional justice project that is unfolding in Kenya.

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# Justice and Reconciliation in Zimbabwe

## Transitional Justice Will Have to Wait

Ismael Muvingi

16 January 2009

### INTRODUCTION

Talk of transitional justice before political transition in Zimbabwe is premature and possibly pointless. The focus of discussion therefore needs to shift toward the more immediate and pressing imperative of political change. Zimbabwe stands on the brink of a Somalia-type disorder, and regional efforts have thus far concentrated on pressing the Movement for Democratic Change (MDC) into joining the Mugabe regime in the hope that this will facilitate an orderly transition of power. For the MDC, that route is fraught with danger, but transition is fast becoming a desperate need rather than a political aspiration.

In this essay, I highlight three arguments that militate against the pursuit of transitional justice at this point. First, holding ZANU-PF accountable for its criminal conduct is not feasible while the party still holds the reins of power. The ZANU-PF political elite will resist accountability, the police and senior army personnel are complicit in criminal conduct, and the judiciary has been co-opted by the government. Second, any attempt at truth telling and reconstruction of the ZANU-PF's political, social and economic narrative is at this point equally unfeasible and will pose serious physical danger to any potential participants. Third, the country is literally on its knees economically and currently has neither the political will nor the resources for embarking on transitional justice processes.

Repressive regimes rarely engage seriously in accountability processes that focus on their own actions. It is therefore hard to imagine ZANU-PF acceding to transitional justice processes in any form while it remains in power. Transitional justice, in its narrowest conception, is limited to the criminal prosecution of wrongdoers, but on more

comprehensive accounts, it encompasses a wider range of processes as defined by Alex Boraine: accountability, truth recovery, reconciliation, institutional reform and reparations.<sup>1</sup> Taking each of these transitional justice options in turn, it is clear that none of these can be envisioned in Zimbabwe before a radical political transformation.

### UNFEASIBLE TRANSITIONAL JUSTICE OPTIONS

First, accountability comes through the rule of law and in Zimbabwe today that is seriously compromised, and is likely to remain so until there is genuine political change. A partisan police force that is itself one of the instruments of repression is unlikely to bring ZANU-PF personnel to justice, and even if it did, a judiciary that has been bought off with farms and satellite TVs is not likely to mete out justice to its benefactors. Therefore, accountability based on criminal prosecution is not an option.

Second, there have been various experiments with processes for recovering the truth about past violations: truth commissions, trials, victim and offender narratives and public discourses, among others. These mechanisms all presume an ability of participants to speak with considerable freedom and security. But, public disagreement with ZANU-PF remains a very dangerous enterprise and conditions are not yet conducive for truth seeking. The dreaded Central Intelligence Organisation (CIO) and the ZANU-PF militia (the so-called "green bombers") must be disbanded before anyone can feel safe about speaking out against the government. Third, attempts at reconciliation would be both potentially hurtful and possibly counterproductive at this point as people's wounds are not only still open but are still being inflicted. There cannot be reconciliation while government suppression continues unabated.

Fourth, prosecution of ZANU-PF leaders requires serious institutional reform, but this in turn requires

at the very least the political will for change and a significant resource commitment. The MDC may have the commitment and could conceivably mobilise international aid and investment, but so far it has not even gained a toehold on power. Mugabe's conduct during the negotiations for a Government of National Unity indicates that ZANU-PF has no desire to relinquish political control. Meanwhile, ZANU-PF lacks the resources to keep the existing institutions functioning, let alone embark on any sort of reform. The government's only answer to a collapsing economy has been to print more and more worthless money.

Finally, is it desirable for compensation or restitution to be paid to those whose rights have been violated? Reparations are a symbol of contrition that helps foster reconciliation and in some cases they can constitute substantive restitution for the losses victims suffer. But this is unlikely in Zimbabwe. The state coffers are empty and compensation raises many thorny issues, including questions of who would pay for reparations; whether it can be justifiable that public resources raised from taxing citizens, some of whom have themselves been victims, be used for reparations; and in particular, whether there is sufficient acknowledgement of wrongdoing and willingness to compensate on the part of ZANU-PF.

#### **ADDRESSING THE HUMANITARIAN CATASTROPHE**

Concurrent to the political and economic dynamics that currently constrain the feasibility of any transitional justice processes, there is a humanitarian disaster unfolding in Zimbabwe. This gives urgency to the need for a political transition so that desperately needed resources can be channeled into the country. The UN's Food and Agricultural Organisation (FAO) states that droughts and floods as well as a shortage of necessary farming inputs have caused a serious food shortage.<sup>2</sup> As a result, the UN estimates that "in the first quarter of 2009 more than 5.1 million people, nearly half the population, will require food assistance."<sup>3</sup> Where food and other basic necessities are available in the country, they remain unattainable unless one has external sources of funding or

professes allegiance to the ruling party. Given the unemployment levels and the record breaking hyperinflation, life for the ordinary person is nasty, brutish and, for many, short. Zimbabwe now has the lowest life expectancy rate in the world.<sup>4</sup>

The health situation in Zimbabwe is perilous. The country already had one of the worst HIV-Aids problems and now, due to the failure of the government to ensure sanitation, a cholera outbreak is decimating urban populations. With the onset of the rainy season, if there is no external intervention, things will only get worse. South Africa has so far resisted calls for it to use its considerable leverage to bring about political change in Zimbabwe, but the disaster is now spreading into South Africa. Cholera-stricken Zimbabweans are flocking south in their hundreds in search of medical services.<sup>5</sup> Major Zimbabwe hospitals have shut down and there are few medical facilities or supplies within the country. As some reports have indicated, hospitals have simply turned into morgues. It is so bad that Physicians for Human Rights has called for Zimbabwe's collapsed healthcare system to be placed under international receivership.<sup>6</sup>

The ZANU-PF government is incapable of addressing these crises because it is a central part of the problem. It has no money, no international political or social capital for securing aid and clearly has run out of ideas for tackling the collapse. The government did attempt to secure aid and investment from China as an alternative to Western human rights-conditioned assistance and dwindling investment.<sup>7</sup> So far however, the "look east" policy has not helped resuscitate the collapsing economy.<sup>8</sup> In a desperate move, the government is now trying to court Russia. Mugabe has never liked Russia, which as the Soviet Union, supported his political rival, Joshua Nkomo, and to date Mugabe has studiously avoided having any close relations with Moscow.<sup>9</sup> The outcome of the new initiative remains to be seen, but given past performance, hope in this latest venture would be misplaced.

These realities emphasise the need for political transition before any talk of transitional justice. A

famous community mobiliser stated, tongue in cheek, that ethics are the prerogative of the victor or at the very least the successor.<sup>10</sup> That may sound cynical, but there is a logic to it. The very prospect of facing justice ranks high if not top of the list in explaining the intransigence of the Zimbabwean uniformed brass and political elite. They have much to fear from their past conduct. They would have to be extremely naïve or altogether out of touch with reality to expect forgiveness from the victims of state brutality. ZANU-PF will continue to use every conceivable tactic to avoid accountability.

Zimbabwe is thus caught between the proverbial rock and a hard place. Should immunity and a golden handshake be promised to encourage ZANU-PF to let go? That option is tempting and has driven the MDC to participate in a patently undesirable negotiation exercise and the resultant "government of national unity." It is an unattractive proposition because the MDC risks contamination by association and, worse, inheriting the ZANU-PF mess without the power to clean it up. An outright electoral victory would have given the MDC a clean slate and a firm grip on government, but clearly free and fair elections under ZANU-PF control are not possible. The state is militarised and the population is terrified. The National Constitutional Assembly has started to talk in terms of do or die: that it may be time to face army bullets and get real changes through a public uprising. After all, people are dying anyway. But this is a nation that has been traumatised by state brutality and debilitated by hunger, disease and the memories of another recent war. And there is a political vacuum: the middle class and even a substantial proportion of the working class have fled the country.

Archbishop Desmond Tutu and Kenyan Prime Minister Raila Odinga have called for forceful intervention, with Julius Nyerere's 1978 intervention in Uganda in mind. But as Mugabe has scornfully challenged the African leadership, who in Africa has the moral standing to forcibly remove him? Botswana has called for an African blockade, which could conceivably work if implemented, but requires South African support,

which will not happen. The South African government shouts the language of human rights and social justice but its foreign policies betray a serious disregard for the wellbeing of ordinary Zimbabweans. It has been the major stumbling block for United Nations resolutions condemning Mugabe and ZANU-PF.<sup>11</sup>

That brings us to the harsh realities of political compromises and the sacrifice of justice. Immunity for Mugabe and ZANU-PF is what Thabo Mbeki's quiet diplomacy sought to achieve: Mugabe gets a golden twilight and ZANU-PF avoids accounting for its misdeeds through a long drawn out transition. That is a bitter pill for justice. But then the present is not a good place. Paradoxically ZANU-PF's major bargaining chip has been the desperate condition of the masses: their salvation for ZANU-PF's immunity.

Perhaps as Boraine said of Afghanistan, what Zimbabwe currently needs most is food, medication and good governance.<sup>12</sup> Transitional justice should take second place to the need for political change that will enable reconstruction to begin. The main imperative now is literally survival. It is also social and political order. If the disgruntlement in the army ranks spreads, the worst of the Zimbabwean situation may yet be to come. Therefore, while transitional justice remains desirable and important, what is currently more pressing is to determine how political power can be transferred and the humanitarian crisis addressed.

The Southern African Development Community has forced through a government of national unity. The MDC's Tsvangirai will be the prime minister responsible for rescuing the country from collapse, but he takes on the challenge without much power as Mugabe remains president with the power of dismissal. The international community has expressed scepticism and the EU has made clear it will not resume aid or investment unless there is evidence of real change. The sub-region is divided, with Botswana openly criticising the outcome of the negotiations and Zambia and Tanzania reportedly unconvinced of the viability of this option. Internally, people are clinging to any source of hope, but there too,

scepticism is widespread.<sup>13</sup> A new and clean election, managed by the African Union or the United Nations, would have been ideal. As second best, some significant devolution of power from ZANU-PF would have helped start the transition of power. Instead, Mugabe secured everything he wanted: somebody else to share the blame but not the power. SADC has authored a *fait accompli* and rendered an externally supervised election near-impossible. Now we can only hope that Tsvangirai can work a miracle of extraordinary proportions.

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## Political Crisis, Mediation and the Prospects for Transitional Justice in Zimbabwe<sup>1</sup>

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18 December 2008

### INTRODUCTION

On 15 September 2008, the Zimbabwe African Nationalist Union Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations signed a political agreement brokered by Thabo Mbeki under the mandate of the Southern African Development Community (SADC). The agreement was the culmination of a process that began in March 2007, itself preceded by various other attempts by African leaders, as far back as 2004, to bring an end to the Zimbabwean political crisis. The central aim of the September agreement was to find a power sharing arrangement that would reflect the balance of political power in the country after the March 2008 elections, which, together with the abortive presidential run-off election at the end of July 2008, left the issue of the presidential election unresolved. While the Agreement left key areas, such as the allocation of ministerial portfolios, unresolved, it also comprised a good basis for moving the political situation forward in Zimbabwe.

One of the major silences in the Agreement, however, was around the area of transitional justice. This was not surprising given that ZANU-PF, the major perpetrator of human rights offences in the post-colonial period, was unlikely to support such a process. Moreover, the MDC for its part, with its own problematic history of intra-party violence, neither sought to make this issue a deal breaker in the negotiations, nor had the political muscle to enforce such an inclusion. Thus, the September 2008 Agreement contained one section that set out to:

give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post independence political conflicts.<sup>2</sup>



The context for this provision was a discourse in the Agreement that combined demands for dealing with human and civic rights abuses with the need to resolve issues around the redress of historical inequalities. Thus, the language sought to encompass both ZANU-PF's redistributive demands around the land question, with the more political demands for democratisation that have become the hallmark of the MDC and civil society movements in Zimbabwe.<sup>3</sup> It is around such tensions in the political struggles in the country that discussions on transitional justice need to be contextualised.

Within the framework of the broad structural and human rights abuses that were a constitutive part of colonial rule, there have been three major periods of human rights abuses in Zimbabwe: the war of liberation, 1965-79; the disturbances in Matabeleland and the Midlands, 1980-1988; and the era of violence since 2000.<sup>4</sup> The human rights abuses of the colonial period were generated in the long struggles between the violent structural exclusions of settler colonial ideology and practice, and the often intolerant assertions for unity by a nationalist movement that was "majoritarian without qualification."<sup>5</sup> In the post-colonial period, a combination of the authoritarian legacy of settler rule, the militarist forms of nationalist struggles and the monopolisation of the state by the ruling party bred a new round of human rights abuses that have continued into the present period. Moreover, such abuses have been embraced with various amnesty laws at the end of each period of state-led violence.

Since the 1990s, with the emergence of vibrant civil society struggles around constitutionalism and human rights in Zimbabwe, human rights organisations have intensified their efforts to place transitional justice questions on the national political agenda. The official report on the disturbances in Matabeleland and the Midlands in the 1980s was arguably the first major call for transitional justice in the independence era, and remains a central reference point for continuing work in this field.<sup>6</sup> Its major recommendations centred on the following issues: national acknowledgement; human rights violators;

legal amendments; identification and burial of the remains of missing persons and remains buried in unmarked graves; health; communal reparation; and constitutional safeguards. Many of these recommendations remain pertinent today.

Following this report, an important symposium on "Civil Society and Justice in Zimbabwe" was held in Johannesburg in August 2003, assembling many of the key civil society organisations working in this field. This symposium set out several recommendations to deal with human rights abuses in both the colonial and post-colonial periods.<sup>7</sup> Many of these recommendations were then included in the recommendations of a Harare workshop held by the Zimbabwe Human Rights Forum on 9-10 September 2008. The Forum called for transitional justice mechanisms that would recognise the following principles: "Victim-centered; comprehensive; inclusive; consultative participation of all stakeholders particularly the victims; the establishment of truth; acknowledgement; justice, compensation and reparations; national healing and reconciliation, non-repetition; gender sensitive; transparency and accountability; and nation-building and re-integration."<sup>8</sup> The Forum also set what it termed "non-negotiable minimum demands for a transitional justice process," including:

- (iv) No amnesty for crimes against humanity, torture, rape and other sexual offences, and economic crimes such as corruption;
- (v) No extinguishing of civil claims against the perpetrators or the state;
- (vi) Comprehensive reparations for victims of human rights violations;
- (vii) No guarantee of job security for those found responsible for gross human rights violations and corruption;
- (viii) A credible and independent truth seeking inquiry into conflicts of the past which holds perpetrators to account and which provides

victims with the opportunity to tell their stories with a view to promoting national healing;

- (ix) Independent monitoring and reform of operations and structures of the police, army, paramilitary, security coordination, administration of justice, food distribution and other organs of state involved in the implementation of the transition;
- (x) Development of interim or transitional rules to guarantee the rule of law and upholding of all basic rights during the transition, including the right to engage in political activities. These rules must be enforceable. They must be encapsulated in amendments to the Constitution or an interim constitution. Such rules must remain in place until free and fair elections are held and until a final Constitution, endorsed by the people, is in place; and
- (xi) Gender equity in official bodies and for transitional justice initiatives to pay particular attention to marginalised communities in Zimbabwe.<sup>9</sup>

These demands comprised a wish list of desirable processes and outcomes for transitional justice and accord with Alex Boraine's conception of the five key pillars of what he calls a "holistic approach to transitional justice": accountability; truth recovery; reconciliation; institutional reform; and reparations.<sup>10</sup> However, it is also clear that such demands are unlikely to be implemented in Zimbabwe, given the nature of the September political agreement, and the balance of political power in the country. Thus there is a danger of setting out civic demands for transitional justice that are, to use Mahmood Mamdani's critique of the ethos of the Truth and Reconciliation Commission (TRC) in South Africa, a "combination of strong moral fervor and weak political analysis."<sup>11</sup>

Moreover, such transitional justice recommendations tend to gloss over the longer term structural injustices that have engendered Mugabe's authoritarian nationalism and the anti-colonial discourse that has constructed the human rights question as a Western imposition. In the context of the failures of neo-liberal economic policies in Africa, the efficacy of transitional justice processes that are not connected to broader structural changes in the economy can very quickly be undermined by revived nationalist politics around redistributive agendas. It is therefore important to understand the broader global context for the emergence of TRCs in which the latter have "served as instruments for re-establishing political and institutional stability according to liberal democratic norms" and the discourses of reconciliation, forgiveness and political consensus "have been understood as the basis for moving forward into an era of market-driven economic progress."<sup>12</sup> The Zimbabwe crisis and the repudiation of reconciliation politics that accompanied it at the end of the 1990s, emerged in the context of a failed economic liberalisation programme.<sup>13</sup> Given the enormity of the economic collapse that characterises the current situation in the country, and the global catastrophe around de-regulated finance capital in 2008, measures around transitional justice that lose sight of these major structural constraints have little chance of success.

It is therefore the major purpose of the rest of this paper to set out the current political and economic constraints on transitional justice in Zimbabwe in **Part II**, and then, in **Part III**, to suggest ways in which transitional justice options can begin to be set out. It is hoped that the analysis provided here will present a more realistic assessment of the prospects of transitional justice processes being placed on the current national political agenda in Zimbabwe.

### THE POLITICAL CONTEXT 2008

The 29 March 2008 elections for parliament, senate, local government and the presidency led to the first electoral defeat for the ruling party ZANU-PF and its president Robert Mugabe. The two formations of the MDC, which split in October 2005, won a majority

109 seats in parliament against ZANU-PF's 97 seats, while the first round of the presidential vote gave the MDC leader 47.9% of the vote to Mugabe's 43.2%. The remainder of the vote went to ZANU-PF dissident Simba Makoni. However the inability of either presidential candidate to win 50% plus one of the votes necessitated a run-off. The state-led violence that preceded this run-off at the end of June was of such intensity that even Mugabe's long standing supporters in SADC and the African Union (AU) could not endorse his election "victory."

Mugabe's failure to receive an endorsement in Africa combined with long-standing condemnation from the West increased pressure for the Mbeki-led SADC mediation to find a political solution to the crisis. On 21 July 2008 both ZANU-PF and the two MDCs signed a Memorandum of Understanding (MOU) committing their parties to "creating a genuine, viable, permanent, and sustainable solution to the Zimbabwe situation." The agreement also set out to achieve the immediate cessation of violence and the withdrawal and disbanding of militia groups, paramilitary camps and illegal blocks; the normalisation of the political environment; the reinstatement of access by humanitarian agencies to the people of Zimbabwe in order to provide food, medical and other critical services throughout the country; and the commitment not to take any decisions that would have a bearing on the agenda of the dialogue such as the convening of parliament or the formation of a new government.

On 24 July 2008 ZANU-PF and the two MDCs resumed the negotiations that had broken down before the March elections. By 6 August the negotiators adjourned with several issues outstanding, including: the duration of the transitional government; the form and structure of the interim constitution; framework issues pertaining to the new government; the powers and duties of the president and the prime minister in the transitional government; and the method and appointment or election of the prime minister and president. Whereas the South African mediators had crafted a compromise that attempted to spread executive authority of an inclusive government between the President, Prime Minister and cabinet,

the MDC of Morgan Tsvangirai saw the compromise as allowing Mugabe to retain too much power as the Head of State. For Tsvangirai and his party, any agreement under the MOU needed to reflect the parliamentary and presidential outcomes of the March elections, effectively installing Tsvangirai as interim head of state until a new presidential election could take place under a constitutional reform process endorsed by a referendum.

In ZANU-PF's view, Tsvangirai asked too much of the March elections, which had left the Presidency undecided. The ruling party thus sought to retain as much power as possible under a government of national unity headed by Mugabe, with the Joint Operation Command composed of the heads of the army, police and security services, continuing to play a central role. In the words of one of ZANU-PF's negotiators, Patrick Chinamasa:

There is no basis whatever to justify Tsvangirai's demands. He wants President Mugabe to become (former titular President Canaan) Banana. But judging by the March 29 Elections there can be no basis for these demands. What he is asking for is a transfer of power, not a sharing of power.<sup>14</sup>

Mugabe's negotiators felt that "no single party can argue for transfer of power to itself because no single party has the absolute majority to say we are entitled to have power transferred to us."<sup>15</sup> The growing congruence between the position of the smaller MDC, on the one hand, and ZANU-PF and SADC on the other stemmed from several factors; including the increasing tensions and lack of trust between the two MDCs since the 2005 split; the shrinking of the support base of the Mutambara formation; and the greater reliance on the mediation process by the Mutambara group to secure a foothold in a political settlement. That the minority MDC gained 10 seats in the March election also gave it important leverage between the two major political parties, since it held the votes that could swing the majority in parliament. Since the discussions began under the July MOU, the tensions between the two

MDC formations continued. Mugabe was quick to capitalise on these tensions and attempted to cultivate a closer relationship with the Mutambara group, thus weakening the negotiation position of the opposition.

The result of these tensions between the two MDCs was exemplified in the vote for the speaker of parliament on 25 August 2008. Both MDCs put up rival candidates for the post, with most of the ZANU-PF MPs voting for the Mutambara candidate Paul Themba Nyathi. The Tsvangirai candidate, Lovemore Moyo, won the speakership with additional votes from both ZANU-PF and the smaller MDC, dealing a major blow to the smaller MDC. In the process of Moyo's winning the speaker position, Mugabe was jeered and howled at during his speech in parliament, and suffered deep humiliation. This event evoked a short-term sense of opposition victory. However, the sad irony of watching the two MDCs foreground their own differences before the larger problem of the Mugabe regime underscored the continuing difficulties of building strong opposition politics in Zimbabwe.

With the continuing blockages in the mediation process, the Tsvangirai MDC formation adopted a three-pronged strategy against the Mugabe regime. First, it chose to reject the current terms of the agreement crafted through Mbeki's mediation, and to push for the mediation process to be shifted from SADC to the AU and the UN. This position accorded with the MDC's well known distrust of Mbeki's "quiet diplomacy," as well as with the tensions that emerged between Mbeki and the EU/US on the Zimbabwe question, with the latter pushing for a UN Security Council decision on sanctions against the Mugabe government. Both the EU and the US repeatedly stated that they would only accept an agreement on Zimbabwe that registered a decisive movement of power away from Mugabe. This is the position that the Tsvangirai MDC took in its attempt to move the negotiation initiative away from SADC. The second, and perhaps less important, prong of attack by the MDC was to use its control of the legislature to create an alternative centre of power

against the executive, blocking attempts by Mugabe to govern outside of a broader agreement. The third part of the MDC approach was a somewhat fatalist belief that the crisis economy would effectively undermine Mugabe's ability to govern.

The first prong of this strategy was unlikely to succeed, given that the AU took its cue from SADC on the Zimbabwe question, particularly since representatives of the AU had been part of the extended reference group attached to the SADC mediation. It would thus be very difficult for the current Chair of the AU, Tanzanian President Jakaya Kikwete, who had been critical of Mugabe, to move the AU away from the collective SADC position. Regarding the UN it was unlikely that either China or Russia, particularly in the context of the Georgia conflict, would support another attempt by the EU/US to get a Security Council sanctions vote against Zimbabwe. On the Parliamentary strategy, Mugabe had already begun a process, after the March 2008 elections, of whittling down the majority position of the MDC by arresting MDC MPs suspected of engaging in election violence.<sup>16</sup> Such a strategy would almost certainly intensify in the event of a persistent deadlock in the mediation.

Turning to the belief in the capacity of the economy to deal the fatal blow to the Mugabe government, it is clear that the majority of Zimbabweans face the prospect of continued devastation of their livelihoods as a result of the disastrous policies of the incumbent regime. Beyond the profits being made by foreign capital in the extractive sector, and the rent-seeking activities of sections of the ruling elite, the majority of the workforce in both the rural and urban sectors face the likelihood of deepening poverty, if not mass starvation. Three characteristics stand out in the economic devastation that has taken place. First, hyperinflation of about 10 million percent has wiped out the savings and earnings of the workforce in the context of a serious drop in production, and major shortages of food, electricity, fuel and all basic goods. Consequently, most key transactions in the economy have been dollarised, resulting in rent-seeking activities, speculation, cross-border trading,

dependence on remittances from outside the country, and criminal activity.

Second, there has been a huge decline in formal sector employment and a corresponding growth in the informalisation of labour. The indicators of this process include: the shrinking of the formal sector workforce from 1.4 million workers in 1998 to 998,000 in 2004, with the current unofficial data indicating further decline; and the share of wages and salaries in gross domestic income dropping from an average of 49% during the pre-structural adjustment of 1985-90, to 29% in 1997-2003. Moreover, the production crisis resulting from the land occupations has created a double squeeze on the livelihoods of workers as the breakdown of production and incomes in both the agricultural and the manufacturing sector has placed enormous stress on the reproduction of labour households.

Third, the economy has witnessed a growing displacement of labour. During the structural adjustment period in the 1990s the volume of urban-rural labour circulation increased because of the difficulties of sustainable livelihoods in the urban areas. This trend has intensified by the greater displacement of families since 2000 as a result of the land occupations, electoral violence, the growing diasporisation of the labour force, and mass urban evictions during Operation Murambatsvina in 2005.<sup>17</sup> The latter, aimed at clearing away the informal sector in the urban areas, and diminishing the opposition's primary constituencies, resulted in the loss of livelihoods of some 700,000 people, and a labour migration process that both pushed numbers of people out of the cities and forced others to find new places in the urban spaces.

While this enormous destruction of the economy eroded the support for the Mugabe regime, the process also presented challenges for the opposition. A central pillar of the MDC since its formation in the late 1990s has been the labour movement. However, this base of opposition politics has been adversely affected by the economic crisis described above, and this has in turn created difficult conditions for

political mobilisation in several ways. First, the shrinkage of formal sector employment has resulted in a drop in the rate of unionisation and subscriptions, thus undermining the capacity of unions to carry out various organisational and educational activities for their members. Second, as a result of this structural decline and more aggressive attacks from the state on union leaders, the labour movement has become more strategically defensive, and less able and willing to lead broad civic alliances as it did from the late 1980s to 2000. Third, the strikes and stay-aways that were such an effective weapon against the state in the 1990s, when the economy was more buoyant, were no longer viable mobilisation strategies in the context of a rapidly shrinking labour force. The informalisation of the labour force has moved workers away from formalised labour practices and protest actions in the public sphere into more individualised and criminalised strategies of survival. The progressive regulation of labour relations that was one of the early achievements of the post-colonial state has been replaced by growing uncertainties around work and formal labour organisation.

This weakening of the labour movement and the culture of worker mobilisation and organisation that was central to it, has led to urgent appeals from the once strong Zimbabwean Congress of Trade Unions (ZCTU), for international intervention in the Zimbabwe crisis. A report on a statement made by the President of the ZCTU in 2008 to this effect noted that:

Mr. Matombo said that many of his members are too brutalized by Zimbabwean forces to organize effectively. That is why he will push his group to support stronger international intervention, despite the short-term pain that a blockade or other action could cause to Zimbabwe's poor.<sup>18</sup>

Given the serious weakening of this central MDC organisational base, it is not surprising that there emerged an almost desperate compulsion to view the economy as an active ally in the struggle against Mugabeism. What amounted to an admission of the diminished capacity of the opposition to mobilise

politically at the national level was increasingly translated into an adamant assertion of the capacity of an economic crisis to complete the task of that depleted resistance. Several reports indicated the pervasiveness of this conception. Morgan Tsvangirai was recorded as saying that Zimbabwe's rapid downward economic spiral would "eventually force Mugabe to compromise,"<sup>19</sup> a view shared by key civic leader Lovemore Madhuku who stated:

Mugabe will have a difficult time governing without a majority (in parliament), but that is not his real problem. His main and insurmountable problem is the crumbling economy. He has no room to move.<sup>20</sup>

Mugabe himself was aware of this argument and was not slow to link it to his view that this was part of a "regime change" strategy sponsored by the West. In his opinion, the MDC "have been promised by the British that sanctions would be more devastating, that our government will collapse in six months' time."<sup>21</sup>

There was certainly a general opinion, in the opposition and the donor community, that the parlous state of the Zimbabwean economy was unsustainable and that its disastrous deterioration would soon affect the capacity of Mugabe to continue in office. However, it was also apparent that the crisis was beneficial to key sections of the ruling elite, particularly in Mugabe's major support base, the military. Additionally there was insufficient information on the survival mechanisms of the poor in Zimbabwe, and the different forms of economic relations emerging out of the crisis, that would allow the economy to persist, albeit at deplorably low levels of survival. Thus, to predicate a strategy of change on economic decline risked underestimating the strength of an authoritarian regime to persist.

#### POLITICAL AGREEMENT

Given the above analysis, it was not surprising that the Mbeki mediation led to a political agreement between the major parties on 11 September 2008. With limited options available to the major political

actors in Zimbabwe, Mbeki used such limits at the national level and pressures for change from regional and international forces to push for a political settlement. The eventual agreement signalled the uneasy relations between a once dominant party forced to concede to the sharing of power and an opposition unable to effect the decisive transfer of that power away from the ruling party.

Among the major areas of the agreement are the following:

- Mugabe will continue to be President with two vice presidents from ZANU-PF.
- The new position of Prime Minister will be occupied by opposition leader Morgan Tsvangirai with two deputy prime ministers, one from each formation of the MDC.
- There will be 31 Ministers, with 15 nominated by ZANU-PF, 13 by MDC (Tsvangirai) and 3 by MDC (Mutambara), and 15 Deputy Ministers with 8, 6, and 1 respectively from ZANU-PF, MDC (Tsvangirai) and MDC (Mutambara).
- The cabinet will be chaired by Mugabe with Tsvangirai as his deputy and will have the responsibility to "evaluate and adopt all government policies and the consequential programmes."
- The Prime Minister will chair a Council of Ministers which will oversee "the formulation of government policies by the Cabinet" and "ensure that the policies so formulated are implemented by the entirety of government."
- A new constitution will be agreed upon within 18 months as a result of a process that will include the participation of the Zimbabwean public and will culminate in a referendum.

The implementation of the Agreement will be monitored by a Joint Monitoring and Implementation Committee (JOMIC) composed of four senior members from ZANU-PF and four from each of the MDC formations.<sup>22</sup> The Agreement leaves many areas unclear, such as the relation between the authority and decision-making status of the Cabinet and the Council of Ministers, as well as which specific

ministries will be allocated to different parties. The latter problem continues to delay the implementation of the agreement as the Mugabe regime persists in its efforts to retain control of key security and economic ministries. However, the agreement should be viewed in the light of ongoing political struggles for state power that both parties will continue to fight, and in a situation where the ruling party still has the advantage of the control over the means of coercion. ZANU-PF is much weaker as a political party than it was after the 2005 election, while the MDC is not yet strong enough to exert its hegemony over the state.

There have been critical positions on the Agreement from some key voices in civil society. The ZCTU warned:

A Government of National Unity is a subversion of our National Constitution and only a Transitional Authority should be put in place with a mandate to take Zimbabwe to fresh, free and fair elections that will hopefully not be disputed by parties.<sup>23</sup>

Moreover, for the Chair of the National Constitutional Assembly (NCA), the Agreement represented a "capitulation by the MDC." However, it is clear that neither of these social forces has the capacity to resist this process, and indeed the alternative proposed by the Chair of the NCA of "going back to the trenches and putting pressure"<sup>24</sup> is, for the moment, more a harking back to past possibilities than a realistic assessment of present challenges. Meanwhile, other voices in civil society have expressed a more cautious openness to the Agreement, willing to explore its capacity to open up political spaces in the country, and aware also of the lack of political alternatives in the current political conjuncture.

At the time of writing, the 11 September Agreement remains to be implemented, halted by a dispute over the distribution of ministerial posts. That it should be mired in such a dispute reflects the tendency for struggles over the post-colonial state to become

zero-sum battles, with access to the state being the *sine qua non* for employment, patronage and future accumulation. For the ruling party, the danger of losing control of this resource threatens to unravel the rent-seeking structures of profiteering that have become the dominant feature of the fortunes of the political elite. Both MDCs have a clear sense that a prolonged period in opposition cannot be sustained in the current context of economic decline. Under these conditions the challenges of introducing transitional justice issues into the political debate will be formidable, and it is this question that the next section addresses.

#### **TRANSITIONAL JUSTICE OPTIONS IN ZIMBABWE 2009/10**

This paper began by referring to the demand from civil society in Zimbabwe for an end to impunity, for justice and truth, and for reparations in the wake of many decades of state violence against its own citizens. Both MDCs have stated in their policy documents over the last nine years that a truth commission should be instituted under an MDC government, and civil society actors have stated there should be no amnesties. Interactions at the community level by the authors and others for more than a decade make it clear that many victims urgently desire both justice and the chance to be heard. One of the primary criteria for the likelihood of any formal truth-telling and/or prosecutorial process taking place and succeeding is thus in place in Zimbabwe – namely a strong desire on the part of a significant segment of the population for such a process.<sup>25</sup>

However, there are other important preconditions and realities to be considered in assessing whether a nation is likely to succeed in adopting an official policy of transitional justice processes, including widespread prosecution of senior leadership, or in establishing a truth commission. The earlier sections of this paper have located the Zimbabwean transitional justice debate in the context of a near total collapse of the economy, including health, education and food production, and this collapse is itself indicative of longer term structural injustices



that have enabled ZANU-PF to entrench its authoritarianism. Furthermore, any transitional justice process under the current power-sharing arrangement risks being derailed by the ideological clash between the understandings of MDC and ZANU-PF regarding what it is that should be accounted for, and whether there should be any accounting at all, for example for post colonial abuses.

There have been at least 25 official truth commissions or commissions of inquiry into human rights abuses worldwide since the June 1974 Commission of Inquiry into the Disappearance of People set up by Idi Amin in Uganda. The majority of these have been only marginally successful, or have failed to achieve much – including the 1974 Ugandan commission. The major challenges facing truth commissions include: the problem of “over-reach” in the context of debilitating economic and political conditions; lack of consultation with a broad range of political and civic actors; inadequate preparation by groups hoping to make contributions to the process; high expectations particularly around issues of reparation and prosecutions; the absence of long-term institutional follow-up to support the process; and avoiding the temptation to use other countries’ experiences in this area as a model to be replicated in different contexts.<sup>26</sup>

Under the power sharing arrangement, ZANU-PF retains much control of the state and the accompanying corrupt access to wealth. It is hard to imagine, therefore, that it will allow prosecutions of, for example, Perence Shiri, who was Commander of the 5 Brigade in 1983-4, when 10,000 Ndebele speakers were massacred in the west of Zimbabwe, and who is now Commander of the Zimbabwe Air Force.<sup>27</sup> Emmersen Mnangagwa, who was head of the Central Intelligence Organisation (CIO) in the 1980s, remains highly influential within the ruling party and has allegedly played a key role in the violence of the Joint Operational Command during 2008.<sup>28</sup> Much of the Zimbabwean bureaucracy has been militarised, and military chiefs are to be found in many high places in parastatals and elsewhere, with a vested interest in maintaining the status quo of impunity, in

order to safeguard not just their freedom but also their excessive, corruptly gained wealth. Previous reports by human rights organisations have shown clear links between many senior officials and gross human rights violations.<sup>29</sup> In terms of the power sharing deal, ZANU-PF retains control of the Ministry of Justice, the CIO, the army, and through the fact that the president appoints the Chief of Police, will continue to have close to blanket control of the whole Joint Operational Command – now called the National Security Council.

How, in this situation, in which furthermore the impartiality of the Courts has been shown to be highly suspect, does civil society intend to ensure prosecutions of senior perpetrators? As mentioned already in this paper, it seems unlikely that Morgan Tsvangirai will push for any process of national accountability at this stage. He has remained vague recently on the issue of amnesties and prosecutions, and has reiterated several times that ZANU-PF should not fear the MDC having the Ministry of Home Affairs (including the police) as they would not use this to seek vengeance.<sup>30</sup> In the interests of maintaining the power sharing deal, the MDC is unlikely to rock the boat by reminding ZANU-PF of their transgressions.

Prosecution aside, a key criterion of a successful truth commission is official support at the highest level. If this is not the case, then the process is likely to be derailed by, for example: debates around its preparation that last indefinitely; a toothless model; the suppression of the final report; or creating unacceptable risks to those who come forward to testify.

Zimbabwe already has a very bad record on official commissions of inquiry into human rights abuses since independence in 1980. There have been two formal commissions of inquiry – the 1981 Dumbutshena Commission of Inquiry into the Disturbances in Entumbane (Bulawayo) and the 1984 Chihambakwe Commission of Inquiry into the Disturbances in Matabeleland. Both of these commissions have had their findings suppressed by the State to date – in both instances to suppress

state complicity in the abuses. The Chihambakwe Commission investigated the massacres of what is now believed to be around 10,000 people by the 5 Brigade during 1983. Yet at the very same moment as commissioners sat recording statements in February 1984, the same Brigade was overseeing further murders in Bhalagwe Camp in Matabeleland South, less than 200 kilometres away from where the Inquiry was taking place in Bulawayo. The Legal Resources Foundation (LRF) recently took the government to court demanding the right of the nation to see the Chihambakwe Report. The court ruled in favour of the LRF, but the government then announced that there had only been one copy of the report and it had been lost, so they were unable to comply.

In short, even though it would be difficult for such blatant suppression of proceedings and findings to occur at this stage in Zimbabwe, we need to be sure that conditions are right for an official, full disclosure of truth before promoting a half-hearted process that aggravates and thwarts the nation's ultimate need for truth and accountability.

### COMMISSIONING A COMMISSION

If one examines who creates and empowers a truth commission, it can be seen that the majority of truth commissions are established by presidential decree.<sup>31</sup> This seems an unlikely prospect in Zimbabwe under Mugabe. Less commonly, the national legislature may create a truth commission, as in South Africa. Although the MDC has a majority of support in the Lower House, ZANU-PF still has the overall legislative power to block such a move in the Senate, and to water down the terms of reference and powers of such a commission, possibly rendering it a face-saving but powerless event.

Truth commissions can be introduced as part of a peace accord – however the power-sharing agreement signed by ZANU-PF and the MDC in September 2008 does not clearly enunciate on the issue of a formal truth commission, as we have already pointed out, making only a weak reference to “considering” a mechanism for national healing. This rather tentatively framed clause is a good indication

of the ambivalence with which ZANU-PF views such a process – an agreement to *consider* such a mechanism is not an agreement to *agree* to such a mechanism.

*Even though the likelihood of a strong framework for a truth commission being developed at this stage is not strong, should some kind of an official process nonetheless be pushed for at this time?*

The shortcoming with such a proposal is that if a commission is instituted and is given a weak mandate, or if it turns out that the space, freedom of movement or security for victims does not currently exist for a successful inquiry, it is not likely that a second commission will be set up when the timing is better.<sup>32</sup> Most seriously, testifying at a commission should not create risks for victims, and as long as ZANU-PF remains in control of the army, CIO and the Ministry of Justice, the risk to victims, particularly in rural areas, cannot be ignored. While one can be generally optimistic Zimbabwe will not soon deteriorate into widespread violence, it could be pragmatic to let events unfold over the next year or two and then reassess the degree of official space for a truth commission initiative.<sup>33</sup>

However, while an official truth commission may not be possible or advisable at this time, civil society and the opposition should continue to debate the parameters and mandate of a future truth commission, which may become more possible in the future. Such discussions involving all Zimbabweans could occur in the context of the forthcoming, officially mandated process of debating a new constitution. In terms of the power-sharing agreement, this process will begin with the appointment of the new cabinet and run for eighteen months.

### TRANSITIONAL JUSTICE INITIATIVES POSSIBLE NOW

While official, national transitional justice processes are unlikely to take place, much can still be done towards promoting accountability; truth recovery; reconciliation; institutional reform; and reparations.

### **Accountability**

Since the food riots of 1998, Zimbabwean civil society actors have endeavoured to make the law work for victims of political abuses by prosecuting identified perpetrators. While this has seldom proven successful, on occasion damages have been won through the courts, notably for some of the victims of the food riots.<sup>34</sup> Throughout the last eight years, civil society has continued to use the law to achieve moments of justice, but this has become increasingly difficult as the impartiality of the judiciary has become undermined, and as the state has turned the tables by passing repressive and unjust laws, which it has then used to criminalise the opposition. The Public Order and Security Act in particular has been used to prevent civic and political activity, with several thousand political arrests since 2000.<sup>35</sup> However, legal records exist of many of these arrests, contributing to documentation of events, and Zimbabwean lawyers have done a courageous job of trying to insist that the police and the courts hold people accountable, and exposing their failure to do so.

While prosecutions of senior government officials are unlikely for the reasons given above, the prosecution of many hundreds or even thousands of human rights violators at the community level is more likely to be accomplished – and may well go a long way towards fulfilling victims' need for justice. A remarkable aspect of the violence of April–June 2008 is that the majority of victims are able to name at least some of the perpetrators. This is the result of the tragic reality that neighbours and even family members were primarily responsible for horrendous assaults, murders, and destruction of property within their own communities.<sup>36</sup>

Regarding the 2008 violence, there have already been arrests and prosecutions of handfuls of individuals who stole cattle from their neighbours or who assaulted them in the context of the political violence. Such prosecutions have depended heavily on the cooperation of specific local policemen and magistrates.<sup>37</sup> But the precedent has been set, and it is a straightforward strategy for civil society actors to continue to promote such arrests and trials across the

country, in both urban and rural settings, by providing free legal and moral support to those willing – and brave enough to risk repercussions in the still unstable current context – to go ahead with laying charges. However, prosecution is more problematic for victims whose attacks occurred more than three years ago, as for these the right to claim damages will have been prescribed in terms of current laws.

### **Truth recovery**

Civil society in Zimbabwe has already done a remarkable job of keeping track of human rights violations, particularly over the last eight years, but also before this.

In 1998, the Catholic Commission for Justice and Peace and the Legal Resources Foundation released "Breaking the Silence, Building True Peace: a Report on the Disturbances in Matabeleland and the Midlands, 1980 to 1988." This report, and the processes undertaken to develop it, emulated many of the characteristics of a formal truth commission. Over a thousand victims of the atrocities came forward to testify to two interviewers over the course of several months, and their testimonies together with archival evidence were used to produce a history and database of abuses. The report included a section on recommendations to heal the region. Interest in this report has not waned, as it remains the only concerted locally driven effort to document events of these years, and it was in fact reprinted in 2007, ten years after its initial release. A summary has also been released in all three official languages of Zimbabwe.

In the late 1990s, state violence rose once more, and civil society came together at that time to document and prosecute state offenders where possible. This meant that in 2000, when abuses became rampant ahead of the June election, civil society was well situated to document them.

Since 2000, literally hundreds of documents and reports have been released by organisations such as the Zimbabwe Human Rights NGO Forum, which does monthly violence reports, and Solidarity Peace Trust,

which does two or three major reports a year on current violence and related issues.

The Crisis in Zimbabwe Coalition, the Zimbabwe Peace Project, Zimbabwe Lawyers for Human Rights, the Media Monitoring Project of Zimbabwe, the Zimbabwe Electoral Support Network and the Catholic Commission for Justice and Peace have all produced periodic reports over the last eight years, particularly documenting human rights abuses during election periods. These records importantly include thorough medical records of torture, murder and assault, as well as lawyers' records and sworn statements on abuses both in and out of state custody.

The evidence from Zimbabwe is that formal reports can be written that in many ways are identical to those of official truth commissions, and can be undertaken by civic and church groups. Victims can be given the chance to be heard and to have their stories recorded, either by individual interviewers, or by their local communities, as a result of civic initiatives.<sup>38</sup> If the intention of any truth telling process is to ensure that the national memory incorporates and acknowledges both the suffering of ordinary people during a time of oppression, the culpability of the state, and the consequences of this for the present and future, then formal but unofficial processes can make a significant contribution. "Breaking the Silence" managed to do that and ensured that the Matabeleland massacres are now very much part of the national memory in Zimbabwe. However, the "Building True Peace" aspect of this report will rely on the goodwill of a future Zimbabwe government prepared to implement recommendations of this report and those that may come from future civic initiatives linked to the more recent violations.

### **"Reconciliation"**

A great deal has been written on how "reconciliation" should be defined in relation to transitional justice processes, although the concept remains contested. However, most people broadly accept that a major intention of transitional justice is to promote reconciliation at some level. After massive conflict, relationships between individuals and communities

will be damaged and will need interventions to heal. Failure to attempt to do this could lead to long term negative repercussions, such as further cycles of violence.

Broadly speaking, reconciliation incorporates peace-building, victim empowerment, individual healing, but also needs economic development and extensive social reform. It is hard to imagine that any person or community could begin a real process of reconciling, in a nation with 400 million percent inflation, no access to health or education, no access to formal employment, and with 45% of the country dependent on food donations. A recent pilot survey in Matabeleland in which people were asked to list their communities' priorities found that 100% of respondents rated food as the current most urgent need, followed by water at 87%.<sup>39</sup> This same survey found that most people rated their leadership either "Bad" or "Very Bad", and similarly rated intra-community relationships as "Very Bad", mainly because of the political violence and years of political manipulation of access to resources by local leadership. Moreover, this survey did not manage to interview anyone between the ages of 18 and 25 as this age group was entirely absent in the villages targeted, and women respondents predominated, as a result of the diasporisation of Matabeleland's rural population. Very few able bodied men remain in rural areas, and this in turn impacts dramatically on the capacity of communities to till land and grow crops – particularly bearing in mind that 9% of these same respondents have no donkeys or cows.

In the face of such extreme poverty, where people's priority right now is to simply survive for another day, what interventions are sensible? We would suggest that peace-building and leadership building are needed, but that this needs to occur simultaneously with efforts to economically empower rural families, and to improve access to basic education and health care. Schools and clinics where they exist, are barely functioning, with no staff or resources. It will take state intervention and massive interventions by development organizations specialized in small enterprise projects to begin to reverse this situation.

It will also require the normalization of the macro-economic environment, so that it becomes financially possible for a teacher or nurse to survive on a formal salary.

We would agree with Brandon Hamber that reconciliation is “a voluntary act and cannot be imposed.”<sup>40</sup> It is also most difficult for the poorest people in a nation to “reconcile” to their pasts and to forgive the neighbours who burnt down their homes when they themselves have no prospect of replacing what was lost and are considering a bleak future.

We need to begin developing a new culture of leadership that is not about repression and bullying, exclusion and impunity. Many civic organisations in Zimbabwe already undertake conflict resolution programmes, inclusive of leadership training and empowerment of ordinary people to challenge their leadership. Such organisations need to coordinate their activities and methodologies, and to expand them to include more grassroots churches, for example. The proposed constitutional consultation process, which is part of the September 2008 Agreement, is ideally suited for civil society to combine skills training with debate on constitutional issues, including how to hold leadership accountable in the future in Zimbabwe.

Civic organisations and churches already working in rural communities should discuss with communities the possibilities of local solutions to the recent violence, such as those who destroyed homes being ordered by local leadership to rebuild for their neighbours, and to make other material reparations at the local level, including of livestock and furniture, where the perpetrators own such things. There is no need to wait for national consensus on this approach, but to explore over the next few months where and how this might be adopted by villagers, either through communal court processes under cooperative traditional leaders, or through church mediation at the local level. In our experience, fear and anger remain high in villages affected by recent violence. There is a need for impartial mediation as soon as possible in as many places as possible to prevent

further cycles of violence. In Matabeleland ZANU-PF is now afraid and being ostracised at the village level. ZANU-PF supporters are being thrown out of village funeral gatherings for example, their “ZANU” maize meal being churned into the dust when they bring it as an offering to such gatherings. In a starving community this is an extraordinary act of contempt and rejection.

In Matabeleland, the issue of mass graves in the community setting remains a burning one. Once the political situation allows, it will be a priority to resume the exhumations conducted by the Amani Trust Matabeleland in the late 1990s in the region. This is a highly skilled task for properly trained forensic experts, and requires extensive psycho-social support, but Amani’s experience is that exhumations and the accompanying “healing of the dead” is a life-changing tool that lends itself to conflict-resolution and truth-telling.

In Mashonaland too, in the wake of the recent violence, there are reports of shallow graves, and of bodies being dredged out of dams in Mashonaland East. The problem of these recent enforced disappearances must be dealt with, including the construction of a database to begin tracking who these disappeared might be. There are well established data formats for entering all relevant information including pre, peri and post mortem information of disappeared people all over the world, and a request for training for interested persons in Zimbabwe, to learn how to access and use such a database has already been activated.

It would appear that the space exists for many different types of community-based interventions that might contribute to the possibility of “reconciliation.” Many activities that could be classified as transitional justice-oriented are already taking place, including conflict resolution and leadership training. These need to be better resourced and coordinated.

### ***Institutional reform***

Institutional reform will need the cooperation of the state. Many of the institutions most in need of reform seem likely to remain in ZANU-PF control. However, it is to be hoped that in a transitional phase, as national polarisation declines, ZANU-PF will be amenable to suggestions regarding where and how to reform. The police and prison services are in a dire state of misadministration, politicisation and lack of resources. The justice system barely functions, with massive staff turnover, absenteeism, and empty posts. The magistrate's court in Bulawayo cannot find a simple sheet of A4 paper on which to type a letter. There is a need to de-politicise these institutions, and to try to reverse the tide of bribery and corruption which currently predominates in all of them. This will take massive resources, as well as the normalisation of the economy, so that police and court officials do not have to rely on bribes and goods stolen from vendors to survive themselves.

Civil society can play a key role here in engaging the relevant ministries, in documenting the collapse and corruption of state institutions and in insisting on a state response. A workshop took place in October 2008 in Bulawayo involving senior prison officials and members of civil society organisations, including lawyers and people who had recently been incarcerated in the jails. The prison officials were apparently open to comment. There is a need for relevant civics groups in different sectors to undertake more discussions of this nature with officials of all state institutions. We need to develop coherent policies and action plans on what can be done, to de-politicise our High and Supreme Courts, for example. We need to develop and offer training programmes for police and prison officers, for magistrates and prosecutors. There are decades of work ahead, but it is possible to strategise around this now. This does not require waiting for the state to develop a broad policy, but developing working relationships with officials that can implement immediate change at the micro level – such as fixing toilets in remand cells, and reviving prison programmes to grow food for prisoners' consumption.

### ***Reparations***

Most victims of violence in Zimbabwe, whether recent or from the 1980s, raise the need for compensation. At the moment, apart from the desire for justice, the desire for compensation rates most highly. However, Zimbabwe has a very poor history of individual compensation, with the War Victims Compensation Fund being looted in the 1990s by those with political connections. In 1997, Mugabe also bent to massive pressure from the War Veterans Association and paid out Z\$50,000 per ex-combatant; an act that caused a dramatic decline in the value of the Z\$ at that time. In both situations, many who did not qualify for benefits received compensation while others did not. In Matabeleland, the handful of ex-dissidents from the 1980s who were also ex-members of the Zimbabwe People's Revolutionary Army received payouts, while those whose lives they had destroyed received no compensation, as this payout was only for ex-combatants and not their victims.<sup>41</sup>

Considering the scale of the violence in Matabeleland in the 1980s, and the scale of violence in certain parts of Mashonaland in 2008, there will be entire regions where almost every family may have a legitimate claim to compensation. The question then has to be raised whether individual compensation is a practical option. In the case of violations that took place more than a few years ago, including violence dating back to 2000, families may find it hard to prove their losses. Furthermore, a system of making people individually responsible for recounting their abuses, especially in a situation of dire poverty, will invite fraudulent claims and invented histories, which will confound efforts to reach any kind of 'forensic' truth in terms of patterns of violations in the future.<sup>42</sup> The expertise and human resources that would be required to thoroughly double check every such claim would tie up such a process for years, resulting in frustration and disillusionment for genuine claimants.

The concept of community compensation should therefore be considered, with individual compensation being restricted to support for families of political murder victims. As mentioned previously in this paper, individual compensation at the community level could

be partly facilitated by perpetrators being forced to help with the rebuilding and restocking of homes they have destroyed. Large government-driven urban housing initiatives could prioritise those who were displaced by Murambatsvina, and a proactive policy on vending and the informal sector could help those who lost livelihoods to rebuild them without state harassment. Longer term skills training and possibly small business loans could help shift the informal sector back into the formal sector over time, and all of this could be done in the name of compensation. Compensation on the scale required will need to be dealt with at the level of government, and probably international donors, but civil society can continue to consult on community needs and priorities. In our experience over more than a decade, communities in Matabeleland are open to the idea of communal reparation, including improved access to health, education, small enterprises and in the urban setting, state housing.

### CONCLUSION

There is an overwhelming cry for justice and compensation in Zimbabwe in the wake of recent violence. It is indeed necessary to end the pattern of one hundred years of impunity, but the road to achieving this will be complex, particularly in the current political context. The political space is not going to open up at the state level any time soon to enable the widespread prosecutions of senior officials. It may be highly problematic to push for a truth commission at this stage, as the current transitional government will be too weak and compromised to give such a commission the power necessary to make its outcomes useful. However, there remain many activities that civil society could currently advocate; some will require government support, and others can proceed independently, as long as some level of democratic space exists. Perpetrators could be held accountable at the community level, either through the courts, or some form of local reparation. Truth recovery can be on-going, and formal reports can continue to be written by civil society, although there is a need to return to firsthand sources to validate claims that were made at a point in time when it was difficult to do so. Peace

building and leadership building activities that are already taking place need to be expanded and methodologies shared. Civil society needs to lobby for institutional reform, and to take part in this process where feasible, with training and simple resources. Above all, there is a need for civil society to maintain a dialogue with victims and victimised communities, to establish each community's own priorities and understanding of what it is that has happened in their area over the years, and what needs to be done about it now. This may vary considerably from one village to another, and there should not be an oversimplified approach to what needs to take place at this time.

### RECOMMENDATIONS

The battle for transitional justice issues to be placed more squarely on the Zimbabwean political agenda has been going on in one form or another since the 1980s. However as the country struggles to find a way out of the current political quagmire, and to develop a democratic discourse beyond the stale imperatives of an authoritarian nationalism trapped in the narcissism of its narrow version of the past, the need for a sustainable transitional justice process must be pursued more vigorously. Moreover the pursuit of the process must be understood as a terrain of competing national agendas within a particular historical and political context that will be one of the key determinants of future political struggles in the country.<sup>43</sup> As a way forward this paper recommends the following:

1. **Accountability:** While prosecution of senior government and party officials is unlikely to be possible under the current political conditions, the prosecution of perpetrators at community level is more likely to be accomplished. This can be done both through the court system and through forms of accountability developed through community structures.
2. **Truth Recovery:** Civil society groups need to continue with the valuable work of truth recovery that they have carried out since the 1980s. However, this work needs to move beyond the



empiricist, forensic nature of evidence gathering, to more historical understandings of processes of state and community violence.

3. **Reconciliation:** Processes of reconciliation are more likely to succeed in conditions of economic recovery where the hope of a better future can provide a material basis for linking reconciliation to economic reconstruction. Moreover, at any one time reconciliation is built around contested notions of legitimacy, and building linkages between different sites of legitimacy will demand careful balancing between the state and different sites of power within society. It will be important therefore not to reduce the debate on reconciliation to a moralising voice that places the burden of reconciliation on the victims. A much more sustainable process will link such a debate to material changes in power relations within a society, ensuring growing empowerment for the marginalized and victimized.
4. **Institutional Reform:** Indications of reforms within the coercive arms of the state must become immediately apparent in a political transition in order to begin the long process of building trust in the state. Thus reforms in the judiciary, the police and the army must begin to point the way towards a greater respect for the rule of law. Once again a stabilisation of the economy is an essential part of reviving the capacity to deliver in these areas.
5. **Reparations:** In Matabeleland and in some parts of Mashonaland, almost every family would have a legitimate right to claim that they have suffered state-orchestrated human rights violations at some point since the 1960s. However, the problems of how individual reparations should be validated and financed, together with the pressing demands for more general economic recovery and development, mean that communal reparation could be explored as an alternative to individual payouts. There is a need for extensive consultation with victims around any process of reparation.

1. This paper is a modified version of a document prepared by Solidarity Peace Trust for the SITO, Idasa Meeting on "Transitional Justice Options in Zimbabwe", Pretoria, 24 October 2008. More information on SITO can be found at: [http://www.idasa.org.za/index.asp?page=programme\\_details.asp%3FRID%3D54](http://www.idasa.org.za/index.asp?page=programme_details.asp%3FRID%3D54).
2. Agreement between the Zimbabwe African National Union-Patriotic Front (Zanu-PF) and the Two Movements for Democratic Change (MDC) Formations, on resolving the challenges facing Zimbabwe. 15th September 2008, Harare.
3. For a discussion of the tensions around this debate in Zimbabwe see Brian Raftopoulos, "The Zimbabwean Crisis and the Challenges for the Left." *Journal of Southern African Studies*, Vol 32, No 2, June 2006, pp 203-220.
4. Shari Eppel, "A Brief History of Violations of Human Rights in Zimbabwe since 1965 to the Present." Paper prepared for the International Center for Transitional Justice, New York, October 2003.
5. Terence Ranger, 'Introduction' in Terence Ranger (Ed) *The Historical Dimensions of Democracy and Human Rights in Zimbabwe*, University of Zimbabwe Press, Harare, 2003, p.21.
6. The Catholic Commission for Justice and Peace and The Legal Resource Foundation, *Breaking the Silence, Building the Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980 to 1988*. CCJP/LRF Harare, 1997.
7. Civil Society and Justice in Zimbabwe: Summary of the Proceedings of a Symposium held in Johannesburg 11-13 August 2003. Themba Lesizwe, Pretoria, 2004.
8. Zimbabwe Human Rights Forum, Minimum demands adopted by participants at the Transitional Justice Workshop "Options for Zimbabwe" held at the Holiday Inn, Harare 9-10 September 2008.
9. Ibid.
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13. Brian Raftopoulos and Tyrone Savage (Eds), *Zimbabwe: Injustice and Political Reconciliation*. Institute for Justice and Reconciliation Cape Town, Weaver Press, Harare, 2004.
14. Jason Moyo and Mandy Rossouw, 'MDC: Brown's Trojan Horse?' *Mail and Guardian*, 22-28 August 2008.
15. Interview of Welshman Ncube, Secretary General of the MDC(Mutambara), [www.newzimbabwe.com/pages/mdc253.18653.html](http://www.newzimbabwe.com/pages/mdc253.18653.html). 22/v111/2008.
16. "ZANU-PF 'plots to seize' parliament." *Business Day*, 1st September 2008.
17. 'Operation Murambatsvina' is the Shona term for 'clear out the filth', an expression often used by the ruling party to refer to the urban support base of the MDC.
18. Margaret Coker, 'Powerful South African labour group ponders how hard to press Mugabe.' *Wall Street Journal*, 9th July 2008.
19. Basildon Peta, 'Mugabe advised to quit talks.' *Cape Times*, 22nd August 2008.
20. Dumisani Muleya, 'Mugabe to call new cabinet, dealing blow to talks.' *Business Day*, 28th August 2008. This argument is also put forward by Piers Pigou, 'Malice in Blunderland,' *Molotov Cocktail*, 05, September-October 2008. Pigou asserts that "if Morgan Tsvangirai and the MDC can hold their nerve, the

- economic pressure on the rulers of Zimbabwe will eventually pay off." P15.
21. Jason Moyo, 'Mugabe prepares for the next move.' *Mail and Guardian*, 29th August-4th September 2008.
  22. Agreement 15th September 2008 op cit.
  23. Statement by the Zimbabwe Congress of Trades Unions, Harare, 16th September 2008.
  24. SW Radio Hot Seat Transcript of Interview with Lovemore Madhuku, [www.swradioafrica.com/pages/hotseat250908.htm](http://www.swradioafrica.com/pages/hotseat250908.htm)
  25. Priscilla Hayner, *Unspeakable truths: confronting state terror and atrocity*, Routledge, 2001.
  26. *Ibid*, page 214. (Also contribution by Priscilla Hayner at an Idasa Meeting on "Transitional Justice Options in Zimbabwe", Pretoria, 24th Octpber 2008.) The Uganda Commission was set up by Amin as a face saving measure because of international pressure, without political commitment to real change. It documented 308 forced disappearances but did not prevent a worse wave of abuses in its wake. Only one copy of the report is alleged to exist in Uganda.
  27. CCJP and LRF, op cit.
  28. 'Exposed: The Mnangagwa, Makoni Plot', *Zimbabwe Times*, 17 July 2008.
  29. See Zimbabwe Human Rights NGO Forum reports at; [www.hrforumzim.com/frames/inside\\_frame\\_special.htm](http://www.hrforumzim.com/frames/inside_frame_special.htm). See also Amnesty International, "Time for Accountability", November London, 2008.
  30. Most recently at a rally in Harare on Sunday 12 October 2008. Then on 1 November in Bulawayo, Tsvangirai called for a truth commission and said that "without justice we cannot move forward" ["Tsvangirai calls for truth commission, AFP, 1 November 2008.] This immediately led to ZANU-PF accusing Tsvangirai of trying to derail the unity agreement, 'in illustration of the point we are making that a truth commission is too divisive to be successful at this point in time.' ["Tsvangirai dabbling in peripheral issues", ZANU-PF, [www.zimonline.co.za](http://www.zimonline.co.za), 4 November 2008.]
  31. *Ibid*, page 214, for summary of most common histories of truth commissions in section following.
  32. Hayner. *Ibid*, page 202.
  33. At the moment human rights violations continue in pockets of the country, notably in Manicaland.
  34. Zimbabwe Human Rights NGO Forum managed to win damages for a handful of victims, although this was then challenged by the state and in the meantime inflation has rendered the damages meaningless.
  35. See SPT, *Policing the State*, 2006, for an account of around 2,000 political arrests.
  36. Human rights organizations have tracked the names of perpetrators over the last few years, but in many instances victims have not been able to name their torturers.
  37. SPT, *Desperately seeking sanity*, July 2008.
  38. In Bulawayo, the Catholic Church began a process of encouraging victims of abuses to testify in front of congregations in 2002, and these services for Justice and Peace were then replicated in other parts of Zimbabwe and even in London, where refugees now testify on UN Day in Support of Victims of Torture. The experience of Amani Trust Matabeleland with exhumations also resulted in mini truth telling processes in Matabeleland – see below under reconciliation.
  39. Masakhaneni Trust: "A base line report on the means and priorities of targeted communities in Matabeleland North and South", Bulawayo, October 2008.
  40. Brandon Hamber, "Evaluating projects and programmes for reconciliation and transformation: experiences from the field." Cape Town conference, April 2007.
  41. It must be added that only 122 dissidents surrendered in 1988, but this example serves to illustrate the pitfalls of singling out certain groups for individual monetary compensation and not others.
  42. We were recently told in rural Matabeleland by a headman that it should be expected that people would lie about being victims if they thought they stood to gain materially by doing so, as people are so poor. He claimed that when church officials came asking about the post March violence, some families in his area had falsely claimed to have been among those beaten, in the belief that these officials were undertaking some sort of "registration for compensation" exercise – when in fact they were simply trying to document what had happened in the area. Personal interviews, Lupane, October 2008.
  43. For an excellent discussion of the 1979 peace settlement and its aftermath in Zimbabwe see Norma Kriger, *Guerilla Veterans in Post-War Zimbabwe: Symbolic and Violent Politics 1980-1987*. Cambridge University Press, 2003.

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## Zimbabwe: Transitional Justice without Transition?

Pondai Bamu

18 December 2008

The July 2008 Memorandum of Understanding (MoU) between the Zimbabwe African Nationalist Union Patriotic Front (ZANU-PF) and the two factions of the Movement for Democratic Change (MDC) offered the first glimmer of hope in resolving the long-standing crisis in Zimbabwe. With the signing of the MoU, the parties began to negotiate a settlement to the crisis under the mediation of Thabo Mbeki, the then South African President. However, it is still unlikely that the current negotiations will lead to a political transition in Zimbabwe. The current regime will remain in power and block meaningful efforts at accountability for past violations. Though a political transition remains highly unlikely any time soon, it is important to consider the form that transitional justice could take in Zimbabwe if ZANU-PF were to lose political power. This essay discusses what shape transitional justice could take if some form of transition were to occur, while recognising the immense challenges to this becoming a reality.

### LIMITATIONS OF NEGOTIATED TRANSITIONAL JUSTICE

Transitional justice processes generally depend on the nature of the political transition. In the case of a negotiated transition, there are usually limits to prosecutions and therefore alternative mechanisms are often considered, including various forms of restorative justice, truth commissions or even deliberately ignoring the past. Where there is a complete political break with the past, it is much easier for new leaders to opt for prosecutions of violations committed under the former regime. In Zimbabwe, a debate is already taking place regarding the possibilities for prosecutions<sup>1</sup> and the relative advantages of a truth commission.<sup>2</sup>

There are several factors to consider when evaluating the transitional justice mechanisms that are appropriate for, on the one hand, dealing with the past while, on the other, safeguarding the democratic

future. First, it is important to consider the time frame that the transitional justice mechanism should cover. In Zimbabwe, gross human rights violations were committed during the colonial era, against the Ndebele in the early 1980s during the first years of independence, directly after the 1998 food riots, and during the fast track land resettlement and the election violence including *Operation Murambatsvina*<sup>3</sup> in 2005. The colonial era violations cannot be ignored since they have created problems regarding distributive justice and ensuing efforts to address these economic imbalances in the post-independence period. The fast track land resettlement, moreover, could be traced back to the colonial period. The early 1980s also left unhealed wounds among large sectors of the Zimbabwean population.

What is likely in Zimbabwe is reform short of transition and this will shape how past violations are handled and how the future is mapped. Reform short of transition is likely because negotiated settlements rarely bring about complete transition. Complete transition would mean dismantling the ZANU-PF edifice, which appears highly unlikely, given the negotiations and agreements to date. ZANU-PF still holds substantial power and will stop any forms of transitional justice that would mean the punishment of their own. This will mean that to have a semblance of accountability, some form of commissions of inquiry could be instituted, but they will not bring tangible results in terms of establishing the truth or getting some form of justice for victims through reparations.

It would seem expedient to deal with past violations using a truth commission as well as offering victims economic compensation rather than pursuing prosecutions of perpetrators. In many ways, prosecutions may not be the ideal mechanism in addressing the long history of violations in Zimbabwe. It can be onerous to gather convincing criminal evidence from events that occurred more than 30 years ago and when most perpetrators are either too old or dead. Prosecutions will only be symbolic in this instance. If one is to prosecute Mugabe, he is likely to be released due to his age. Instead, a truth

commission is more likely to establish the truth about what happened during Zimbabwe's dark years, as well as to recommend steps toward victim reparations. Indeed, most post-independence perpetrators are themselves victims of the colonial past and will also be subjects of redress, including Mugabe and most senior security personnel in the current government who are accused of perpetrating violations. This past has not been properly redressed for them or the black population in Zimbabwe. A truth commission would provide the possibility at least of dealing with these complicated dual victim/perpetrator identities.

Furthermore, if prosecutions are pursued, they should not target only a limited number of individuals. Advocates of prosecutions argue for the indictment of Mugabe and the security personnel implicated in the violations. While this may be noble, crimes were also committed during colonialism, including the economic marginalisation of the black majority; admittedly a situation that Mugabe has abused, in particular since the 2000 elections. The approach to redressing the violations in Zimbabwe must therefore be holistic and not only an attempt to punish Mugabe or to seek revenge; otherwise, the chosen transitional justice mechanism will alienate other victims. In short, concentrating only on Mugabe and his regime represents an insufficient response to the plethora of perpetrators and deep divisions in Zimbabwean society. Instead, a comprehensive truth commission is necessary to address all past violations, as well as to recommend the reparation policies necessary to address broader issues of economic justice.

#### NEGOTIATIONS WITHOUT TRANSITION

It is highly unlikely that the current agreement between ZANU-PF and the MDC will bring about a political transition in Zimbabwe. The early negotiations broke down because ZANU-PF considered the position of President Mugabe to be non-negotiable. There are indeed echoes from the 1987 negotiations with the Zimbabwe African People's Union (ZAPU) under Joshua Nkomo,<sup>4</sup> but there are obvious differences between 2008 and 1987. Today, the parties are negotiating roughly from a position of equal strength: while Mugabe can count

on the force of the coercive state apparatus and, if the March 2008 presidential elections are anything to go by, almost 50% of the electorate, MDC leader Morgan Tsvangirai has the support of the international community as well as half of the votes in Zimbabwe. It now leaves the situation open to shrewd negotiating tactics; and on that score Mugabe has extensive experience.

In the current negotiations, ZANU-PF seeks to incorporate the MDC into government rather than a transition to democracy since ZANU-PF argues that democracy already exists. The MDC, at least the Tsvangirai faction, seeks to take the reins of power rather than be incorporated into a coalition government, since it believes it won the March 2008 presidential election. For all its promise, these negotiations are not explicitly about democratisation but about power-sharing, hence the continued reference to a power-sharing arrangement. Whether this arrangement will be transitional or permanent, as was the case with the 1987 Unity Accord, is currently unclear. ZANU-PF is negotiating only because it needs international legitimacy and has failed to rescue the economy. If ZANU-PF could achieve all of this without the MDC, then there would be no negotiations. The MDC factions are negotiating because there seems to be no other means of attaining power. The agreement reached in September this year is confusing as it creates two opposing centres of power, the executive Presidency and the executive Premiership. How these two executives should operate is not defined. However, already it seems the experiment is having negative effects, since Mugabe and Tsvangirai are both exaggerating the reach of their powers; Mugabe more so. This tragic scenario has played itself out in the appointments of Cabinet members.

The current negotiations are not *explicitly* about transition to democracy – in fact ZANU-PF insists that Zimbabwe already has a democratic government. Any transitional arrangement should ensure the depoliticisation of the police, army, prisons, air force and intelligence services specifically and reform of government structures in general. Institutional reform

should not only be about changing the constitution as the parties seek to do for different reasons, but also depoliticising the security apparatus and government structures to ensure they do not service a particular leader but the people of Zimbabwe.

### **FUTURE OF AGREED TRANSITIONAL JUSTICE MECHANISMS**

The agreement reached in September does not cover transitional justice mechanisms in detail, but Article vii (c) of the agreement states that the new government shall "give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of pre and post independence political conflicts."<sup>5</sup> The agreement therefore does not mention justice as a goal but cohesion, healing and national unity, which points towards a truth commission of sorts rather than prosecutions. In time we may see the structure and mandate of this commission. However, such eventualities are doubtful, given the agreement's emphasis on *consideration* of a truth commission rather than a dedication to establishing one.

In terms of mechanisms to deal with the past, the most likely would be some form of commissions of inquiry short of truth commissions and civil procedures short of criminal prosecutions. These have been employed previously in Zimbabwe with little or no success. The civil procedures, which refer to civil suits against violators of human rights, including the police, the army, war veterans and militias, may lead to compensation but without establishing criminal liability. As in the past, civil procedures are likely to continue informally through NGOs such as Zimbabwe Lawyers for Human Rights (ZLHR) and the Zimbabwe Human Rights NGO Forum.<sup>6</sup> Any compensation, however, will be paltry since the payments are usually delayed and thus eroded by inflation, rendering them symbolic and a form of false victory for the victims. Commissions of inquiry would be set up to foster legitimacy and improve the government's public image. It would be highly unlikely that any reports by such commissions be made public and they would not facilitate meaningful redress for victims and positive

change nationwide. Whether the MDC will resist this turn of events remains to be seen. It is unlikely that the MDC will succeed in opposing every decision by ZANU-PF without a total breakdown in the fragile arrangement. Until Mugabe and ZANU-PF leave power, there will be no real transition and no real transitional justice in Zimbabwe.

1. See, for example, Enough Project, "Seeking justice for Zimbabwe: a case for accountability against Robert Mugabe and others 1981-2008", July 2008, <http://www.enoughproject.org/node/986>
2. See for example Du Plessis M. & Ford J., "Justice and Peace in a new Zimbabwe: Transitional justice options", ISS paper 16, 4 June 2008 [http://www.iss.co.za/dynamic/administration/file\\_manager/file\\_links/PAPER164.PDF?link\\_id=3&slink\\_id=6195&link\\_type=12&slink\\_type=13&tmpl\\_id=3](http://www.iss.co.za/dynamic/administration/file_manager/file_links/PAPER164.PDF?link_id=3&slink_id=6195&link_type=12&slink_type=13&tmpl_id=3)
3. See UN report of the fact-finding mission to Zimbabwe to assess the scope and impact of Operation Murambatsvina by Anna Tibaijuka [http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe\\_rpt.pdf](http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf)
4. The late Joshua Nkomo was the ZAPU leader who negotiated the Unity Accord in 1987 to end the Matabeleland atrocities; an era that saw the murder, torture and violations of a large majority of the Ndebele ethnic group in Zimbabwe. Nkomo became one of the two Vice Presidents and Zimbabwe has had two Vice Presidents since.
5. See "The agreement between the Zimbabwe African National Union Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) Formations on resolving the challenges facing Zimbabwe", signed on 15 September 2008.
6. See, Zimbabwe Human Rights NGO Forum, "An analysis of Zimbabwe Human Rights NGO Forum Legal Cases 1998-2006", June 2006.

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## Root and Branch, Tree of Life: Sowing the Seeds of Grassroots Transitional Justice

Andrew Iliff

10 March 2009

### INTRODUCTION

Zimbabwe's acute need for justice and reconciliation highlights a longstanding tension in transitional justice practice. The need for transitional justice processes in Zimbabwe has been clear since at least 2003, when Zimbabwean civil society articulated an ambitious set of transitional justice objectives in the Johannesburg Symposium.<sup>1</sup> Yet nearly seven years later, this agenda remains in limbo, stranded by the failure to find a political solution that might loosen the grip of perpetrators on the reins of power.

Practitioners and theorists assume that transitional justice cannot proceed until the individuals most responsible for rights violations cease control of crucial state functions, including the police, military and judiciary. This assumption has the ring of common sense – you cannot expect the chief of police to cooperate in his own arrest and prosecution.

Yet this singular focus by international observers on international crimes and concomitant national or international accountability can be to the detriment of more modest, local strategies that focus on community level reconciliation, dialogue and accountability. This essay outlines emerging grassroots reconciliation strategies in Zimbabwe, which suggest that in situations of ongoing violations in which international criminal accountability for gross violations remains out of reach, transitional justice advocates should bracket international crimes until more propitious circumstances prevail. In the meantime, advocates should promote non-state, locally developed programs to promote community healing and reconciliation, which in turn lower the stakes of future political contests.

### BACKGROUND: THE ZIMBABWEAN CRISIS

The contemporary Zimbabwean crisis is broadly characterised by a violent campaign to retain political

power on the part of the Zimbabwe African National Union (Patriotic Front) (ZANU [PF]). While the immediate crisis comes in the face of widespread popular dissatisfaction with thirty years of repressive single party rule, economic collapse, and a potent electoral challenge from the Movement for Democratic Change (MDC) the roots of the crisis, however, can be traced back to the liberation struggle of the 1970s and still further back. Since 2000, widespread political violence has marked each election; following parliamentary elections in 2005, the government launched the Murambatsvina campaign of evictions that affected 700,000 people.

In this context there are serious obstacles to many transitional justice objectives. For example, there will be no prosecutions of ZANU (PF)-affiliated perpetrators of political crimes as long as both the senior police leadership and the Attorney General owe their allegiance to that same party.

Similar concerns are raised about truth-telling, reparations or lustration. In a climate of ongoing political violence, participants in any such process must fear reprisals, and there is concern that powerful perpetrators may dig their heels in or even instigate further violence in an effort to retain the protections and privileges of power.

But doing nothing – optimistically awaiting a successful political settlement – is indefensible in light of the ongoing violence and deepening trauma. Southern African Development Community (SADC) leaders have shown no stomach for enforcing political reforms in the country, making only token gestures at relaxing President Mugabe's iron grip on power. Political violence abated somewhat in 2009 following the GPA, but it could quickly return to epidemic levels, particularly when elections are called – probably in 2011, though Mugabe may call a snap election sooner. There have been reports that ZANU (PF) youth militias have been redeployed in rural Zimbabwe to influence the outcome of the constitutional review process and the election.<sup>2</sup> Meanwhile, the GNU has emboldened some MDC supporters to exact revenge against their erstwhile



abusers.<sup>3</sup> One third of Zimbabweans have experienced politically motivated threats or intimidation and 12% have experienced politically motivated assault.<sup>4</sup>

Unaddressed, the mental health consequences of this trauma worsen over time.<sup>5</sup> Waiting for political parties to take the lead in reconciliation is unrealistic.

The persistence of the Zimbabwean conflict in the face of the weak political settlement presents severe obstacles to transitional justice programs. However, the urgent need for transitional justice is underscored by the extent of trauma among Zimbabwean civilians, and the potential for the perpetuation of this trauma through revenge crimes, the increased political polarisation of youth, and the entrenchment of violent political engagement as a norm.

### TRANSITIONAL JUSTICE DURING CONFLICT

Faced with this tension, and despite little public action by international NGOs, Zimbabweans have sought novel paths to reconciliation. Both civil society and the compromised state are shaping transitional justice concepts. The GNU has created the Organ on National Healing, Reconciliation and Integration,<sup>6</sup> although to date it has maintained a low profile while undertaking a series of consultative meetings with traditional and civic leaders. Its prospects of becoming a powerful advocate for transitional justice, however, are hampered by its location within the office of the President, its limited budget and extremely cautious work, and the recent promotion of ZANU (PF) Minister John Nkomo from the Organ to the office of the Vice President. If Zimbabweans invest their hopes for justice in a body that remains co-opted by ZANU (PF), they may become frustrated and disenchant with the entire transitional justice project.

### GRASSROOTS TRANSITIONAL JUSTICE

With little prospect of centralised state support for effective justice or reconciliation initiatives, Zimbabweans have seized on decentralised modes of transitional justice. A diverse array of civic, church, traditional, business and community bodies have taken advantage of the slight easing of the security and political environment afforded by the GNU to

begin reconciliation programs, adopting a politically neutral community-based approach.

The grassroots programs, strikingly similar in structure, have modest goals. They eschew attempts at reparation or punishment in favour of restoring a modicum of tolerance and dialogue in divided communities. The programs provide a forum for participants to speak out in small groups of their peers about their experience of trauma, including political violence. Critically, these organisations engage both perpetrators and victims, recognising the complex intermingling of roles in which militia members may have been beaten and intimidated into attacking others and ZANU (PF) supporters may have been the victims of revenge crimes. Many Zimbabweans have experiences of abuse dating from the liberation and Gukurahundi periods.<sup>7</sup> Political operatives from outside the community are often the instigators of political violence that leaves communities fragmented long after they themselves leave. MDC Minister Sekai Holland of the Organ on National Healing has begun advocating community-based reconciliation programs mediated by traditional leaders, citing a cultural model dubbed *kusvitisana fodya*, under which perpetrators and victims would discuss and resolve their grievances before sharing tobacco in a sign of their reconciliation. This model is problematic, as many traditional leaders are viewed as compromised by their complicity in political violence. Given their historical stature, however, traditional leaders are a necessary component of the reconciliation process.

### TREE OF LIFE

The work of the Tree of Life (ToL) organisation illustrates the potential for innovative community-based reconciliation processes tailored to the Zimbabwe crisis. ToL began conducting workshops with Zimbabwean victims of political violence in South Africa in 2003, and has since conducted workshops across Zimbabwe, focusing on hotspots of political conflict in both urban and rural areas. Oxford ToL workshops take place over two to three days, consisting of a series of circles (*dare* in Shona) that are organised around the analogy between



individuals in a community and trees in a forest. Participants discuss their roots (ancestry), trunk (childhood), leaves (important features) and fruit (family and future plans), and explore the benefits of diversity and collective action.

Working with one facilitator to four participants, the *dare* agrees at the outset on rules of conduct, including the use of a “talking piece.”<sup>8</sup> Participants, who are typically selected by community bodies rather than ToL and may include both perpetrators and survivors, share meals and where possible share accommodations. The workshop includes discussion contrasting hierarchical and cooperative forms of power and, crucially, a “trauma circle” in which participants are invited to describe their experiences. Contributions often include a wide range of experiences including familial traumas and historical grievances as well as political violence, reducing the political stakes of the workshop. ToL has successfully maintained a neutral political position in the eyes of ZANU (PF) by framing its work as “community healing and empowerment,” disavowing any justice agenda. Indeed, in some districts, government District Health Officers have endorsed ToL workshops.

ToL provides effective and cost-efficient means of beginning the process of community reconciliation. ToL has leveraged its minimal staff, extending its range by forming a broad network of partner organisations that run the gamut from religious to business associations. ToL trains members of these partner organisations to conduct workshops alongside ToL facilitators, increasing ToL’s reach and legitimacy within communities, and allowing organisations to adapt ToL strategies to fit their constituencies. Facilitated by Zimbabwean survivors of political violence, ToL workshops do not require clinically trained counselors, and reach more survivors than individual counseling. The workshops outcomes deserve further documentation, but research to date indicates their efficacy in reducing self-reported levels of trauma, and participants frequently describe a renewal of community ties and trust attributed to ToL.<sup>9</sup>

At the close of a workshop I observed, attended mostly by ZANU (PF) members on the site of a prior militia base, participants alluded to their complicity in earlier violence and foreswore future participation. Other workshops have included direct exchanges between perpetrators and survivors, acknowledging the harm done to the community.

## CONCLUSION

The grassroots approach epitomised by ToL has manifest limitations, and cannot accomplish the full range of transitional justice goals, most importantly individual accountability for violations. Such community-based approaches must at some point be supplemented by some combination of prosecutions, reparations and other accountability strategies backed by a rights-observing successor regime. But in the absence of the necessary political transition, the unavailability of centralized justice processes should not preclude grassroots reconciliation initiatives. The emerging Zimbabwean experience indicates that such initiatives can be successful, and this success may in turn contribute to community solidarity, reducing the scope for future violence instigated by outsiders during elections and other moments of political contestation.

The preceding discussion also highlights a deficiency in much contemporary transitional justice debate, which views the functions of the centralised state as the *sine qua non* of transitional justice processes. International NGOs are still influenced by the paradigmatic model of the South African Truth and Reconciliation Commission and its institutional cousins, and therefore seek to collaborate with successor governments and national-level civic organisations to establish high-profile national-level processes, sometimes at the expense of smaller, grassroots initiatives. Transitional justice practitioners should reexamine their priorities, particularly in protracted “complex emergencies” akin to the Zimbabwean crisis, where a political solution may come too late for many survivors.

A renewed focus on grassroots initiatives will allow for greater engagement by victims and survivors in

transitional justice, increasing its integrity and local legitimacy. The reconciliation initiatives described above may only be the very beginning of a successful transitional justice program, but they substantially increase the ability of survivors to set the agenda for subsequent centralised processes, if eventually established.

1. See Themba Lesizwe, *Civil Society and Justice in Zimbabwe, Proceedings of a symposium held in Johannesburg, 11-13 August 2003*, Pretoria: Themba Lesizwe (2004).
2. <http://www.timesonline.co.uk/tol/news/world/africa/article6896171.ece>; <http://allafrica.com/stories/200907201640.html>
3. Institute for War and Peace Reporting, *MDC Supporters Take Revenge*, 25 February 2009, ZCR No. 182, available at: <http://www.unhcr.org/refworld/docid/49a79dff1a.html> [accessed 7 February 2010]
4. Freedom House/MPOL, "Public Attitudes Towards Transition in Zimbabwe," 11 December 2009.
5. "Acute versus Chronic effects of Organised Violence and Torture: Comparing the Victims in Contemporary Zimbabwe with the Survivors of the Liberation War," Harare: Research and Advocacy Unit (RAU), February 2010.
6. Article 7.1.c of the Global Political Agreement provides: "The Parties hereby agree that the new Government shall give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post independence political conflicts."
7. "Gukurahundi" refers to a period of military repression in the Matabeleland region during the 1980s.
8. A "talking piece" is an object held by the current speaker in a circle, requiring that other participants listen without interruption until the object is replaced by the speaker in the centre of the circle.
9. On follow-up, one third of participants had reduced self-reported trauma levels to below clinical levels; see "The Tree of Life: a community approach to empowering and healing survivors of torture in Zimbabwe," Tony Reeler et al, *Torture*, vol. 19 no. 3, 2009. See also "A Research Note on the Effectiveness of the Tree of Life: Report prepared for the Tree of Life by Tony Reeler, Research and Advocacy Unit," Harare: Research and Advocacy Unit, 2009.

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PART  
FIVE

## ICC Observers Interviews

ICC Observers Project – Oxford  
Transitional Justice ResearchExclusive Interview with Eric Leonard, Professor  
of Political Science, Shenandoah University

14 April 2009

*Professor Leonard is an Associate Professor of Political Science and the Henkel Family Endowed Chair in International Affairs at Shenandoah University in Winchester, VA. He has published several articles, case studies and a book on such issues as the International Criminal Court, U.S. Foreign Policy, humanitarian law, theoretical conceptualizations of sovereignty, and global governance. His book is entitled, The Onset of Global Governance: International Relations Theory and the International Criminal Court.*

**Q. You have written about the relationship between the US and ICC. What do you think the current relationship will be between the ICC and the US under the Obama administration? Will the US show increased support for the ICC? Is there a possibility that the US will ratify the Rome Statute? How will the arrest warrant for Bashir affect the dynamic between the US and the ICC?**

**A.** It's going to be interesting to see how the Obama Administration approaches the ICC question. At this point, prior to the Bashir arrest warrant, the Obama administration was in many ways hedging its bets on the ICC and possible US support. During the election process there was really only one mention of the ICC by the Obama campaign, and what he said was that this would be a situation that they would look at, he could counsel with his generals and military personnel, and then they would approach the subject at a later date. He really danced around the issue of the ICC and possible US support. There have been, however, some positive steps that have occurred recently. One, not necessarily with the Obama

administration, but with the Democratic Congress, was the elimination of the Nethercutt Amendment in the Omnibus Bill that just passed. At this point the US is moving away from a belligerent attitude against the ICC. Article 98 agreements are no longer a part of US foreign policy towards the ICC. However, I am not sure we can say that this shift in attitude towards the ICC is just a result of the Obama administration's policies. We saw this softening towards the ICC occur at the end of the Bush administration. Condoleezza Rice was the first to stipulate that Article 98 agreements were a means by which the US was shooting itself in the foot. With the case in Sudan, the fact that the US did not oppose the Security Council referral of the Darfur cases to the ICC but merely abstained from the vote was another indication that there was a bit of a softening.

The Bashir arrest warrant changes things a bit. I think that it's putting more pressure on the Obama administration to actually do something about the ICC. Again though, they are really trying to push the issue of the ICC to the side. When questioned about this, the Obama administration is saying things like "you cannot criticize us for doing nothing, we are having backroom negotiations with the British and the French, and we are trying to come up with a solution." However, Darfur and the ICC are clearly not their primary concerns at the moment. Domestic interests have consumed the Obama administration's interest. This has been very disheartening to many of us who want the US to be part of this process and part of the ICC's attempts to end impunity. This is a particularly unfortunate point, given that Obama called US failure to act in Sudan as a "stain on our souls."

In terms of ratification, I have no hope at all that the US will ever ratify the Rome Statute. I think the best that we can hope for is a situation where the US is able to cultivate a relationship with the ICC in which the US is supportive of what the ICC is doing to a

certain degree, and possibly more important, that the US at least does not actively oppose the ICC and what it is attempting to do. Getting the Rome Statute through two-thirds of the Senate and having ratification is, however, something that is just implausible.

**Q. What would you say are the primary goals of the Court? Do you think the goals for the Court differ for international, national, and local actors; for government and non-governmental actors? How will the Court fit into the overall structure of the international system?**

**A.** In terms of the primary goals of the Court, the ICC is trying to be an instrument by which we can end impunity in regard to those specified core crimes. I do not think that the goals are necessarily different from international, national, and other local actors, or even different in terms of actors defined in terms of government or non-government. I think there is a core of the international community that is now working towards this goal, although possibly doing so in different ways. One of the things I find frustrating about the attempt to achieve international justice, is that oftentimes you see these different actors as counterpoised in terms of what they are trying to achieve. We talk about – is it better to have domestic or international prosecutions? Is the ICC simply preventing national justice from occurring to end impunity? The goal here is to see the different actors as behaving in a complementary way. So issues of domestic universal jurisdiction laws vs. international tribunals, the ICC vs. hybrid courts – I think it's a real problem to see these issues as being in competition with one another, which is often how they are viewed. From an ICC perspective, I do not think the intent of the ICC is to be in competition with other forms of justice. I think the point of complementarity is to work with these other actors and to establish universal justice standards that will be fulfilled for all parties involved in the ICC process. The goal of ending impunity is what we are trying to achieve, and no matter how it is achieved, if we are successful then that will be satisfactory to the members and the supporters of the ICC.

**Q. Does (and will) the doctrine of complementarity actually work to accommodate both national sovereignty and the enforcement of fundamental human rights? Under what circumstances can we expect the Chief Prosecutor to accept assertions of national jurisdiction? Where might there be sources of conflict between the ICC and national jurisdictions? How should those conflicts be resolved?**

**A.** I think the principle of complementarity, its intent, theoretically, is to work to accommodate national sovereignty, but not to simply accept national sovereignty as the end-all, be-all. So some of the things I have written about sovereignty and its relationship to the ICC address this question. If you look at the notion of sovereignty and the idea of sovereignty as absolute and final authority, when we look at the ICC, it does have that final and absolute authority within this particular arena. Will it always be able to act on that? That is a separate question. Theoretically, however, it does in many ways override national sovereignty while still trying to accommodate it through the principle of complementarity. The ICC does a good job of acknowledging that sovereignty is a principle fundamental to the idea of international law and vital to the stability of the international community, but we cannot simply accept that national sovereignty will trump issues of international justice with regard to war crimes, crimes against humanity and genocide.

In terms of the Chief Prosecutor and times in which he might accept assertions of national jurisdiction, specifically talking about Ocampo, I am not sure that he would ever not proceed with an investigation if a country gave him assurances that they were themselves going to investigate. Just in terms of how he has behaved up to this point, I think he would say "I'm going to conduct my own investigation and we will see what they come up with. If they proceed through this process and have a trial that is acceptable to the Court, then we will allow that to stand, but if not, we need to be prepared to step in and investigate ourselves." A good example of this would be the Uganda case. The ICC was invited in to investigate, it was a self-referral case, but then there

was backpedaling by the Ugandan government. They claimed that they wanted to investigate things themselves and Ocampo simply would not accept that answer – he told the Ugandan government that they invited the Court in and that he was going to continue his investigation. I do not think that Ocampo is necessarily going to cater to the issue of national sovereignty, but I think the Court in general, if it sees a legitimate trial occurring in a national context, then according to the Statute they must accept it, and I hope they will.

**Q. What is the significance of the Court prosecuting state vs. non-state actors in the international system? In the case of Sudan for example, the Court has focused on state crimes, whereas in the DRC and Uganda the emphasis has been on rebel groups and non-state actors. Does the choice of who to prosecute in particular situations affect the perceptions of the Court's legitimacy on the international stage?**

**A.** In many ways, this is really a political question. This goes back to the question of how Ocampo wants to deal with the political issues that the Court is embroiled in on a daily basis. For the prosecutor, dealing with non-state actors and non-government officials may be politically easier than moving forward against government officials. My sense of Ocampo, however, is that, although he is somewhat aware of the political dynamics of what's going on, I think in many ways he is also trying to push forward in as objective a fashion as he possibly can. I am not sure that the political calculus is going to influence how he proceeds in investigations and whether he looks at non-state or state actors.

I think the only real problem in terms of legitimacy, in relationship to this question, is whether the perception by the international community is that the Court is proceeding in a purely political manner. If it chooses to prosecute only state or non-state actors on a fairly regular basis, then the perception might become that the selection of cases is simply based on a political calculation by the Court. I think that such a perception will hinder the ICC's legitimacy more than

anything else. However, if they proceed in a juridical, objective fashion, then I don't see a real problem in terms of legitimacy.

**Q. Does the ICC have an implicit political role to fulfill? What is this role? Should the Court strive to remain politically neutral in conflict situations? Does the Court's participation in political conflicts threaten to undermine its perceived legitimacy? Can the ICC be successful if it conceives itself purely as a juridical institution?**

**A.** I'm not sure that the ICC has an implicit political role to fulfill. In some ways I think I'm wary of that line of questioning because it almost makes it seem as if the ICC has to recognize its political role in the system and act upon it in some way. I think I would come at it a little bit different. I think the ICC has to recognize, and what Ocampo has to recognize and I don't think he really did at first, is whether he likes it or not, the ICC is a political institution. I fully believe that there are no institutions, governmental, legal, etc., that are not political institutions. There is a political component to all aspects of the global community and the ICC is not exempt from that. So do they have a political role to fulfill? No. I think they have to approach the selection of cases and whom they prosecute within those cases in the most objective fashion possible. They do, however, have to be aware of the political implications that every decision that they make have. Ocampo doesn't always understand the political implications of what's going to happen. With the Uganda case and the self-referral, standing there with the president of Uganda to announce that the ICC is going to prosecute gives a very political nature to the case, almost immediately. And he is starting to recognize those problems. However, I think the Bashir case is another instance where I'm not entirely sure that he fully recognized the political implications. This may add to the legitimacy of the Court, the fact that he and the Court in some way are going after those they believe are guilty of certain crimes. But this doesn't alter the political nature of every institution in the global community. I don't think that their participation in these political crimes will undermine their legitimacy;

it will only undermine their legitimacy if the perception is that they're clearly favoring one side or the other. I fully believe that perception in many ways creates reality and the biggest problem for the ICC is to create a perception of being a purely juridical institution; despite the fact that I don't think they can be a purely juridical institution. But the perception among large portions of the international community has to be that this objectivity is the Court's ultimate goal and that they're doing a good job. In some ways, they have done well at this, in other ways they've failed. They have to be aware that the perception in many ways will determine their legitimacy in the international community. How they are perceived could provide them with a sense of legitimacy, which will allow them to fulfill their goals.

**Q. What is the ideal relationship between the ICC and the Security Council as detailed by the Rome Statute? How have the current activities of the Court and the Council failed, exceeded or lived up to this ideal?**

**A.** I think so far the relationship has been pretty good. I am not sure I would call it ideal, but my understanding of how the ICC and the Security Council should interrelate is in line with the principle of complementarity that defines the relationship between the ICC and national jurisdiction. I think that the Security Council in many ways is also supposed to complement the ICC when needed. So in the Sudan case, this is a great example of a situation where the international community was more or less calling for action and the Security Council was able to step up and complement the ICC's activities by giving them the power to go in and investigate. At that point the Security Council was to step back and allow the ICC to proceed as they see fit. I would hope that that is how the relationship will evolve, and I think this is how the relationship was intended when the international community drafted the Rome Statute. Those in Rome were very wary of the politicization of the Court by the Security Council; however, they also recognized that there had to be some sort of relationship between the Security Council and the ICC and that the relationship should be in many ways a

complementary one. Coming back to the political question, the Security Council is also going to have to recognize when the ICC has gotten in over its head in a political situation. That might be the point at which Article 16 is going to be implemented. I think, however, that it is going to be rare that you see Article 16 authorized – it will be rare that the Security Council acts in concert to say that they are going to stop the ICC's activities for 12 months and possibly renew it after that. So as long as it proceeds in that way and they use Article 16 sparingly and the Security Council is there to give the ICC the authorization to go in to investigate situations like the one in Sudan, then, to me, I think that's living up to the standards that were set in the Rome Statute.

**Q. Does Article 16 of the Rome Statute effectively give the Security Council authority over the prosecutor's office? On what grounds and in what types of situations should the Council invoke Article 16? What will be the implications of adopting an Article 16 Deferral in general but also in the Bashir case in particular?**

**A.** I do think that Article 16 does in many ways give the Security Council authority over the Prosecutor's office. Article 16 provides the Security Council with the opportunity to suspend the activities of the Prosecutor's office for 12 months and then renew the investigation more or less at their discretion. So this power of deferral of investigations and prosecutions is clearly a point at which authority resides in the Security Council and not the Prosecutor's office. However, in terms of when this might be used, I address the issue from two perspectives – personally, my hope is that it would be used sparingly. I hope that the Security Council would more or less grant the ICC and the prosecutor's office leave to proceed with investigations as they see fit. Then thinking specifically about what types of situations or criteria exist where they would invoke Article 16, I think, practically speaking, that invocations of Article 16 will be few and far between. There has been talk of doing this for the Bashir case, and I am not sure that I see all members of the Security Council accepting suspending the indictments of the ICC in this case

unless there was a very clear indication that a cessation of the crimes was going to occur in the Darfur region. The reality of that happening is minimal at best. I simply do not think that the countries of the Security Council are going to be duped into accepting that, and I personally do not think that Bashir would ever offer that up given how he has reacted to the warrant in the past few weeks. Are there theoretical debates about when and how Article 16 should be used? Possibly. The peace versus justice question is a very real question; I tend to believe that you cannot disaggregate the two. However, if there was a situation where you had a peace plan on the table and the one stipulation was that all warring parties would sign this if the ICC arrest warrants are suspended against certain individuals, then yes, I think that that is a situation where Article 16 would be appropriate. The key with Article 16, in terms of what types of situations it should be used in, is to remember that it only suspends the prosecution from its activities. If a year later, the peace process breaks down, then the ICC can go back in after the 12 months and renew its investigation and prosecution. Article 16 does not simply make the situation go away; I think this is a key aspect of Article 16 that many critiques of it forget.

**Q. How significant is it that the first (and still all) of the cases currently before the Court are against Africans for crimes committed in Africa? How does this affect the perception of the Court's legitimacy in the international community?**

**A.** Perception often creates reality and this is a problem that the Court has to work on. The perception at this point is that the Court is focusing on Africa and that it has a Western bias and that this is why it is looking at these particular cases. It is regrettable that this is the perception of what the Court is doing. I do not believe that the fact that all the cases are in African countries is necessarily problematic. We have to remember that all of these cases are either self-referrals, or were initiated by the UN Security Council. The Court has not done a good job making these facts known to the broader public.

To those that study the ICC and look at this issue, I think there is a better understanding of why these cases were chosen and why the ICC is acting like this in these particular instances. I think the ICC has to work on its public relations in terms of portraying a more legitimate and beneficial perception of itself to the broader international community. Until it does that, these questions of legitimacy, in relationship to where the Court is investigating, are going to persist. They have looked at other cases and there has been a discussion of opening other cases in other parts of the world. Unless you are looking at particular cases or following the press releases of the ICC, you are not going to be aware of these facts. It is unfortunate that the majority of the public and the international community are not fully aware of everything that the prosecutor's office is doing.

**Q. The Rome Statute was originally supposed to govern the crime of aggression as well. What do you think the future of the crime of aggression will be for the Rome Statute? Will the States Parties to the ICC agree upon a definition of aggression? How might this influence the role of the Court in the future?**

**A.** I've become very pessimistic on this question. This question has dogged the establishment of this Court since the WWII era. When you had the activities after WWII, in the late 1940s and early 1950s, to establish this Court, the official justification for not establishing it was that they could not come up with an agreed upon definition of the crime of aggression. That probably was not the sole reason given the emergence of the Cold War and other issues. But as we move forward, we have a definition that emerges in the 1970s that was not palatable to enough actors that they were willing to implement it into a juridical institution like the ICC. So at this point, I am not very optimistic that the crime of aggression will ever be a part of the Rome Statute. Quite honestly, I'm not sure that this is necessarily a bad thing at this point. To me, as I look at the crimes contained in the Rome Statute, I think the crime of aggression may be the most easily politicized of all because it does not have an accepted definition as I think most of the other



crimes do. So to have this undefined crime of aggression put into play in the Rome Statute and to allow the prosecutor to act on that, I think would be extremely problematic; I would worry about the politicization of that crime and the overuse of that crime and in many ways, I would think it might hinder the legitimacy of the Court rather than help it. The ICC would be best served to stay with the longstanding definitions of the three core crimes it already governs, and then eventually they can come to a definition of the crime of aggression, but only when and if the Court is a more accepted institution in the international community.

anything. At that point I would rather have seen the Rome Statute fail in 1998 than have the ICC.

The ICC's fate is solely dependent on the international community of states. If the ICC is not to become a dead letter institution, then it's up to the states to prop it up and make it a fully functioning institution, but this will simply be about how states wish to construct the future international community and whether they believe their interests are best served by multilateral means or not.

*Interview conducted by Zachary Manfredi and Julie Veroff.*

**Q. What do you see as the future role of the Court in 10 years? Will international criminal law gain increased authority and enforceability? Why or why not? Can you give an example of a best- and worst-case scenario for the Court?**

**A.** I think the future of the court is extremely dependent on the world's state actors. As much as I loathe a state-centric, realist perspective of the world, I think the reality is that states still play a fundamental role in how the future international community will be constructed. And so as we look at the Court, I think that the future role of the court will be dependent on the acceptance of the Court and the buy-in by the international community of states. Without that buy-in by the international community of states the ability of the Court to arrest people like Bashir, to act on the warrant, to have any type of enforceability, is extremely limited. The Court simply does not have the independent means to fulfill its mandate. It must rely on states to fulfill its mandate. Simply having a hundred plus ratifications does not mean in a practical sense that these states are going to support the Court in a clear fundamental way in terms of the enforcement of its rulings on the arrest warrants, etc. The best-case scenario is that you do get the buy-in from these states, they do accept the mandate, see it as beneficial to their interests in the international community and they assist in every way possible. The worst-case scenario is that these states don't buy-in and the Court simply flounders for the next ten years in terms of its inability to enforce

## ICC Observers Project – Oxford Transitional Justice Research

Exclusive Interview with Colin Thomas-Jensen,  
Enough Project Policy Advisor

29 March 2009

*Colin Thomas-Jensen is a Policy Advisor at the Enough Project. Based in Washington, D.C., Colin helps to guide Enough's analysis and policy recommendations to end crimes against humanity. He also oversees Enough's field research in Sudan, Chad, Congo, Uganda, and the Horn of Africa. Colin previously worked at the International Crisis Group, where he had a range of responsibilities including direct advocacy with senior policymakers and research trips to Africa. He joined Crisis Group from the U.S. Agency for International Development (USAID), where he was an information officer on the humanitarian response team for Darfur. He also served as a Peace Corps volunteer in Ethiopia and Mozambique, and has traveled extensively in East, Central, and Southern Africa. Colin has an MA in African Studies from the University of London's School of Oriental and African Studies (SOAS), with a concentration in the history of Islam in Africa, African politics, and Islamic family law. He has written for Foreign Affairs on U.S. policy in the Horn of Africa, publishes regular commentaries and op-eds in U.S. and African newspapers, and speaks frequently with international news outlets.*

**Q. You recently authored a strategy paper for Enough outlining different mechanisms for peace building and conflict resolution in Eastern Congo. In the report you argued that the Court should investigate and prosecute cases in North and South Kivu. Specifically, what role do you think the Court can play in conflict resolution in the DRC? You say the Court should increase pressure on international actors to develop an apprehension strategy for Ntaganda – how can it do this? More generally, what should be the political role of the Court?**

**A.** One of the big issues that's fueling conflict and atrocities and human rights violations across Congo is impunity. You essentially have a state with a non-

functional/dysfunctional court system and a limited capacity to investigate, arrest, try, and hold people accountable for the crimes that they commit, all the way from shoplifting up through war crimes. In the Kivus, certainly over the past ten years, we've seen a level of criminality and a level of violence directed towards civilians that's almost unprecedented. For anyone doing human rights work, the Great Lakes is one of the biggest challenges that we have. Beginning to establish accountability for war crimes and crimes against humanity is critical to changing the behaviour of combatants in these conflicts and ultimately ending them.

In the Kivus specifically, and since 2002, because we're talking about the ICC here, we've seen sexual violence perpetrated on a massive scale, we've seen war crimes, forced displacement, murder, torture. All of the ingredients are there for what I believe should be a full scale ICC investigation. The state in question is unable to end impunity on its own in the Kivus and certainly because of the situation we're seeing now with Bosco Ntaganda, unwilling to even live up to its own commitments under international law and as a signatory to the Rome Statute. And on that question in particular, I was really struck when Nkunda was removed from the head of the CNDP and replaced by Bosco Ntaganda that there was almost deafening silence from the human rights community, from nation states – specifically those signatories to the Rome Statute – and from the Court itself, on the fact that Bosco was essentially walking around unmolested in Goma. And that continues. He appears regularly in public, he spends time with government officials, yet this is someone who they're obligated under international law to arrest. I'd like to see the Court increase pressure on the Congolese government to arrest him, and doing that means pounding the table a bit more. The prosecutor and his deputy do have a bully pulpit and can start to make a lot more noise about the fact that this guy, a guy who's responsible for some pretty heinous stuff, is not only walking around carefree in Eastern Congo, but also has been given military responsibilities by the Congolese government that most certainly would give him yet another platform to commit atrocities.

**Q. In the case of the Sudan, Enough's strategy has particularly focused on accountability for state actors and state crimes, but in the DRC, your strategy appears to focus more specifically on rebel leaders and non-state actors like Ntaganda and the CNDP. What is the reason for this strategy? Is there a role for the ICC to play in helping to assure accountability for state crimes in the DRC, as well as for those committed by rebel leaders?**

**A.** Justice must be impartial. In the case of DRC, there's no question that the Congolese army – whether of Kabila I, Kabila II, the transitional government, or the current government – has been responsible for a significant number of human rights abuses and in many ways has been one of the causes of the conflict. In Congo, the army is more of a predator than a protector. The inability of the state not only to protect its own citizens but the decision by members of the military to commit atrocities is something that ought to be punished. The focus thus far has been on rebel leaders because as we've seen, the state referred the case and Nkunda and Bosco and others are obvious targets because of their reputations and the investigations that have gone on by a lot of human rights groups that I'm sure presented information to the Court. But the state in this case is often complicit in violence against civilians, particularly sexual violence. And also, I think here, again, there's a split. Because the Court's mandate is 2002 on, we're looking at different periods. Many of the war crimes committed during Congo's civil war were committed before 2002. Many of the criminals responsible for this violence are sitting in rather plum positions in the military or have retired to nice villas. In addition to the Court going after crimes post-2002, we also need to start looking at broader forms of transitional justice in DRC and particularly a process to vet army officers and remove and punish those who are proven to be responsible for war crimes and crimes against humanity.

**Q. What was your reaction to the arrest of Jean-Pierre Bemba and the charges of war crimes and crimes against humanity brought against him? Is it**

**significant, and how so, that these charges are for crimes committed in the Central African Republic and not the Democratic Republic of Congo? How might this affect the perception of the Court and his trial at the local level as opposed to an international level?**

**A.** Bemba is someone who bears significant responsibility for crimes in both CAR and in DRC and the Court very well could have put together a pretty strong case against him for his conduct during the Congo War. That the arrest warrant was issued for crimes committed in CAR and that that case was referred to the Court by President Bozize and that that President Bozize is a close ally of Kabila and that Bemba is Kabila's main political rival – these factors add to the perception that Kabila, like Museveni in Uganda, many think, have used the Court to isolate and neutralize political or military enemies. And whether that's true or not, the question is: has the Court done its job in investigating crimes committed by all sides in putting together strong cases against the most egregious offenders and in ultimately, bringing these guys to justice? On the specific case of Bemba, I think it's quite obvious that he did some pretty awful stuff in CAR and I do think he deserves to be in the dock for that and for that the ICC should be commended. But the other side of that is that there were atrocities committed by all sides in the war in Central African Republic and I would hope that there are ongoing and aggressive investigations to bring those members of the government responsible for atrocities to justice.

**Q. We have seen some successful military tribunal trials in Eastern Congo recently, despite larger problems of impunity that you previously discussed. It seems that individuals like Lubanga or Bemba could ostensibly have been tried in military tribunals instead of the ICC. How does this affect the legitimacy of the Court? Are these too small fry to be tried by the ICC, or did these cases warrant ICC attention?**

**A.** The trials in Katanga ought to be seen as big successes, though from a human rights perspective, it's unfortunate that the defendants were sentenced

to death. Because I focus mostly on the Kivus, my understanding of what's gone on in Katanga is mostly from Human Rights Watch and friends and colleagues there, and a successful Congolese prosecution is something we ought to applaud. But at the same time it is a small drop in the bucket of the level of criminality and violence that has characterized these wars. The imperative in the Kivus, where we often forget that 1,000 people are still dying a day due to this war, is bringing the conflict to an end. I think that whatever mechanisms are available to both the Congolese government and the international community to end impunity, which is fueling these wars, have to be exploited and the ICC is certainly one of them. I'm not sure if it's a question of big fish versus little fish – the ICC certainly wants to be going after the high-profile individuals, those with command responsibility and responsibility for significant violations of international law. But in the Kivus, there are so many murderers running around and so many people with blood on their hands that the Court certainly has a role in both conducting its own investigations but also, and Ocampo always stresses this, working with local government or the host country government to improve its capacity to do these types of things on their own. And in some way, and I wish I had the evidence for this, with the trials and convictions in Katanga, there is perhaps a connection between the success that the Court has had in Ituri and in apprehending suspects and having them delivered to the Hague and the Congolese government taking on more responsibilities to try and prosecute its own war criminals.

**Q. What do you think of the Pre-Trial Chamber's decision to issue an arrest warrant for Omar al-Bashir? What is the impact of the absence of a genocide charge on the advocacy movement? If there is a consensus among international jurists from the UN Commission of Inquiry Report from 2005 and now the Pre-Trial Chamber of the ICC that the violence of Darfur does not constitute genocide, will this affect the advocacy movement's, and Enough's, strategy and advocacy focus with regard to the conflict?**

**A.** First, on the Pre-Trial Chamber's decision, I understand that the deliberations, specifically over the question of genocide charges, were extremely contentious and that a couple of the judges are no longer on speaking terms because of it. And I think that speaks to the fact that this wasn't, as some armchair academics have said, a slam-dunk in the face of the Prosecutor that Bashir is not responsible for genocide. It was something the judges debated and discussed and disagreed upon. Whether those charges are warranted or not – ultimately in this case not – there will be other prosecutions and I'm sure there will be other attempts through whatever justice mechanism, whether it's domestic in Sudan or international, to prove these charges, because I think there's evidence enough to warrant at least a trial on genocide charges. I say that in part because of the decision reached by the US government to call this genocide, and it was not one taken lightly. It resulted from a legal investigation and determination by State Department lawyers, who are not known to interpret these things liberally. They are quite conservative, so to make that determination was something they felt quite strongly they had legal basis to do. And look at the Commission's report itself. It was incredible to me that despite the litany of crimes listed as committed by the government and its proxies, the government of Sudan was able to twist the report into quite a propaganda machine for itself simply because the commission didn't say that genocide had been committed. It said that there were acts committed that were tantamount to genocide but didn't quite reach that threshold. But there was very little legal discussion of what that meant. To me it sounded like the US State Department talking about Rwanda in 1994, when the spokesperson famously said that acts of genocide had been committed but the U.S. government shamefully refused to say, in the face of continued questioning, that genocide was being committed.

On the question of how this is going to impact advocacy and activism: my own strong belief is that the question of whether or not what's happening in Darfur, or what has already happened in Darfur, was or is genocide is important from a legal perspective

and from the victims' perspective. It has to be said that the use of the word was certainly important to building an activist movement and certainly catalyzed a number of communities to take action in the United States and around the world. The continued use of that term is a contributing factor to the energy that we've seen built up around ending this conflict. But at the same time, the debate over whether or not it is genocide has been unproductive in many ways. It's also been non-productive and it's been counterproductive to the movement to end whatever we want to call it: war crimes, crimes against humanity, genocide, mass atrocities, atrocities, atrocities crimes. It has been unproductive in the sense that it's been a distraction. We're still seeing reams being written and discussed about whether this is or is not a genocide. At this point, it is important from a legal perspective, but it is more important that six years into this conflict, we have yet to see meaningful steps taken to end it, except by the ICC. It is non-productive because, even though the US reached the determination that the violence constituted genocide, it then made this astonishing leap and said, "And we're doing all that we can to stop it." The fact that you had the conservative General Counsel and lawyers at the State Department authorizing the US to make a pretty extraordinary claim on the international stage and then following it up by saying, "And that's basically it," raises the question of: what was the point? What then did it mean? And then I think counterproductive for the reason I said before: the fact that any time an institution or a commission makes a finding that it is in fact not genocide, the government of Sudan can rail against the United States and others for their claims without having to face what's often embedded within the text, which is that the government is responsible for terrible crimes against humanity and atrocities no matter how you cut it or how you define it.

I think the way it's going to impact the movement in immediate terms of the Chamber's decision is minimal. I think that many activists and, it must be said, many lawyers and academics believe strongly that genocide has occurred and may be still

occurring. And as a way to frame a conflict in which civilians have certainly been targeted on the basis of their race and ethnicity, it's going to continue to be a descriptor and it's going to continue to drive a movement that we hope will help to end the conflict.

**Q. Looking at Enough's four "P" strategy – Peace, Prevention, Protection and Punishment – sometimes these various objectives may come into conflict with one another. Could you describe the decision-making process of Enough staff when deciding to support a decision like the ICC arrest warrant for Bashir that, while it furthers the interests of justice, may also have negative implications for peace and protection in the short term?**

**A.** Our strong belief is that you need all three at the same time if you are going to make any progress towards ending a conflict. Protecting civilians in and of itself is not going to end a conflict. Peace without justice most likely fails to end conflict and accountability in the absence of anything else is not going to end the conflict either. You need to move forward on all fronts. We also have to be realistic and sober when we think about what the impacts of various moves might be for people on the ground and it is disingenuous for any activist to say that the ICC's decision and the way that the government of Sudan has responded to the ICC's decision, is not going to have an extremely harmful impact on civilians in Darfur, in both the short and perhaps medium term. The reason why the international response to the Sudanese government's decision is so important is that up until now, the government has really faced very few if any real consequences for what it has done in Darfur. I do agree with some that the regime is acting in part out of paranoia that western NGOs are embroiled in a plot to bring down this government. However, I also think that they have calculated the human cost of this decision and it is something that plays into their war strategy. If there is no response, or if the response is to consider an Article 16 suspension of the warrant so that humanitarian assistance can continue, we will have essentially enabled the regime and others like it to

manipulate humanitarian assistance and accountability to their own ends. If the Sudanese government does not reverse its decision to expel humanitarian groups or face harsh consequences for its actions, the immediate lesson for this regime and others like it is that for all of the rhetoric of human rights, international law, and responsibility to protect, the international community remains as toothless in the face of genocide as it was in Rwanda. A return to the status quo right now, despite the overwhelming costs that I fear civilians are going to suffer, is the worst thing that can happen to Sudan just now.

**Q. How significant is it that the first (and still all) of the cases currently before the Court are against Africans for crimes committed in Africa? How does this affect the perception of the Court in Africa and in the international community more broadly? Where might the Court issue its next set of indictments? Where should the Court look for future prosecutions? Also, as a parallel question given that Enough also describes itself as an organization dedicated to ending genocide and crimes against humanity, what is the significance that all of the conflicts Enough has thus far focused on are also African? Does Enough plan to focus on other conflict situations in the future?**

**A.** At Enough, when we began our work, it was essentially two Africanists that founded the organization – John Prendergast and Gayle Smith – and I was a sort of wobbly third wheel and also an Africanist. We believed strongly at the time that the three conflicts that warranted the most attention and would benefit the most a constituency of Americans pushing policymakers to take action to end atrocities were Sudan, Congo, and Northern Uganda, or wherever the LRA happened to be at the time. Over time, however, our strategy certainly is going to be to expand beyond just Africa and to start adding any crisis to our portfolio in which crimes against humanity or genocide are occurring. One of the ways we are going to make those determinations is through a project to establish metrics for those places most at risk – tackling this question with political science research. We are going to examine

the question of where atrocities are most prevalent and what countries are most at risk of atrocities. I am pretty certain that once we finish that project, we will have a roadmap to some of the other countries that we are going to be working on. I have no doubt that Sri Lanka and Burma would be high on the list as places where civilians are bearing a high cost in war. It must be said that we receive a constant barrage of feedback on the website from people asking why we are not focusing on Iraq and Gaza. There is a strong case to be made that atrocities are being committed in the Middle East, but many of these crises already get a whole lot of attention from the media and policymakers and from activists. Our mandate is to try to shine a spotlight on those conflicts that are equally bloody, if not bloodier, but that do not generate the same kind of heat. That is how we make our decisions.

As for the Court and the fact that its work has been limited to Africa, I do think the Court now has a big perception problem on its hands. I think they are aware of it, but I do not know what specific steps they are taking to deal with it. For those who critique the Court on these grounds, their argument is that it is a neo-colonialist imperialist enterprise aimed at keeping African countries in their place. The counter-argument of course is that three of the current cases – CAR, Congo, and Uganda – were referred to the Court by elected, sovereign governments and the Sudan case was referred by the Security Council, which is the ultimate arbiter of international peace and security. It may not look fair, the argument goes, that the Court only has cases in Africa, but that it has just turned out that way early on. I think that that is the case, but the issue of perception has to be managed better as well; the perception that this is a Court of white man's justice needs to be accepted on face value and combated aggressively not only by the Court but by state parties to the Rome Statute as well. My greatest frustration with the ICC is not with the institution itself, but rather with the states that signed the Rome Statute and the fact that in the face of criticism from the global south, criticism from multilateral organizations like the Arab League and the African union, that the Court's major backers

have been somewhat muted in their response: this certainly hurts the ICC.

It is not the prosecutor's and the Court's responsibility alone to defend their actions day in, day out. They need support from those countries and those institutions that helped to establish the Court. And not only does the Court need defense against and criticisms and questions about whether they are targeting Africa, but they also need support in executing the warrants. It was incredible to me that the ICC issued arrest warrants for Joseph Kony and his close associates and the Court's major backers within the international community literally had no plan and no notion of a plan on how to execute them. As a justice mechanism it is the prosecutor's job is to take on cases, pursue them aggressively, and put people behind bars, but it is the broader international community's job to support that effort in the face of criticism and to support the prosecutor if he makes a mistake. I'd like to see more friends of the ICC that were more vocal and assertive in putting forth that alternative narrative, because I'm getting pretty sick of hearing how the Court is targeting Africans, particularly when it has to be acknowledged that some of the worst war criminals in the world are killing with impunity in Central African and Sudan.

**Q. What do you see as the future role of the Court in 10 years? Will international criminal law gain increased authority and enforceability? Could you speculate about possible best- and worst-case scenarios for the Court? What can the ICC and other international actors do to ensure its own legitimacy in the future?**

**A.** I think we have to look at the broader trends. Although by no means is the job close to being finished, the world has made leaps and bounds in halting atrocities and in ending impunity for war criminals. I do think you can say that we have made significant progress through the international tribunals of Rwanda and the Former Yugoslavia, and the Special Court for Sierra Leone; we are seeing major war criminals behind bars, on trial, in the dock, answering tough questions about their behaviour and

ultimately spending time behind bars. That is not something that was happening 20 or 30 years ago. The optimist part of me, and it is not a large part, but the optimist in me says that despite the fits and starts that are inevitable with any institution that the ICC, over time, is going to establish its legitimacy through prosecuting and putting people behind bars and that it is going to earn increased support. A very important issue for the future is the strategy that the Court and its backers put in place to manage its perceptions, particularly in the Global South. I think there does need to be much more considered and concerted action taken to do that. I also think that the work that the Court's main backers do behind the scenes to support its work is of incredible importance. The ICC does not have an army and it does not have a huge investigative force. When it does investigations, it relies on support from others within the international community. I know people who have provided evidence in a number of cases: they have just volunteered. They have said, "I have these photos of this incident, do you want them?" And the Court says of course. Those of us who support international justice have a responsibility to do what we can on an institutional and a personal level to support the Court. If the ICC does receive that support, we'll have an institution that in ten years is locked in place within the international system. It will have its ups and downs, but will be well established as a mechanism to bring the worst war criminals to justice.

I don't want to speculate on the worst-case scenario. Certainly the Sudan case is a major challenge and the fact that the Court's backers and Rome Statute signatories have allowed the African Union and the Arab League and others to marshal as much opposition to this arrest warrant as they have is problematic. The possibility of African states pulling out in a block from the Court is a very real problem and one that ought to be combated. I do not think that would be a deathblow to the Court, but it would certainly be a significant shot. My general sense though is that, despite the horrible crimes that are still occurring, the trends in international law towards ending impunity and preserving human rights are



positive. I think the ICC will ride that wave and in ten years will be in a place that might not be as far ahead as we would like it to be, but will be well-established.

*Interview conducted by Zachary Manfredi and Julie Veroff.*

## **ICC Observers Project – Oxford Transitional Justice Research**

**Exclusive Interview with William Schabas, Professor of Human Rights Law and Director of the Irish Centre for Human Rights at the National University of Ireland, Galway**

26 March 2009

*Professor William A. Schabas is director of the Irish Centre for Human Rights at the National University of Ireland, Galway, where he also holds the chair in human rights law. William Schabas is an Officer of the Order of Canada. Professor Schabas is the author of eighteen monographs dealing in whole or in part with international human rights law, including Introduction to the International Criminal Court (Cambridge: Cambridge University Press, 2007, 3rd ed.), and Genocide in International Law (Cambridge: Cambridge University Press, 2009, 2nd ed.). Schabas has often participated in international human rights missions on behalf of non-governmental organizations such as Amnesty International (International Secretariat), the International Federation of Human Rights, and the International Centre for Human Rights and Democratic Development to Rwanda, Burundi, South Africa, Kenya, Uganda, Sudan, Cambodia and Guyana. He is legal counsel to Amnesty International Ireland. In May 2002, the President of Sierra Leone appointed Professor Schabas to the country's Truth and Reconciliation Commission, upon the recommendation of Mary Robinson, the United Nations High Commissioner for Human Rights.*

**Q. In a recent article, you wrote that the UN Commission of Inquiry's report on Darfur, while finding that "the Government of Sudan has not pursued a policy of genocide," left room for the possibility of individual actors having committed genocidal acts. Does the ICC ruling change your opinion about this possibility? What is the distinction in customary international law between "acts of genocide" and an organized state "policy of genocide"?**

**A.** There is case law from the Yugoslavia tribunal that holds that the crime of genocide as defined

internationally doesn't require any contextual element such as a state plan or policy. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that an individual acting alone can commit genocide. That view was endorsed, in a sense, by the Commission of Inquiry that was presided over by Professor Cassese, but in a purely theoretical sense, because the Commission did not find any individual with a genocidal intent in Darfur on which to hang that accusation. I have personally never found this to be a particularly helpful proposition because I do not think the problem of an individual with a genocidal intent should be of any concern to international criminal law. The problem of an individual acting in isolation with a genocidal intent should be a concern for psychiatry. I have argued this position since the 1999 decision of the ICTY, I've written about this, and I reiterate my position in the second edition of my book on genocide, which is that a state policy element is essential for a determination of genocide. In the article you are referring to, I took the view that the Commission of Inquiry on Darfur had confirmed the importance of a state policy because it had in effect responded to a question from the Security Council – was genocide being committed in Darfur? – with the answer, “No, we don't see any genocide in Darfur because we do not observe a state policy of genocide.” So I took the report of the Commission of Inquiry as confirmation of my position, although I have to acknowledge that the Commission says that they cannot exclude the possibility that an individual acting alone could have genocidal intent. I know this to be the view of Professor Cassese, but I don't agree with that position.

Now, in the recent decision on the Bashir arrest warrant, the majority of judges hold the view that genocide requires the policy element, in effect deriving this standard from the Elements of Crimes. It is important to understand that the Elements of Crimes, which were negotiated in late 1999 and early 2000, took place in context of the ICTY and the cases involving the lone genocidal perpetrator. It is well known that the requirement of a contextual element for genocide, which is in the Elements of Crimes, was a response to the decision of the ICTY. The majority

of the Pre-Trial Chamber has insisted on applying the Elements of Crimes for the purposes of applying the law of the Rome Statute. They distinguish it from the position taken by the ICTY but without making any observation as to what it might constitute for international criminal law. The judges of the ICTY would no doubt say that the Pre-Trial Chamber's decision is a particular interpretation of the provisions of the law applicable to the ICC rather than a statement of customary law; this is only because they think what they are pronouncing on is customary law. I have noticed that the judges of the ICTY refer to the Rome Statute as authority of customary law when they agree with it, and when they do not agree with it they say it is not representative of customary international law. This suggests that customary international law is what the five judges of the Appeals Chamber of the ICTY think it is. I do not think that's the correct position.

I think that the Elements of Crimes, which represent a consensus of the states involved in the ICC, is more authoritative of what customary international law is than what the judges of the Appeals Chamber of the ICTY think it is. However, no one can answer that question definitively – we now have a situation where we have one interpretation from the Yugoslavia Tribunal, which is based on the judges' own interpretation of treaty law, namely Article 2 of the Genocide Convention as repeated in Article 4 of the Yugoslavia Statute. The ICTY judges are relying on a literal interpretation of that provision, because they argue that there is nothing in the text that says that in order to commit genocide there needs to be a contextual element or state policy element, so they conclude that you do not need a state policy element. That is, unfortunately, the extent of their analysis. To say that this view is customary international law is pretty superficial, because there is no attempt to identify what customary international law is in this case, but rather their opinion is based only on a literal interpretation of the treaty provision. What the ICC has in its favour is that when you combine its text – which is the same text in Article 2 of the Genocide Convention, Article 4 of the ICTY Statute, and Article 6 of the Rome Statute – with the

Elements of Crimes, and a dose of common sense, you end up with a contextual element to the crime of genocide. What we do not know now is whether people will look to the Pre-Trial Chamber's decision in the future and say this is a useful correction that helps us to clarify customary law or whether people are going to interpret it as a particular decision dictated by the specific terms of the Elements of Crimes.

We have to bear in mind that there is a dissenting opinion in this case that tends to dismiss the significance of the Elements of Crimes. There is also Article 10 of the Rome Statute that reminds us that the Rome Statute is not necessarily a codification of international law. Those are all the pieces of the puzzle and where things will go from here I cannot say, but I am pleased with the arrest warrant decision.

**Q. How does the Pre-Trial Chamber's ruling in the Bashir case relate to the 2005 UN Commission of Inquiry's findings? Does the Court's refusal to grant the genocide charges support the findings of the Commission? Are we reaching a consensus that the violence in Darfur is not appropriately classified as genocide? How will this influence the future development of international criminal law?**

**A.** Yes, it is clear that there is a growing authority for the view that the events of Darfur do not constitute the crime of genocide: the Commission of Inquiry, the Pre-Trial Chamber, and the major human rights NGOs – Human Rights Watch and Amnesty International – have not used the term genocide. I think it is clear that when one gives an interpretation based on the definition of the Genocide Convention, we get the result that this is not a case of genocide. When one looks at something like the document produced by Madeline Albright entitled Preventing Genocide, from her Genocide Task Force in 2008, we see it adopts a definition by which genocide means all forms of mass killings. That is not a particularly legal determination and she and her co-authors tend to dismiss objections to their view as legal pedantry. I, however, do not know that it is proper to dismiss the Genocide

Convention and the Rome Statute as merely legalistic pedantry. These are significant and recognized distinctions in international criminal law between genocide and other forms of mass killing, which would constitute crimes against humanity or war crimes.

The definition of genocide and the answer to the question of whether genocide is taking place in Darfur depends on whom you are talking to. If you are talking to an international lawyer, then it is not genocide. If you are talking to an American politician or sociology professor, then they might say it is genocide. It just depends how you use the word. The Oxford English Dictionary adopts the definition from the Genocide Convention. However, people are free to use words as they want. For example, sometimes people will use rape to describe violent sexual assault, while some merely use the word to describe something unpleasant. So when we debate whether 'genocide' is taking place in Darfur, we need to know what people mean by genocide. There are a lot of different meanings floating around out there. For international law, it means that there is growing support for the feeling that Darfur is best not characterized as genocide, and there is also growing authority for the view that the definition of genocide in the Convention and Rome Statute should be interpreted in a relatively strict and narrow manner. We now have a great deal of authority for this view: the decision of Pre-Trial Chamber, the ICJ ruling in *Bosnia v. Serbia*, and the Yugoslavia Tribunal in the *Krstic* ruling, and we have the report of the Commission of Inquiry. Against that, you have a few dissenting judges, and you have a few national court decisions that weigh on the other side, but on balance, the authority is clearly in favour of a narrower interpretation. That is why so many thought that the actions of the Prosecutor in attempting to get the arrest warrant for genocide given the indications of the law were not very productive. I am not talking about the demagoguery or extravagant use of the term genocide in this case. The consensus among international lawyers and from the UN Commission was that the prosecutor could not get an arrest warrant on the grounds of genocide. So in

terms of international law, the Pre-Trial Chamber's decision is just further evidence of a trend towards a narrow interpretation of the crime of genocide.

**Q. What do you make of the possibility that Moreno-Ocampo might appeal the judges' decision or bring future charges of genocide against Bashir and other Sudanese officials?**

**A.** I do not see that as a serious possibility. He has filed an application for leave to appeal, and it will have to be determined by the judges of the Pre-Trial Chamber who issued the arrest warrant. There is no appeal of right of a decision denying issuance of an arrest warrant. He has to demonstrate that the ruling would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that an immediate determination of the question by the Appeals Chamber is required. He would have an argument if the warrant itself had been denied. But he has his warrant, and he now can proceed to trial, and lead all of the evidence he requires. If he succeeds in establishing genocide, the judges at trial can amend the charges. So all of this can be addressed according to the normal procedure. No useful purpose is served by an appeal at this point. This suggests to me that it is unlikely the Pre-Trial Chamber judges would give him leave to appeal this.

As for him producing new evidence – and people have made a lot of the fact that the judges included a paragraph to this effect – you can say that about anything. There is no need to put that in the judgment; it is obvious. If he produces new evidence, he can get a new arrest warrant. If new evidence comes to light, he does not even have to get the arrest warrant amended. The judges themselves can propose that the charges be amended to include genocide. The introduction of new evidence has always been a possibility. I do not know if it is particularly productive to insist that there is something significant about the fact that the judges reserved his right to come back with new evidence, since the prosecutor had this right anyway. On one occasion in the past the judges even asked for new

evidence, and I assume Moreno Ocampo gave it his best shot. This is not like Srebrenica where there was a mystery about whether they could get secret communications from the Serbs ordering the massacre. Here the facts are pretty straightforward and well known. A lot has been written about this issue documenting the statistics similar to the arguments of the prosecutor.

If someone were to come forward and say that the prosecutor made a mistake because there is a whole lot of evidence that was not presented with regard to the case of Darfur, then we might have a more compelling argument that the Pre-Trial Chamber ruling could be revised or that there will be another bite at the apple. I have not heard that, and I assume the prosecutor has presented the best evidence that he has, and it is widely available evidence, including the UN Commission's report and all the NGO material. I do not think it is likely that he will get leave to appeal, and I question whether the judges will even agree that they can give him leave to appeal such a decision. If they do grant him leave to appeal, well, then we are into the question of fact and of law. Mainly, however, we are not debating the facts here, we are debating the application of the legal definition to the facts. No one quarrels with the facts Moreno Ocampo presented and I do not think he has additional facts that could provide him with stronger arguments for a genocide charge.

**Q. Does the Court's refusal to grant the genocide charge amount to a failure in any way for the prosecutor? Some have argued, in Sudan, that this shows the weakness of all the charges. Others think that it shows that the Pre-Trial Chamber is a credible body and not merely a rubber-stamp for the prosecutor. What do you think?**

**A.** I think this shows one more bad exercise of discretion by the prosecutor, one more bad call by Moreno Ocampo. He was chastened last year because of his decisions on gathering evidence that he could not then disclose to the defense and that led to a terrible and unnecessary delay in the Lubanga proceedings for more than six months. This was an

error in judgment and I think seeking a warrant for genocide charges in Darfur was also an error in judgment. I think he should have confined himself to the clearly established charges of crimes against humanity and war crimes. The same Pre-Trial Chamber has already granted two arrest warrants for those charges; the judges had already concluded that the events in Darfur justify those two charges, as in the Ali Kushyab and Ahmad Harun arrest warrants. Presumably they would have done the same thing in the blink of an eye should that have been all they were asked to do. Then the only question would be: does the evidence link the dots between Bashir and those crimes. Had this been Moreno Ocampo's strategy, we probably would have had an arrest warrant in August instead of February. The delay of six months in issuing the arrest warrant was due to the prosecutor insisting on trying to get a genocide charge, which was doomed to fail as shown by the Pre-Trial Chamber's ruling. These actions show a lack of good judgment on the prosecutor's part; it is a mistake, and not the first he's made.

As for showing weakness or strength of the Court, it just shows it is a Court that functions properly. When the prosecutor asks for something, the judges look at it seriously and come to a decision that is based on an accurate, intelligent and well-reasoned assessment of the law; people should be satisfied that what we have here is a serious, functioning institution capable of issuing judgments of high quality. What more could you ask for?

**Q. In one of your articles you mention that some human rights activists considered the UN Commission's report a betrayal because it failed to find genocide charges. What will be the reaction of human rights activists to the Court's findings? How will the Court's ruling influence the actions of human rights activities on Darfur in the future?**

**A.** Well, I cannot predict how they all will react. As I've mentioned, two of the leading international NGOs, Amnesty International and Human Rights Watch, have not labeled the conflict in Darfur a genocide. I haven't checked what the International

Federation of Human Rights or International Commission of Jurists have said on the matter, but I imagine they've taken the same cautious approach. The big international human rights organizations have not bought into the idea that the violence in Darfur should be labeled as genocide, and everything from these organizations I have read indicates great satisfaction that a head of state was charged with serious atrocities and this is being addressed by the ICC. I think there must be a considerable amount of jubilation, at least among the major international NGOs.

There is, of course, another community, a specialized community of NGOs focused on Darfur, and some of the academics who write about Darfur as well, and they may find this ruling to be a repudiation of their views. Some of them are not singing from the same hymn sheet as the rest of us because they adopt a definition of genocide that is simply their own. I work from the Genocide Convention, the Yugoslavia Statute, the Rome Statute, and so on, but some of the people involved in these debates have their own definition of genocide. All that these actors can say is that the narrow definition of genocide, which they do not endorse, has been applied by the Court. I have always thought that there was a bit of an obsession with trying to label Darfur as genocide. This is not the only case where we see this obsession: there are people who want to label speeches by Iranian President Ahmadinejad as genocidal, people who want to label the war in Gaza as genocide, etc. There are many examples of what I call the 'extravagant' use of the term genocide. For people who indulge in that, they can keep doing it, but if they want to be part of the legal debate, they should just get over it.

**Q. What kind of outcomes will we need to see from the Court in order to ensure its legitimacy? What about the Lubanga and Bemba trials: do you think the Bashir case has taken too much attention away from these cases? What will be the outcome for the Court if these two cases are tried successfully, but Bashir remains at large?**

**What do we need to see overall from the Court in order to establish it as a legitimate actor on the international stage?**

**A.** The Court is doing that right now. It is becoming more and more of a legitimate actor on the international stage. It had a slow start. The first phase in the history of the Court was the adoption of the Rome Statute and that was from the early 1990s until 1998. This was an exhilarating period in terms of the development of international criminal law and particularly because the more hesitant or conservative models of what an international criminal court might look like, which were the ones advanced by the International Law Commission in 1994, were totally set aside in favour of a much more robust and innovative, radical if you will, international criminal court, with an independent prosecutor separate from the UN, and many features that I won't go into. But what resulted was the Rome Statute. So that was a very exciting period. And then there was a period of about four years for entry into force, which was like a continuation of the first period. Achieving 67 ratifications within less than four years was something nobody had ever dreamed would take place. Most people on the night of 17 July 1998 when the Statute was adopted thought it would take at least a decade to get to 60 and maybe longer. So things went very quickly. And then when the Court started, when all the officials were elected and the Court became operational in mid-2003, it went through a difficult period when things didn't seem to work. There were plans that it would hold its first trial in 2005, the budget set aside money for the first trial, but there was no trial until 2009. That's four years behind schedule, and pretty much everything has seemed to take much longer [in this period]. I don't know what the explanation is for that, but whatever it is, it's taking longer than expected and perhaps it is simply that that's how long things should take. We'd been through a previous period that had gone exceedingly quickly and that led us to think that it would always be like that and it hasn't been. But now the Court is operating and it is addressing the big conflicts of our time, like Darfur. It wasn't insignificant that a little over a month ago the Palestinian Authority attempted to engage the Court

with regard to Gaza. Whether that will or can take place is a matter of some debate, but the idea that the Court was appearing to engage with or be relevant to the conflict in the Middle East is a big step; it shows the Court is on the big stage now. It's moving forward, it's just taken a little longer than we thought. Now we have a trial going, we're going to have more trials. This is great. I don't have any magic formula for what it should do now. I think it should just do more of what it's doing. The prosecutor ought to reflect upon some of his mistakes and try to correct them. That would make his office more productive and more efficient.

**Q. Does the ICC have an implicitly political role to fulfill in conflict situations? If so, what should that role be? Should the Court strive to remain politically neutral?**

**A.** I'm glad you asked that question. I have strong opinions on this. I would have held to the view in the 1990s that the Court should be totally separate from political debates and that there should be no possibility of political involvement in the work of the Court. As you know, in the final Statute, there's a bit of a compromise there, mainly with respect to Article 16, which allows the Security Council to temporarily halt the proceedings of the Court. The other places where you have quite a clear political involvement of the Court are the triggering mechanisms where you allow both the Security Council and states to trigger the Court. This is politics. These are political bodies that make their decisions politically. I'm increasingly of the view that politics is actually a part of international criminal law and that it's unavoidable. I see this increasingly in decisions about whom to prosecute: decisions about individuals who are prosecuted and also about the organizations that are targeted. In Uganda, for example, the prosecution has targeted the rebels and not the government. I think that's a political decision. The prosecutor has couched it in a strange and ultimately unconvincing theory about prosecuting the most serious crimes, but he defines this in a purely quantitative way. So if the rebels kill more people than the government, then the rebels should be the focus. But the problem

with that is you need a more qualitative approach when deciding who your targets should be. Most of us living in an orderly society would find it far more threatening that the government is committing crimes, even if the outlaws are committing more, because outlaws are supposed to commit crimes and governments aren't. So the prosecutor's decision to go after rebels rather than the government has a whiff of the political to it. If it is purely based on this mathematical calculation, then it's a mistaken one.

I think there's politics going on already. The Darfur prosecution, the decision to prosecute a head of state, is a profoundly political decision. There can hardly be anything more political. You're calling for regime change; that's the consequence of what you're doing. When the prosecutor explained this last July, he said: "I investigate the facts, I'm just an apolitical prosecutor who investigates the facts and goes where they lead me," as if he were Colombo or Sherlock Holmes. But that's not what he's doing. It's a political decision: he goes to the Security Council and asks them to intervene. I'm increasingly of the view that there is politics in this.

I think that our debates in the 1990s when the Rome Statute was being adopted were a bit distorted. What we didn't like about politics in the 1990s was the idea that the Security Council would be the political guardian. That was the extent of our vision. So the way we rejected the Security Council's engagement with the Court and the Security Council's possible control over the Court was with the argument that there should be no politics in the Court. I think in retrospect that maybe we went too far with that. I actually think that those prosecutions often, perhaps not always, involve political determinations.

I've asked people about this at the Court and some people say no, there should be no politics, like what the prosecutor said. Others have said to me, actually the prosecutor has political advisors around him, which kind of confirms my own intuition, which is that there is politics involved and it is quite conscious. But that being said, I think part of the problem is, the idea that political decisions will be

taken by the prosecutor suggests a prosecutor who has a different skill set than the man in the job right now. He's a criminal law prosecutor. Once you acknowledge that the role of the prosecutor has a strong political dimension, then you either solve it by getting a prosecutor who is recruited for political expertise and judgment, or you provide some other mechanism to provide political oversight for the prosecutor. These are my preliminary reflections. I go back and look at events like Nuremberg, where you could say it was political forces who set up the tribunal and they decided politically that the Nazis needed to be prosecuted. One of the critiques of Nuremberg that you often hear was that it was one-sided. That's obviously true, but my question to people is: what should they have done then? Should they have had a second trial of the tribunal that tried 24 British leaders and 24 American leaders? Everyone seems to acknowledge that that's an absurd suggestion, but say maybe they should have prosecuted a few of the allied war crimes for balance. We get this debate at the Yugoslavia tribunal with choosing the ethnicity of the defendants, we get into claims at the Rwanda tribunal that the RPF and not just the Hutu extremists should be prosecuted, we've had it at the Sierra Leone Special Court where they submitted arguments about which faction should be prosecuted and how harshly, how relevant it was that one side was good guys and one bad guys, and all of this involves politics. And I'm more and more of the view that rather than being in denial about the politics we should acknowledge it and then confront it. We should recognize that it is part of these decisions and then find ways to address it in an appropriate and transparent and convincing way, rather than saying as the prosecutor sometimes does that this isn't about politics. It is about politics.

**Q. Could you speculate on the future of the Court five or ten years from now? What are the best- and worst-case scenarios for the Court and what can international actors do to improve the Court's standing and legitimacy in the next few years?**

**A.** I really don't know. It is extremely difficult to predict the future in this case.



I think, when you say best and worst case, certainly people shouldn't exclude the possibility that the Court will be a failure, that it will collapse and won't work. I think that people are naïve to just think that this just moves ahead. The idea that the Court is just going to move ahead and keep progressing and everything, which we would all like, I don't see that as being guaranteed, and we certainly have historical examples of institutions created way ahead of their time. The League of Nations, for example, was ahead of its time. It collapsed and a new institution had to be created. I can't rule that out for the ICC. I heard James Crawford, who was involved in the International Law Commission in the early 1990s and one of the key architects of the Rome Statute, speculating about this at a conference last May. He said we had a conservative draft at the International Law Commission in 1994 because we didn't think the international community was ready for more than that. It wasn't because we were conservative, he said; we were giving the international community what we thought it was ready for. But of course what happened between the draft in 1994 and the Rome Statute in 1998 was the radical reconfiguration of the Statute and a new conception of what the Court should be. That happened very quickly and maybe we moved too quickly. Maybe we created an institution that's ahead of its time. I'm not arguing that position, but it is just one of the possible scenarios. That was Professor Crawford's explanation of maybe why we're having such a hard time now, why we had such a hard time getting the Court going. I can't rule that possibility out.

The other scenario is that the Court moves forward, solves its problem, and becomes a more dynamic and more universal institution. Here the difficulties are, as I've mentioned, the role of politics in the Court. And I do think we need to find a solution to this one or face continuing difficulties or problems. In terms of participation in the Court, we're now up to 108 state parties and likely there will be some more. But we still don't have the biggest countries or some of the most powerful countries, including India, China, or the US, and we don't have three of the five permanent members of the Security Council: China, the US, and

the Russian Federation. We don't have India, Pakistan, or Iran. These are big pieces and it's a question, a big question mark, of whether the Court will become more universal by engaging with those pieces. The other part of it is that the Court is right now not dominated by the permanent members of the Security Council. So the absence of three of the permanent members is perhaps a weakness but it is also a blessing because it's enabled this institution to develop and grow without the overwhelming role and participation and presence of the permanent members of the Security Council and the Security Council acting as the Security Council, which is what would happen if you got three or four of them. I'm told now that at the Assemblies of States Parties they talk about the P4, which describes the permanent members excluding the US, because it has been boycotting the Assembly of States Parties for the last several years. If the big players are brought in, it will change the dynamics of the Court and it may make the smaller players less enthusiastic and less keen on it. So that's maybe a development too that we have to keep an eye on.

I'm also seriously concerned about recent developments around the Bashir arrest warrant. African states were keen supporters of the Court in the early years. Now, they seem to be turning against the Court. This is not a good development. At the same time, the United States is warming up to the Court. Personally, I like the court better when it had the support of African States and was disliked by the US. I prefer that to a Court that the US likes but that African States are uncomfortable with.

But you know, if one looked at the last 15 years or so, that is, the point when what we might call the international justice accountability movement began in earnest, it now shows no signs of stopping. It reflects some kind of idea in the human rights movement and a thirst that people have in countries around the world to see that the perpetrators of serious human rights violations are brought to justice in one form or another. That field generally continues to grow. I would assume that the ICC is in a way the centerpiece of this, and the movement that surrounds

the ICC keeps growing in so many other ways, that even if the ICC would falter a little bit, the movement would keep pulling the Court along with it. I would bet my money on the ICC being a much more significant and meaningful and relevant institution ten years from now than it is at present. But I'm prepared to acknowledge the caveat, because it focuses our mind to accept the danger that the Court could fail. We shouldn't be overconfident; we have to keep addressing the shortcomings and the problems.

*Interview conducted by Zachary Manfredi and Julie Veroff.*

## **ICC Observers Project – Oxford Transitional Justice Research**

**Exclusive Interview with Phil Clark, Research Fellow in Courts and Public Policy, University of Oxford, and David Anderson, Professor of African Politics and Director of the African Studies Centre, University of Oxford**

*23 March 2009*

*David Anderson, MA (BA Sussex; PhD Cantab), is a Professor of African Politics, Director of the African Studies Centre, and a Fellow of St. Cross College at the University of Oxford. He has a long-standing interest in the history and politics of Eastern Africa and state violence and its consequences. He is the author of The Khat Controversy, which examines the global expansion of Eastern Africa's khat economy, and of Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire, which is the first full history of the Mau Mau rebellion and its brutal suppression in 1950s Kenya. Professor Anderson is also the founder and Executive Editor of the Journal of Eastern African Studies.*

*Phil Clark is a Research Fellow in Courts and Public Policy at the Centre for Socio-Legal Studies, University of Oxford, and convenor of Oxford Transitional Justice Research. He has a DPhil in Politics from Balliol College, University of Oxford, where he studied as a Rhodes Scholar. Dr. Clark is author of Justice without Lawyers: The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda (Cambridge University Press, forthcoming), co-editor of After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond (Columbia University Press and C. Hurst and Co.) and currently completing a monograph entitled, Doing Justice during Conflict: The International Criminal Court in Uganda and the Democratic Republic of Congo.*

**Q. How will the potential referral of cases from Kenya be viewed on the ground and how will it impact construction of the violence?**

**David Anderson:**

The Kenya case for the ICC is really intriguing because it brings to light some of the real dilemmas that the

ICC throws up. The people who want the ICC in Kenya are the civil society groups, Kenya Human Rights Commission, and their allies. The reason that they're so keen on the ICC is not because they think it's a wonderful institution necessarily but because they feel that international justice is the only justice they will ever get. They have no faith in their local judiciary. They feel that the collapse of institutions in Kenya is such that if they wait for Kenyan justice then it will never come. So they're appealing to an international route because that's the only one that will work.

The Kenyan government on the other hand, which is known as the unity government or coalition government, is made up of two blocks of politicians. Among each of those two blocks, there are people who might find themselves indicted. Those indictments might relate to the violence of last January and February of 2008 or they might relate to the other events that the UN Special Rapporteur for Extrajudicial Killings, Mr. Philip Alston referred to in his report of two weeks ago, which included police killings of alleged criminals and gangsters in the summer of 2007, and also referred to army atrocities, which are extremely well documented, from Mount Elgon in March and April 2008. So for the Kenyans there are a number of things coming together here. The ICC is seen to be a useful device.

But the government of course doesn't want this. Those politicians, quite unlike the human rights activists, see the ICC as a tremendous threat because it will expose them. Now, in this sense, the indictment of Bashir in the Sudan, combined in the Kenyan case with the visit of the Special Rapporteur from the UN, Mr. Alston, to Kenya two weeks before the indictment, has had an effect of significantly heating up the politics of this in Kenya. And following the indictment of Bashir a few days later, two Kenya human rights activists who worked for the Oscar Foundation were assassinated in Nairobi. Subsequent to that, threats have been issued to a group of other Kenyan human rights activists and several are now in hiding and many are in fear of their lives.

Now, the extent to which the Kenyan government is a coalition of gangsters needs to be recognized. You can't say this might happen anywhere else. Kenya's politics are particular and peculiar at the moment, so one wouldn't want to infer any comparative lessons from this, but there is a direct relationship between the indictment of Bashir and what is now going on in Kenya because people realize the stakes have been raised.

**A. If the Waki Report is turned over and indictments are issued in Kenya by the ICC, what might the impact be for peace and reconciliation and the political situation?**

**David Anderson:**

That's the question that everyone is now mulling over. Since the violence of January and February 2008, there has been much thought given in Kenya to the likely impact of trying to prosecute those who were responsible. Now, public opinion is pretty well divided down the middle on this. Some people argue that to take this forward might be morally and ethically correct but because of the condition of Kenya's politics and institutions, it would be likely to spark further violence of a targeted, specific nature such as the assassinations of the human rights workers. In other words, people are worried that to pursue these people when you don't have the protections that a state institution that functions would give you is very dangerous and very destabilizing. Others argue that that may be the case but that we shouldn't let that stop us with moving forward with these prosecutions because what else can we do? If Kenyans don't have the courage to grasp this nettle, then they're forever in the throes of these gangsters and thugs. That is the dilemma. You'd have to be a very brave person to say which of those arguments is right. For myself, personally, I worry about it because ethically I want to see these people prosecuted. But I don't want to see my friends in the human rights community killed or threatened. So this is a genuine moral dilemma, and a very difficult one.

**Q. If the ICC is the mechanism of justice pursued instead of local or national mechanisms, will that deter or increase future violence?**

**David Anderson:**

There is now anxiety about the ICC in Kenya. Last month, the Kenyan parliament voted down a bill that would have created indigenous tribunals to try the people accused of violence in January and February of last year. It's fairly obviously why parliament turned down that bill, because too many parliamentarians feared that they and their staff would find themselves in the dock. It is as simple as that. Whatever careful language one wants to use to describe it, it's an avoidance strategy. Everyone in Kenya knows this. This is no secret. But it's the decision not to have the indigenous tribunals that has also promoted this crisis; it's not just the ICC's indictment of Bashir, it's also an internal political process that has failed. And Kofi Annan, who was the arbiter of the Kenyan dispute last year is the one who is threatening to give the names to the ICC of the people he is aware of who were involved in the violence.

Now, I should say that there is another context to this that needs to be understood. Why do Kenya's human rights activists have no faith in the judicial process? There are many reasons for that in terms of the lack of functionality of the judiciary but there are also more immediate concerns. Since January, there have been at least six attempts to prosecute individuals who were named as having participated in the violence. None of these cases have been successful. Every time the case is thrown out, usually because of lack of evidence. What this reflects is that witness protection is a serious problem and people are being got at, but it also reflects the ethical dilemma I referred to. Some very honest, good, upright people don't want to give evidence if that evidence leads to further killing. This conspiracy builds up a momentum that goes beyond the conspirators and affects ordinary people who feel challenged and threatened by the very act of saying what it is they saw.

**Q. We'd like to ask you to speak about the ICTR and regional tribunals more generally. How can these actors interact with the ICC and local justice actors? What connections should they be maintaining with national and local actors? What role should complementarity play?**

**Phil Clark:**

There are a couple of things to say on this. The first is that the legacies of an international tribunal located in Africa are very messy. What we've seen with the ICTR is in many ways an institution that is, in the future, going to make it very difficult for international agencies to operate in Africa. The reason is that the ICTR has been very ineffectual in terms of understanding the politics of Rwanda and the politics of the region as a whole, which has really hampered its relationships with governments and its ability to do trials effectively. Subsequently, there's been a real forfeit of legitimacy of that tribunal. In the bigger framework, it's now very difficult for international justice to happen in Africa and for it to be seen as a legitimate process. Populations look at these very expensive tribunals that have been foisted upon them from the outside, the ways in which they've blown in, and found it very difficult even to do legal jobs, to get investigations going, and to do it quickly, let alone to have any kind of bigger impact. So the ICTR has made it more difficult for justice to happen on the grander scale.

In terms of the regional dimension, it's very difficult to see where the impetus for justice in Africa is coming from at the moment. The AU is reluctant to go down this path. There's been some talk of setting up an Africa-wide justice mechanism that could perhaps be more locally situated and with a greater understanding of domestic politics than the ICC might have. But the AU has its hands full in terms of peacekeeping issues and broader security questions, and it's also an institution that is struggling to maintain internal coherence. It's a deeply divided organization with many factions. Without that kind of cohesion, including a range of leaders who have very different viewpoints on whether justice is a good thing or not, depending on their own actions domestically, then it's difficult to think that that kind

of regional dream is ever going to become a reality. So you have a difficult situation where international justice in many ways is debased across Africa, and regional questions are even more complicated. So when asked, "What's the likelihood for seeing justice done in a range of African countries?" this is where the conversation turns to the possibility of using national jurisdictions, and perhaps even community level processes. The ICC at least at the rhetorical level supports this move because of the principle of complementarity and giving domestic courts the first bite of the justice cherry. The problem of course has been – and Dave alluded to this in the Kenyan case – that it is difficult to see many domestic judiciaries being willing to go after their own, being willing to deliver justice for sitting members of government. Perhaps with one key example that hasn't been discussed enough internationally: in Congo, the increasing capacity and willingness of the military courts to deal with very serious cases. This is an interesting development. I don't think many people looked at Congo and thought that military courts were going to be where justice would be done, but that's what we've seen. The military courts, in the last year and a half, have prosecuted some serious perpetrators, including high-ranking officials within the army and senior rebel leaders for serious crimes, including war crimes and crimes against humanity. And in many ways, on the ground in Congo, the perception is that it's neither the regional bodies nor the ICC that is most likely to do justice for the most serious perpetrators; it's actually the military courts operating in people's midst. Now it's difficult because military tribunals across Africa don't have a good history of doing justice. They've been very selective in the candidates that they've prosecuted; they've usually insulated their own. Military courts have often done very short shrift to the justice processes across Africa, but what we're seeing in Congo is a change. So that's a challenge to the human rights community internationally, who would not inherently have a lot of faith in military tribunals. But in terms of domestic processes in Africa geared toward prosecuting major crimes, the military courts in Congo are probably the most active at the moment.

**Q. How do you think the doctrine of complementarity can be best implemented to work with local and national jurisdictions to provide the whole picture of justice?**

**Phil Clark:**

I think the key to complementarity working is for the ICC to enact the principle in the way that it was originally defined, which is that the reason the ICC exists is to prosecute the most difficult cases that national jurisdictions are not able or willing to prosecute. The problem that we've seen in the ICC's first five or six years of operation is it has been dealing with the small fish only: middle ranking officials, rebel leaders, who, as the Congolese example indicates, could have been prosecuted domestically. The problem is the Court is not dealing with the difficult cases it was ultimately designed to prosecute. This engenders a lot of confusion in the wider realm of justice about where this international institution actually fits in. It undermines the confidence of domestic judiciaries; it sends a message that they might be trying to reform themselves and might be trying to deal with very complicated justice questions, but that's not necessarily going to stop an international body from intervening.

So it comes back to the question: What then is the purpose of having the Court? In an ideal sense, the notion of complementarity is a useful one in that it divides the labour between a number of different actors. It gives states the possibility to reform their judiciaries and to pursue justice for serious perpetrators. But the big question across Africa, and this is what the Court needs to wrestle with the most, is the extent to which the state is one of the key perpetrators in cases of mass conflict. What we're seeing consistently is state judiciaries being unwilling to prosecute their own. That's where the ICC can certainly play a role. If the Court is interested in getting runs on the board in the early years and storing up its legitimacy to help the Court in the future, then that's where it needs to be targeting its operations. It needs to be going after leaders like Bashir and other heads of state who are responsible for very serious crimes. I think some of the peace and

stability questions that Dave refers to are salient and we should always be cautious about the impact that this kind of justice can have. But for the Court to be going after the middle-ranking suspects it has so far does a huge disservice to the principle of complementarity and to the whole enterprise of justice.

**David Anderson:**

I think there's a connection between the thrust of international policy in the region, which is increasingly limiting its goals to stabilization. This is a word we're seeing more and more being used in policy documents. So the ambition is not statebuilding anymore, it is just stabilization. If you think about that, you see that the justice issue becomes even more of a dilemma, because in order to pursue justice against some of these major state players, you are going to threaten stability. So there is a more powerful argument than before for not pursuing justice. This is very interesting because the African Union has embraced this stabilization idea for exactly the reasons I'm suggesting. It takes the sting out of certain interventions and it makes it easier to negotiate and broker deals. The African Union essentially favors power-sharing. In a positive sense, power-sharing is epitomized in the government of Rwanda's system of proportional representation that gives the losers something out of the process. At the other end of the scale of power-sharing are Kenya and Zimbabwe, where it generates a government of inertia, put together by people who are trying to avoid the consequences of their actions. The problem is that stabilization views all of these things as a general good. The OAU, the AU's predecessor, was often referred to as a trade union of tyrants. The AU has to prove it is not the same and, at the moment, it's not doing a very good job. I think much of the international community would share a disappointment in this, given the hopes invested in the AU at its rebirth a few years ago.

I would also put into the mix that the regional organization for Eastern Africa, EGAD, went through a very positive phase in the late 1990s and 2000s, largely under Kenyan leadership, when EGAD really seemed to be addressing some of the region's

problems. With hindsight, we can realize that EGAD's successes also held the seeds of some of the current problems. It raised the stakes in some of these conflicts, particularly Great Lakes and Sudan, and people have taken perhaps more entrenched positions. The governments in East Africa have begun to realize that these regional and subregional organizations are the places where you can build your consensus. This is reinforced by the sense that the international community doesn't wish to be seen to be imposing solutions upon any region in the world and that ownership of political decision-making is a crucial and accepted norm and good. So the countries that wish to assist Eastern African countries are keen for them to decide their own solutions to these problems. That means that for the Kenyan and Sudanese governments, counseling their neighbors and canvassing support in EGAD and the AU can build a powerful bulwark against any wider international consensus. And it's notable that the amount of lobbying done in EGAD and the AU has gone up considerably in the last 18 months. Politicians across the region have come to realize this is where you build your support base against wider international criticism and interference. In the Kenyan case, they have skillfully built a support network in EGAD and the AU, and similarly in the Sudanese case. They have very cleverly made alliances that will protect them from international criticism. What this leads to is a divide that sees African governments as representatives of these organizations taking one position while the ICC takes another. And that is a very dangerous political position to find ourselves in. It is disempowering for many of the western donors in particular, who don't want to be exposed as standing against African governments. They want to be seen as moving forward in decisions with African governments. African governments have realized this and are playing politics accordingly.

**Q. How significant is it that the first (and still all) of the cases currently before the Court are against Africans for crimes committed in Africa? How does this affect the perception of the Court in Africa and in the international community more broadly?**

**Phil Clark:**

There is an unfortunate cliché that the ICC is a court of Western intervention in Africa, targeting only African leaders, and the suggestion is that there is something inherently illegitimate about the Court. In many ways this argument has been hijacked by the regional actors Dave's talking about. The argument also does not take into account that there is very serious – although certainly not universal – support for the ICC at the popular level in a number of countries. An interesting case to look at is Zimbabwe. In some cases similar to the Kenyan question, Zimbabwe is a country where the ICC is not yet operating, but the possibility of its involvement is a question that hangs in the air and is having an impact on politics on the ground. In the Zimbabwe situation, for a number of different reasons, civil society has aligned itself with the elements within the power-sharing government in opposing the ICC. So the argument – and it's interesting that it is coming from human rights groups and NGOs, as well as the government – is that it's about local solutions, we need to sort this situation out ourselves. There is a very different message coming from many victims of the violence, however, saying "we have no faith both in the judiciary of this country and in this power-sharing agreement and the leaders within it. We're not going to see serious justice done by these people so there may be recourse to a body like the ICC." Zimbabwe is a particular case where the strongest support for the ICC comes from the grassroots level, but it is very difficult for those voices to be heard because of the government and civil society opposition to the Court.

This is something that opponents of the Court need to contend with. For many African populations there is a great amount of hope for the ICC. We saw this in Congo and Uganda in early days when the ICC first became involved. These cases concerned populations that had seen the debasement of domestic institutions, suffered at the hands of their own governments, and had huge hopes and expectations of international bodies. I think the problem in Uganda and Congo has not been outright popular opposition to the Court – it's been, in many ways, unfulfilled

hopes. Because of the way the Court has gone about its work in Uganda and Congo, it has disappointed the people the most. That's the sad reality for the ICC at the moment.

**David Anderson:**

'Unfulfilled hopes' is a very good way of summarizing it. It leads on to the question of the perceptions that people have of the ICC, which are not entirely positive, and the actual practicalities of what the ICC can do and should do. On the one hand, you have the arguments that the ICC is 'white man's justice' being applied to international law. I think this is a gross misrepresentation of what the ICC is and what it is trying to do. However, the current configuration of the politics is making it all too easy for politicians in Kenya, Sudan, and Zimbabwe to portray it in that way. The fact that we now have a situation where both the African Union and the Arab League have publicly opposed the indictment of Bashir, while Western governments have generally supported it, has polarized this debate in a way that allowed politicians who wish to popularize the idea that this is white man's justice to do so. I think that is very unfortunate and I think it misrepresents the reality of the Court. We are now on the back foot having to sort that out, which is taking up a lot of time and effort. The substantive issue that makes it more difficult still is that the ICC has not always had the best record. Its decisions and processes have sometimes been wanting. Now we know, internationally, especially from experience in the Balkans, that if you want to prosecute state actors for atrocities and organized political violence – which is an extremely difficult and laborious task – then it is likely to require a strong investigative process in which the Court and the prosecutors need to be highly professional and robust. In attempting such prosecutions, you are fighting against a set of institutional and controlling parameters and mechanisms that work in the interests of those you are seeking to convict. If one talks to prosecutors in the Balkans, they will tell you about this in detail. Thousands of pages of testimony, months of work: this is a slow process and it is an enormously expensive process. Now relate that to the ICC:



understaffed, under-resourced, and with too many things on its plate. The ICC is not equipped, yet, to deal with this kind of justice. So perhaps, if the prosecutor has made decisions to go forward with certain cases rather than others, then that might be a pragmatic decision given the resource and staffing issues. Whatever the reason, the ICC has not always been able to do its job very effectively. There are also management and cultural problems within the organization itself and it needs to be revived and to reconsider some of its procedures, some of its staffing issues. Maybe the quality of the staff in the ICC needs to be improved, bringing in those with local expertise and knowledge, and maybe the sense of which level of detail and proof are required for prosecutions needs to be reconsidered and set at a higher level. All these things are institutional, procedural matters that the ICC needs to deal with. I would argue that unless and until the ICC tackles these issues, it is going to find it difficult to win more supporters for what the prosecutor rightly and justly wants to do.

**Q. Is there a role for politics in the prosecutor's work? Does the Court have an implicitly political role to fulfill in conflict situations?**

**Phil Clark:**

The first thing to say is that, whether the court likes it or not, it is a political institution. These questions of whether the ICC and the prosecutor are political actors in many ways are facile and unhelpful. As soon as the Court begins to operate on the ground in Africa, and particularly when it begins to operate in conflict environments, it will inevitably be embroiled in political situations. For that reason, and I would concur with Dave entirely on his last point, that this is largely a question of ICC staffing. Something that has hamstrung the Court immensely is the absolute absence of country specific experts within the institution itself. The Court has undoubtedly some of the most talented legal advisors on the planet, but what it does not have is experts who are well versed in the nuanced politics of Sudan, Central African Republic, Uganda, etc. Without that expertise, the Court is not able to judge well how politics is playing out on the ground.

This is important for two reasons. First is a practical one for the Court itself: if you want to intervene in ongoing conflict situations, you had better know who you need to talk to, how to get to them, how to get people to trust you, to give you evidence and to assist you in your investigations. Without that level of cooperation, trials do not get off the ground. The Court has found that difficult to achieve so far. The second reason is a broader political issue: the Court needs that ground level expertise because it needs to know how its operations are going to be represented locally, nationally and internationally. The Court has struggled with the extent to which its job has been manipulated and broadcast by others for their own means. We have seen this in the Bashir situation because of the way the Court has gone about constructing the case against Bashir and the way the Court has gone about releasing information about what it has done in Sudan: this has played into Bashir's hands. Bashir has found a political saviour in the ICC. We are talking about a president who was bedeviled domestically, and facing increasing political opposition in Khartoum let alone the rest of Sudan. In the ICC Bashir has found a rallying cry. He has used alliances with the African Union and the Arab League to bolster the argument he is propagating domestically that the ICC constitutes neocolonialist meddling in Sudan's affairs. What we have seen now is vociferous support for Bashir from erstwhile opponents and silence from even the government of Southern Sudan and some of the rebel movements in Darfur, who are very concerned about what it would mean domestically to openly support the ICC. Bashir has manipulated this situation extremely well. It remains to be seen how sustainable that support will be. As national elections near and the referendum in Southern Sudan looms, we will see the cracks in Sudanese politics reappear. In the immediate, however, Bashir has gained a huge amount of credence since the indictment. That makes the Court's job a whole lot harder. It has to deal with questions of white man's justice, it has to deal with the fact that there is decreasing sympathy towards the Court domestically. This will make it more difficult to get the material and evidence that would be necessary for a trial of Bashir.

The Court has tried to be an apolitical organization and it has not wrestled with these realities on the ground, and it has made its own job harder in the process. What we have learned from international justice in the last ten years is that it is one thing to have the best lawyers in the world, but you have to understand the societies where you are operating. The ICTY under Louise Arbour was particularly good at hiring country experts. And what those experts were able to do was shape the Court's operations and make sure the ICTY was able to convince governments to hand over their own. That was one of the great successes of that tribunal. In absolute contrast, you have the ICTR, particularly under Carla del Ponte, that did not believe that the nuances of local politics mattered. As a consequence there was continual bad blood between the tribunal and Kigali. This made it impossible for the tribunal to act effectively on the ground and completely eliminated the possibility of looking at crimes committed by the sitting government of the day. I think the sad thing from the ICC's point of view is that it has not learned these very obvious lessons from the tribunals that preceded it. The prosecutor often talks about the ICC as representing the evolution of international justice, building on a heritage of law developed through the ad hoc tribunals. But in the case of politics and the importance of local politics for international justice, the ICC has not learned these lessons.

**Q. Could you speculate on the future of the Court in five or ten years? What are the best and worst case scenarios for its standing in the international system? What can the Court and international actors do to cement the Court's legitimacy?**

**Phil Clark:**

I'll make two main points here. The first is that we are going to see a shift in prosecutorial strategy as time goes on. The early years of the Court have inevitably been difficult because it is a new judicial institution that needs to get results. I think that has led to the kind of pragmatism from the Court that we have seen so far. Part of the reason that the Court has gone after low and middle ranking officials, rather than the Bashirs of the world, is because it has to get

legal results. The hope of course is that with the cases that the ICC has at the moment we are going to see those kinds of judicial results and this will then allow the Court to be more ambitious. We are probably going to see convictions in the Congolese cases; I think the cases against those individuals are quite strong, the evidence has been very systematically gathered – not always by the ICC but by other sources – nevertheless I think the legal cases are quite firm. This will buy the Court some breathing space, and that will be a key factor when the current prosecutor moves on. In that way Ocampo has had the most difficult job, which is to get the Court off the ground. The next prosecutor will face a very different set of challenges, namely whether the Court can live up to its highest vision of itself, will it prosecute the toughest cases, will it move outside of Africa and truly become a global court? This will be a big challenge for the incoming prosecutor.

The second issue, and this is where it is uncertain whether the Court will succeed or fail, is can it get the US on side? This will have to be one of the Court's major goals over the next five to ten years. Without the US's support the ICC is going to continue to face difficulties within the Security Council, which translates to blocking the Security Council's referral of the most important cases to the Court. Let's be honest, with Bashir, we were never going to see a head of state brought to the ICC if we had to rely on a state referral; the ICC needed the UN to do that. This is a trend that is going to continue into the future. We will probably only see sitting members of government indicted by the ICC if they are referred by the Security Council. So if the ICC is going to fulfil this utmost vision of itself, dealing with the toughest cases, then it is going to require strong support and coherence from the Security Council, and the US will be central to this. The other reason that the Court is going to need Security Council support is that it will rely on UN peacekeeping missions and other military support on the ground to do the arresting of the suspects in question. The problem that the Court has faced to date it is that it has rarely had that support. The Court can issue arrest warrants for the LRA in the Northern Uganda situation, but what good is that if

there is no military presence to back this action and arrest and transport these individuals? The same situation will undoubtedly come into play with Bashir: yes he's been indicted and most members of the Security Council have backed that rhetorically, but Ocampo is right to doubt the fortitude of the UN and AU missions on the ground in Sudan to do the dirty work. He knows that for the future of the Court this issue has to be dealt with, and that there has to be this kind of cooperation and the US will be the most important state in terms of getting that cooperation.

**David Anderson:**

I think the ICC is standing at the crossroads. The decisions of the next eighteen to twenty-four months are probably going to be critical. Everything depends on credibility: can the Court maintain credibility if they cannot get Bashir into the dock? How the international community chooses to react to this is critical. Much of this may be out of the current prosecutor's hands; Mr. Ocampo may have no control over this whatsoever. What he has done by indicting Bashir is rolled the dice. The crucial actors here are the US and the EU. Will they support the Court and will they lobby and canvass for it to be properly resourced and developed in such a way that will allow it to bring its cases forward? Or will they decide that you can only do that if you have the support of other regional organizations? If that is what they decide, and I think that is what they might decide, then the future of the ICC is very troubled. At present I cannot see the US under the Obama administration or the leading EU countries, UK and France, moving forward to support the ICC if they know that it is going to bring confrontation with the AU and the UN. We have not really talked about the UN structures here but they are very important, you have to ask why did the UN Security Council pass the Bashir case on to the ICC and why did the US abstain? To an extent here you have a game being played called 'pass the parcel.' The UN is very good at passing problems on to other bodies when it does not think it can fix them without breaking a consensus. The UN now has a Peacebuilding Commission, which is very rapidly becoming more important in the UN. It seems likely that the Peacebuilding Commission will adopt a

stabilization and power-sharing approach, and this will incline towards non-prosecution, aiming to build peace in the short-term, and leaving prosecution issues to the long-term. I may be wrong, but my best bet at the moment is that the combination of the lack of resolve on the behalf of the US and the EU, the UN's desire not to cause any major rifts with member states, plus the Peace Building Commission's commitment to stabilization does not bode well for the ICC. My view is not optimistic; I think the ICC could be in for a very difficult four or five years.

*Interview conducted by Zachary Manfredi and Julie Veroff.*

## ICC Observers Project – Oxford Transitional Justice Research

**Exclusive Interview with David Tolbert, Deputy ICTY Prosecutor and Senior Fellow, Jennings Randolph Fellowship Program at the United States Institute of Peace**  
20 March 2009

*David Tolbert most recently served as U.N. assistant secretary-general and special advisor to the U.N. Assistance to the Khmer Rouge Trials (UNAKRT). From 2004 through March 2008, he was the deputy prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). Tolbert has extensive experience in international law. Prior to his position as deputy prosecutor, Tolbert was the deputy registrar of the ICTY. He also served as executive director of the American Bar Association's Central European and Eurasian Law Initiative (ABA CEELI), which manages rule of law development programs throughout Eastern Europe and the former Soviet Union. Prior to his work at ABA CEELI, Tolbert also served at the ICTY as chef de cabinet to the then president and as the senior legal adviser to the Registry. He has held the position of chief, General Legal Division of the U.N. Relief and Works Agency (UNRWA) in Vienna, Austria and Gaza. He has also taught international law and human rights at the post-graduate level in the United Kingdom and practiced law for many years in the United States. He has published a number of publications regarding international criminal justice, the ICTY and the International Criminal Court (ICC) and represented the ICTY in the discussions leading up to the creation of the ICC.*

**Q. You have worked at the ICTY and in Cambodia, cases in which the application of the genocide convention was controversial. What do you make of the Pre-Trial Chamber's failure to grant Ocampo genocide charges in this case? What is the significance here?**

**A.** I have not had the chance to study seriously the Pre-Trial Chamber's ruling on the genocide charge. In terms of a general comment, in the course of the

history of the ICTY, the only occasions that we were able to obtain genocide convictions arose out of the Srebrenica massacre. Thus, there was a limited application of the Genocide Convention in the ICTY case law, as compared to the ICTR. In Cambodia, the principal crimes do not fall within the ambit of the Genocide Convention because, for the most part, the killings did not target specific religious, national, racial or ethnic groups. There may be genocide charges relating to specific ethnic or national groups such as the Hmong or Vietnamese populations in Cambodia, but the Genocide Convention does not appear to apply to the vast majority of the killings and crimes committed during the Khmer Rouge period.

One of my general concerns with respect to genocide is that while obviously genocide is a very serious crime, there is often a feeling among victims and among the international community as a whole, that if crimes are not found to be genocide then they are somehow less serious than other violations of international humanitarian law, with the perception that crimes against humanity take second place since genocide is perceived to be 'the crime of crimes'. This disturbs me because genocide is a very particular crime and it is difficult to show the intent that is required to prove genocide. Moreover, there are many crimes against humanity that are just as serious, but do not qualify as genocide because they are not committed with the specific intent to destroy, in whole or in part, a specific ethnic, religious, national or racial group. Cambodia is a good example of this issue. During the Khmer Rouge period, the worst crimes committed in my lifetime occurred, but most of these acts do not fit within the rubric of genocide. With the recent Pre-Trial Chamber decision in the Bashir case, there are allegations of extremely serious crimes against humanity: extermination, persecution, etc. My concern, however, is that people can see the failure to have the label of genocide put on these findings and believe they are somehow less serious or should be taken less seriously. I think we need to do a much better job as international lawyers, particularly those of us in the international criminal law field, of explaining genocide in terms of its legal

elements. We need to help people understand that this criteria applies in particular situations and does not apply to other situations, but that crimes against humanity and war crimes can be every bit as serious as crimes of genocide.

I was on a panel at a conference some years ago with Geoffrey Robertson, who advocated doing away with the crime of genocide because it is so difficult to prove and controversial. I do not agree with that argument. Genocide is a crime that is on the books and needs to be prosecuted where it applies, but we need to do a better job of explaining how crimes against humanity and war crimes can be just as serious.

**Q. How does the Pre-Trial Chamber's ruling in the Bashir case relate to the 2005 UN Commission of Inquiry's findings? Does the Court's refusal to grant the genocide charges support the findings of the Commission? Are we reaching a consensus that the violence in Darfur is not appropriately classified as genocide? How will this influence the future development of international criminal law?**

**A.** I want to be very cautious because I understand the prosecutor has said he is going to appeal the decision, so I think we have to wait and see what is the result of that appeal especially, particularly since the Pre-Trial Chamber's decision was a split decision. The Commission and the majority of the Pre-Trial Chamber did not find the facts sufficient to support a genocide charge. I think we have to wait and see and let the process play itself out. Also the Pre-Trial Chamber said although there is not enough evidence to sustain a genocide charge at this stage, it is open to receiving additional evidence. The prosecutor has not been able to get into Sudan for the last several years. In any event, the Pre-Trial Chamber's decision is an indication that we may well be dealing with crimes against humanity and not genocide in the Darfur case. However, we should wait until we have a more final judicial determination before we make any predictions.

The Pre-Trial Chamber has found that there is a *prima facie* case of horrific crimes in Darfur. Thus, I go back

to my first answer and say that we need to do a better job of explaining that simply because there is not a genocide charge, it does not mean that these crimes are not as serious as those that fall under the rubric of genocide. These are extremely serious crimes and human suffering is present in these cases regardless of whether the label of genocide, crimes against humanity or something else is used. I hope the world does not lose focus or somehow downgrade the significance of the charges because of the particular legal label that is attached to them.

**Q. You are currently researching the impact of international criminal tribunals on peace and security in the countries where they have jurisdiction. What methodologies are you using in this study to measure the impact of the tribunals? What case studies are you using? What are your preliminary findings?**

**A.** I have narrowed the focus of my research. I have not come up with the right term yet, but I am examining what I call "positive complementarity" or the "other side of complementarity." I am looking at how international courts can work effectively with domestic courts. On behalf of International Criminal Law Services, an NGO, I spent a month in Bosnia in November and was there again recently, and Aleksandar Kontic and I did an extensive assessment of the Bosnia State Court and Prosecutor's Office, looking at how these institutions are performing. The State Court is a national court that has hybrid elements: international judges sit with domestic judges, and international prosecutors work with national prosecutors. I was interested in these institutions because I spent considerable time at the ICTY working with actors in the region and with the State Court. When I served as Chef de Cabinet to President McDonald, we set up the first international tribunal outreach program to try and explain the role of the ICTY to people in the former Yugoslavia. I was also involved in establishing the Rules of the Road program, whereby the Office of the Prosecutor reviewed cases from domestic prosecutors to see whether they met international standards, and subsequently we moved on to transferring indicted

cases from the ICTY to national courts, subject to monitoring. I chaired the joint ICTY-OHR legal framework task force (which was responsible for establishing the legal infrastructure for the transfer of cases) and then headed the Office of the Prosecutor's Transition Team, which handed over cases that had been developed but not indicted at the ICTY to national prosecutors (called, in our parlance, Category 2 cases). We also shared information by allowing our databases to be accessed by national prosecutors. I have been very interested in how that process is working and I have been pleased to find that it is working well in Bosnia in most respects.

We are moving past the era of the ad hoc tribunals. We also have the benefit of the experience of the Special Court for Sierra Leone and other experiments with hybrid courts, but what we are missing is a fully developed strategy to assist national courts in prosecuting these crimes. Complementarity at the ICC needs to be about more than the legal standard that the ICC applies in determining which cases or situations it is eligible to take. If the ICC takes the case of the general, who prosecutes the colonel? If war crimes prosecutions are going to be effective, how can we build national systems that are effective as well? This is an issue facing the international justice movement, and I am trying to look at these issues, particularly given my experience in Bosnia and the former Yugoslavia and to see whether those models can be applied more broadly.

**Q. What do you think will be the role of regional and hybrid tribunals in the future of international criminal law? Given that the ICC is now up and running and is a permanent court, will the creation of tribunals like the ICTR, ICTY, Sierra Leone etc., no longer be necessary? Will all major violations of international criminal law be filtered through the ICC? Also, how should the ICC view the case law of the regional and hybrid tribunals?**

**A.** I do not think there are going to be more ad hoc tribunals like the ICTR and ICTY. I do think that there will be additional hybrid tribunals, similar to those in

Sierra Leone and Bosnia, and perhaps prosecutions under UN Transitional Authorities like Kosovo and East Timor. I believe we have to develop a better way of doing this, and we have to find ways to build up local capacity and to create partnerships between local courts and the ICC. Thus, we need a wider concept of complementarity. If complementarity is merely the standard used to determine who gets prosecuted at the ICC, and nothing happens in the country of origin, if there are no further efforts to prosecute or investigate the alleged crimes, then the ICC's impact is going to be relatively limited. Thus, we must have a broader strategy. While it is a great accomplishment to have the ICC in place, it is going to deal with a relatively small number of cases and only a handful of leaders, particularly given the number of conflicts in the world.

In terms of the decisions and substantive law that has been generated by the ICTR and the ICTY in particular, I believe the decisions of these courts have to be given a great deal of weight by the ICC, and I think they are being given this weight. Obviously these decisions are not binding on the ICC, but they represent a body of law that been developed by a common appeals chamber and is entitled to respect. As a former prosecutor I have not always agreed with the decisions of the appeals chamber, but on the whole, the ICTR and ICTY and some of the other courts have developed a solid basis of international criminal jurisprudence that has being referred to by the ICC and should be taken very seriously. It is not binding but it must not be disregarded.

**Q. What types of outcomes will the ICC need to produce in order to establish its legitimacy on the international stage? In terms of the Bashir case, the Lubanga Trial or the Bemba Trial, but also more generally, what does the Court need to be to be seen as a viable, respected actor?**

**A.** The ICC needs to have solid cases with solid decisions that meet international standards that are widely seen as fair. That is the basic outcome that we will need to see to establish the Court's legitimacy. When we look back to the early days of the ICTY, I

can remember the first (Tadic) trial, with Judge McDonald presiding. It was widely seen as a fair trial, which was important for the legitimacy and credibility of the ICTY as an institution. The trials at the ICTY and ICTR have largely been seen to be fair and to have been conducted in accordance with applicable international and domestic standards of law. This is the same outcome that we need to see at the ICC.

An important issue that always haunts these international courts is that they do not have coercive powers; they do not have police forces or ways to effect arrests and garner evidence. This is a big factor that works against them. We should take the long-view and assess these tribunals over time. I know that there are many comments that Bashir will not be coming to The Hague. On the other hand, if I think back to Milosevic and all the people we indicted at the ICTY, we heard the same concerns. Now Karadzic is in the dock, Milosevic stood trial, and of the 161 people that were indicted, 159 have come to The Hague, had their cases heard, dismissed or transferred, or they are deceased. On the whole, the record of the ICTY looks quite good. The ICTR's record does not look bad either. Moreover, I would not judge the ICC or other tribunals on cooperation issues; I would judge the ICC on its ability to conduct fair trials in proceedings that are seen as such by objective, outside observers.

**Q. As a follow up question: do you think if Bashir were never brought to trial before the ICC, but that the Court did still manage to have a series of successful prosecutions for lower level officials in different conflicts, that the Court would still be viewed as successful?**

**A.** I think the Court will not be viewed as a success or failure on the basis of one case. I hope it will be judged on its overall record over a longer period of time. I do not think it would be fair to put too much weight on one case. I would not want to judge the ICTY, for example, on the basis of Milosevic dying during the trial. I do not think that it is a fair and objective standard. We would not judge the US Supreme Court solely on the basis of the Dred Scott

case or Plessy vs. Ferguson. The House of Lords has made some bad decisions over the years, but if you look at the record of these courts as a whole, it is a different story.

**Q. Does the ICC have an implicitly political role to fulfill in conflict situations? If so, what should that role be? Should the Court strive to remain politically neutral?**

**A.** In general, of course the prosecutor has to be fully aware of the political situation that he or she is acting in. Prosecutors are elected officials in the sense that the Assembly of State Parties selects them. Most prosecutors need to be cognizant of the political situation in which they are dealing and that affects things like the timing of the issuance of indictments and also has a significant impact on important questions like witness protection, security of staff, and related matters. The political situation is something that the prosecutor always has to be aware of. However, my view is that the prosecutor is first and foremost a judicial actor. Therefore, his or her primary focus is to apply the relevant law to the situation, and the criteria that is set forth in the applicable statute. So yes, there are going to be political considerations or political factors that will have an impact on the Prosecutor's work and on decisions, but a prosecutor first and foremost must be guided by the law and be a judicial officer. If he or she is seen as a political actor, then, at the end of the day, he or she is going to lose credibility and the prosecutor's office is going to lose legitimacy. It is thus important to keep the judicial framework in mind.

**Q. There's been discussion recently that the African Union and the Arab League potentially want to seek a deferral on the basis of Article 16 for the Bashir indictment. Is that a viable option and what should be the criteria for deploying or using article 16? What might be the impact of using it for the future of the Court?**

**A.** Article 16 was essentially a compromise. I remember when it was introduced by Singapore at a New York ICC Preparatory Committee meeting. It was



a compromise to placate the permanent five members of the UN Security Council, particularly the United States, which had wanted the Security Council to be in a position to control the situations that the Prosecutor was allowed to investigate. Since this position was not accepted, Article 16 gave the Security Council some power to temporarily halt an investigation when the prosecutor exercised his or her proprio motu powers or where there had been a state referral. My understanding of Article 16, and I believe that former US War Crimes Ambassador David Scheffer has been pretty clear about this, was never intended to apply to a referral by the Security Council itself. This kind of stop-start approach, whereby the Security Council sanctions an investigation and then pulls it back, was not the intention behind Article 16. Be that as it may, I guess Article 16 can be interpreted in this way. However, my view is that Article 16 is intended for some kind of extraordinary situation. Thus, as a former prosecutor, it causes me concern and nervousness that one could begin a legitimate investigation and then have it halted for reasons that are essentially political and not judicial. My opinion is that the Security Council should exercise Article 16 extremely cautiously. I do not foresee a situation where it would be used, and I certainly do not see the Darfur situation as warranting an application of Article 16. I realize the situation in Darfur is very complex, and there is clearly a considerable political dimension at play, but it seems to me like the prosecutor is acting appropriately under the statute thus far and the process should be left to proceed on its own terms.

**Q. How significant is it that the first set of cases that have been referred to the ICC are all for crimes committed in Africa? How might this affect its overall legitimacy? Where, in the future, do you think the Court might find other indictments?**

**A.** What I find a little odd about this 'only in Africa' mantra is that my recollection is that in the case of Uganda, the situation was a self-referral made by Government of Uganda. The DRC was self-referred by that government as was the case of Central African Republic. So out of the four situations, three have

been referred by the countries themselves. Moreover, the Prosecutor has looked at a number of other situations, such as Iraq, Colombia, Georgia, etc. It does not look to me like the prosecutor has simply focused on Africa. It appears that, except in the case of Sudan, these countries came to him. You can have an argument about whether self-referral is intended in the ICC Statute. There is criticism of the process of self-referral and that is a legitimate subject for discussion and debate, but it is not as if the prosecutor has exclusively focused on Africa. African leaders to the Court referred these cases. However, I do think that this discussion does raise a fundamentally important question regarding international justice and for which we do not have an adequate answer yet. That is that the ICC's jurisdiction is not universal. While the situation has certainly improved dramatically with the ICC, as with the ICTY, it only had jurisdiction over the former Yugoslavia and the ICTR over Rwanda. Now the ICC has a much broader jurisdiction. Nonetheless, there are many war crimes that are being committed or have been committed that it does not have jurisdiction over. There are only 108 state parties to the ICC out of the 192 members of UN, so there are many countries that are not covered by the ICC's jurisdiction. The Security Council referrals are obviously subject to the veto of the permanent five, so there are still vast areas of the world that are not covered by the ICC and this is a problem. I do not think it is an argument against international justice; instead it is an argument for expanding the coverage of the ICC so that it covers the entire world. However, at present the ICC is imperfect in terms of its jurisdictional scope, and we have to push harder for further ratifications. Nonetheless, if we go back to 1993, when no international court or tribunal had any jurisdiction and see that 15 years later the ICC has broad jurisdiction, then we are making progress. It is indeed essential for more states to join the ICC, so we address the lacunae that presently exist.

**Q. The mandate of the Rome Statute was originally supposed to govern the crime of aggression as well. There has been much debate**

**about how the crime of aggression will be defined and whether it will actually be incorporated into the list of crimes the Court will prosecute. What do you think is the future of the definition for this crime and its relation to the ICC?**

**A.** It looks to me like it will continue to be debated for some time. We will have to see what the review conference comes up with. There is a lot of controversy around the crime of aggression, and there always has been. The very term is difficult to define. To some extent, the Court has plenty of work to do already, dealing with genocide, crimes against humanity, and war crimes. I doubt the issue of aggression is going to be solved anytime soon, but on the other hand, I have not attended the ICC meetings on aggression. Thus, I am just a distant observer.

justice movement, I think there are some causes for optimism. I think you have to be an optimist in this business.

*Interview conducted by Zachary Manfredi and Julie Veroff.*

**Q. Could you speculate on the future of the Court in five or ten years? What are the best and worst case scenarios for its standing in the international system? What can the Court and international actors do to cement the Court's legitimacy?**

**A.** My first reaction is to say what Chou En-lai said of the impact of the French Revolution: it's a little early to tell.... There are a couple of possible scenarios. Hopefully the Court will become stronger, passing some of these early tests and difficulties, expanding the number of states parties, thus having much broader jurisdiction, and becoming a truly effective court. Of course, one can see an alternative scenario where things go in another direction, and the Darfur situation is deeply worrying in this regard. However, I am heartened by the ad hoc tribunals' experience. I will never forget in 1997 when I was working in the ICTY, and I was thinking to myself: where is this going? We had only a couple detainees in custody, and we seemed to have no hope for additional indictees arriving. The world's attention seemed to have shifted away, and the ICTY looked in bad shape. A leading commentator, writing in *Foreign Affairs*, advocated for winding up the tribunal and closing it down. Over the next ten years, the situation completely turned around. Thus, it is difficult to make predictions, but based on the experience of the ICTY and ICTR and the general course of the international

## Oxford Transitional Justice Research – ICC Observers Project

**Exclusive Interview: Tom Ginsburg, Professor of Law at the University of Chicago**

15 March 2009

*Professor Ginsburg focuses on comparative and international law from an interdisciplinary perspective. He holds B.A., J.D., and Ph.D. degrees from the University of California at Berkeley. One of his books, *Judicial Review in New Democracies* (Cambridge University Press 2003) won the C. Herman Pritchett Award from the American Political Science Association for best book on law and courts. He currently co-directs the Comparative Constitutions Project, an effort funded by the National Science Foundation to gather and analyze the constitutions of all independent nation-states since 1789. Before entering law teaching, he served as a legal adviser at the Iran-U.S. Claims Tribunal, The Hague, Netherlands, and consulted with numerous international development agencies and foreign governments on legal and constitutional reform.*

**Q. As a scholar of comparative constitutional law what is your opinion of the doctrine of complementarity? How does complementarity actually work to accommodate both national sovereignty and the enforcement of fundamental human rights? Under what circumstances can we expect the Chief Prosecutor to accept assertions of national jurisdiction?**

**A.** From the perspective of comparative constitutional law the doctrine of complementarity is a good thing. It reassures those jurisdictions that are afraid of international overreaching that they will have a degree of autonomy, and also allows those jurisdictions with more capacity for justice to pursue issues of impunity in their own way.

From the perspective of the international system, however, I think complementarity raises some problems and that it is clearly a second best solution. The problems are those that are familiar in debates over universal jurisdiction. The system of universal

jurisdiction means that international crimes are adjudicated, potentially, in the courts of a hundred and ninety some separate countries. This could have grave consequences for consistency and development of the law. The complementarity regime is a half-best solution from the point of view of the international system.

It was designed to induce powerful states like the US to join the Rome Statute, but, of course, it ultimately failed to do that. In the negotiations the US was obviously pushing for the doctrine of complementarity, but there were some in the US that would not have supported the Statute unless it included blanket immunity for the US. So even though the US lobbied for complementarity, fixing or reforming the regime of complementarity is unlikely to induce the US to join the Rome Statute.

**Q. What do you think about the ICC's Pre-Trial Chamber's refusal to grant genocide charges requested against Bashir? Will this at all be seen as a failure? How will it influence the indictment process and the political situation?**

**A.** I heard a radio interview with Bashir's lawyer in which he claimed that this was a great victory and that it showed the weakness of all the charges. This is obviously not the case, and clearly the court did think that it had the evidence to go forward with charges of crimes against humanity and war crimes. Genocide does require a high evidentiary burden in the sense that it does require specific intent, which can be very difficult to prove. Merely causing massive numbers of deaths is not enough to warrant a genocide charge, one must have specific intent to destroy the group *qua* group.

I read this as the court showing that it takes its duties seriously to review the prosecutor's request for indictment and, having weighed the evidence, simply thinking that it was insufficient to warrant that particular charge of genocide. That's the extent of the issue here. You could view it as a signal to Bashir, insofar as the court might not be going as far as it could have, but I do not actually think that was the court's motivation.

In general this points to a predicament that the court has been in that I address in a recent article in the *Chicago Journal of International Law*. It appears that the Europeans would like to use the court as a sort of negotiating stick to induce Bashir to behave better in Darfur. From the point of view of the court, however, this raises serious problems. A court's indictment and legal process requires that it go forward without regard to politics; this is the nature of legal discourse. The court does not want to develop a reputation as being an attack dog that can be pulled off at the will of particular states or groups of states. In other words the court needs to be a credible institution, which will credibly pursue justice without regard to the political imperatives of the moment. Much of what has gone on in the last eight or nine months since the indictment was issued has been negotiation trying to get Bashir to behave better in exchange for an implicit quid pro quo that the court would not go forward. I think that dynamic itself damages the court.

**Q. You've written about the Bashir indictment before and highlighted that it brings forward a "clash of commitments" between political considerations of state actors and the ICC's own agenda as a court pursuing legal justice. Could you explain how this tension plays out in the context of the Bashir case? What do you think will ultimately be the outcome of the indictment and how will it set precedent for the court's future prosecutions? And its perception internationally?**

**A.** The clash of commitments refers to the tension between several imperatives at play in international criminal law. States, particularly those with weak capacity, join the ICC to ensure prosecution of major perpetrators; the court needs to follow through on its commitment to prosecute, or it will be seen as a mere political tool. On the other hand, sometimes states need to commit not to prosecute in order to induce perpetrators to step down or end their criminal activities. Something now has to give in the clash of commitments. Either the court will lose its reputation as a body that can bring major international criminals to justice or it will succeed and the implicit promises by

the Chinese and others to go easy on Bashir will be dashed. If the latter then we will look back and say that the indictment was a great turning point for the court. All signs, however, indicate that it will not succeed; barring a humanitarian intervention by the Western powers in the Sudan it is difficult to see how Bashir will ever be turned over to the jurisdiction of the ICC.

Remember that notwithstanding all the protests in Sudan about the US interfering with its internal affairs, the US is not the ICC and the US is not a party to the Rome Statute. The Court is essentially betting that the US will somehow go in and get Bashir or expend precious political capital, and in the short run I don't think that the US is going to expend that capital.

This is a very interesting development. One of the common criticisms of human rights legislation in the US is that it is plaintiff driven, and that it leads to plaintiffs' diplomacy; international relations are subject to endogenous shocks that are caused by individual plaintiffs filing law suits, for example against terrorist states in the US or against foreign individuals who have been engaged in torture under the Alien Tort Claims Act. What we have here is not plaintiffs' diplomacy, but judicial diplomacy, where international relations has been shocked by an autonomous court issuing an arrest warrant for a sitting head of state. I do not think that anyone is that happy about this development: people in Washington are not pleased and certainly regimes like China and others who support Bashir do not want to spend their political capital protecting him. The court has forced all of these issues on to the international agenda. The court is betting that the US and other Western powers are willing to spend the capital necessary to bring Bashir into custody, and I'm skeptical of that given the other things on the agendas of the international community at the moment.

Only time will tell if the US will act on this case. It strikes me that the US will not want to escalate the situation. Bashir will make things worse for himself if he goes on to create a humanitarian crisis in Darfur.

It may be that he ends up backing off from the steps he has already taken to expel aid groups. If he simply maintains the status quo, then he gets a lot of what he wants without exacerbating the situation and it is difficult to imagine an immediate threat to him. An interesting test of this will be whether Bashir can travel to those countries that are signatories to the Rome Statute, such as many members of the African Union, that have been diplomatically supportive to him. These states have an obligation to arrest him and take him into custody to extradite him to the Hague, but it is unclear if they will actually do so. This again illustrates the risky nature of the arrest warrant: if countries allow him to travel without arresting him then the court is worse off than it was before this whole incident.

**Q. Does the ICC have an implicit political role to fulfill? What is this role? Should the court strive to remain politically neutral in conflict situations? Does the court's participation in political conflicts threaten to undermine its perceived legitimacy?**

**A.** All courts by their nature do have political impact and are political institutions, but very particular kinds of political institutions. They are dependent on relationships with other political institutions to instantiate their decisions. The court does have to act in a way that is very sensitive to what is possible.

Let me give you an example: in the US we have just had a change in power from a president who presided over a regime of state-sponsored torture. Because some of these incidents involved states that were and are parties to the ICC, some took place in Iraq and some involved renditions and transport through countries that were signatories, arguably the ICC would have jurisdiction to examine whether Bush or Rumsfeld were guilty of war crimes.

It is highly unlikely that the court will take on such a case because it would effectively spell the end of the court. There would be such political pressure from the US to cut off the ICC's funding and to sign bilateral agreements with countries requiring them to exit the Rome Statute or otherwise not cooperate with the

court vis-à-vis the US. In the end such a case would harm the court's overall mission.

Now the Sudan case might not be quite that kind of case, but it is certainly a risky one from a practical point of view. The prosecutor and the judges have bet the institution's credibility on its ability to try a sitting head of state who is not in their custody. This may be a terrifically successful gamble, but right now I would say the more likely outcome is that it will be a very unsuccessful gamble. This is what I mean by saying that courts have to act within their political contexts. They must be aware of what is possible in the pursuit of justice and particularly pay attention to what is possible in terms of securing those they indict for trial.

**Q. What would represent "success" for the court overall? What are the standards by which we can consider a prosecution successful?**

**A.** I think that first of all the court needs to meet standards of justice and basic due process and doing all of this in an economical enough fashion that they are not criticized as the ICTY was. With the ICTY some people wonder if the whole effort was actually worth it, given that well over a billion dollars was spent on a few dozen cases.

I do think that it is possible for the court to be successful and I think it is likely, if it chooses cases that it can successfully deal with, to succeed. It could be that we will look back at this moment, as people do now looking at the Karadzic case of the ICTY, where setting out an arrest warrant that seemed impossible to execute was actually good for the court and for the pursuit of justice in the former Yugoslavia. I, however, remain skeptical that this will be the case with Bashir.

**Q. What do you think will be the outcome of the court's first set of prosecutions? How influential will these prosecutions be for the court's future activities? If the Lubanga and Bemba trial are prosecuted successfully, but Bashir remains at large will the court still be viewed as successful?**

**A.** I think that establishing a reputation for conducting high quality prosecution of mid to upper level officials might convince the international community that the court is playing a real and important role.

One reason that it is important to have a lot of cases is so that the court can help develop the standards of international criminal law that are articulated by the ICC and other international legal tribunals. To do this the court will need to take on a sufficiently large number of different cases in different situations. Moving away from some of the more controversial and ambitious tasks of international criminal law, such as defining the crime of aggression for example, is probably healthy for the court as well. It should be seeking to play a moderate role in international politics by providing credible transitional justice, but it should not be trying to engage in judges' diplomacy where it tries to independently affect the political calculus of the most powerful states.

**Q. What do you see as the future role of the court in 10 years? Will international criminal law gain increased authority and enforceability? What will its relationship be with key stakeholders? Might the US ratify the Rome Statute in the future? Why or why not?**

**A.** So far the court has been mockingly referred to as "the international court of African crimes" and there are reasons this has been the case. Many African countries lack the capacity to engage in these prosecutions on their own. There is also a sense in which, consistent with political logic, the court is avoiding making decisions that are uncomfortable for the most powerful states.

This is not necessarily a bad thing. The court is building up a credible record of pursuing and providing international justice. If the court succeeds at this it may be that, bearing in mind possible changes in the landscape of international power relations, it is able to expand its jurisdiction to cover other situations outside of Africa.

In any case the court is essentially an instrument of Western policy, in the sense that most dictatorships are not interested in the international criminal law project. In that sense the position of the court will depend upon the overall balance of democracy and dictatorship of the world in ten years. Right now the pendulum seems to be swinging back toward dictatorship. If that reverses and we have a fourth wave of democracy, which is not implausible given the speed of economic change, then one could imagine a heightened role for the court. The ICC can only play the heightened role if it itself is a pragmatic political actor.

**Q. Given that the Bashir case is the result of Security Council referral how might this change the political calculus of the prosecutor? What more pragmatic options could the court have pursued short of indicting Bahsir?**

**A.** Much depends on the factual circumstances of who was responsible for what in the Sudan, which I confess to know less about than I should. It may still, however, have been more pragmatic to go after a set of lower ranking officials. What we are essentially talking about here are horrible actions that really are attributable to a collectivity and the international criminal law paradigm doesn't fit the situation perfectly, when one considers the role of the Janjaweed militias and such. Given that international criminal law is our only real tool in providing justice in this situation that is what was used.

Ocampo is clearly a gambling man, and it may be that he will win big: if that is so more power to him, but I remain skeptical. I think this indictment does reflect a little bit of the sort of over-ambitious missionary attitude toward justice at all costs. It is better to have a little justice than none at all, and it may be that this risky approach may end up undermining the very enterprise of pursuing transitional justice and the international criminal law projects for those many perpetrators that it is actually possible to prosecute and punish.

*Interview conducted by Zachary Manfredi.*

## Oxford Transitional Justice Research – ICC Observers Project

**Exclusive Interview with Nick Grono, International Crisis Group, Deputy President (Operations), Brussels, Belgium**

6 March 2009

*Nick Grono has overall responsibility for Crisis Group's operations, including finance, development, security and personnel issues. Nick also leads Crisis Group's work on international justice and transitional justice issues. This interview was conducted on 6 January, 2009.*

**Q. What was the impact of the Court's involvement in the peace process in Northern Uganda? Were there tradeoffs between "peace and justice" in this instance? How significant was it that President Yoweri Museveni invited the Court to investigate these cases? What lessons can be extrapolated from this case?**

**A.** It was significant that Museveni invited the ICC into Uganda in the first place. For some this undermined the perceived impartiality of the prosecutor, Luis Moreno Ocampo, when he made the announcement of indictments in Museveni's company. It gave the appearance from the start that the investigation would focus primarily on the crimes of the LRA, and not other actors in the conflict as well. Given the history of the conflict in Uganda, one has to understand that there is widespread resentment against the government in the North, with many believing that has deliberately disempowered Northerners for political and historical reasons.

Recently though the Court has worked diligently to address the issue of how it is perceived in Uganda. The Court has certainly improved its outreach programs in Northern Uganda, but still has a long way to go. The Court's role in Uganda also did change the dynamic of the peace process and has helped to make it a more sustained and deeper effort than almost any other peace process in the past 20 years, even if it hasn't ultimately been successful. So in that sense the Court has also played a positive role in Uganda.

I think the Court has to realize that there will always be a risk it will be perceived as partial to particular sides when it investigates ongoing conflict. I think the Court learned from Uganda that it has to be very aware of the political dynamics of a conflict before it gets involved so it can take the necessary steps to ensure it is, as far as possible, perceived as impartial. Continued improvement to outreach efforts in Uganda is a good step in the right direction.

**Q. How has the request for an indictment of President Omar al-Bashir for genocide impacted perceptions of and expectations for the Court? Do you think a genocide charge can be successfully prosecuted? What do you expect to be the impact of the indictment on prospects for peace in Sudan and the region?**

**A.** First let me say that dealing with genocide is always a difficult issue. There is a view that genocide, while already in a category of the worst crimes, is the most serious of these. Not everyone agrees with this view. Some regard other large scale crimes against humanity as being just as serious. Whatever view one subscribes to, there is, however, a public perception that genocide is at the top of the list and this has important implications.

This is also the first genocide charge the ICC is looking into and also its first charge against a sitting head of state. From a political perspective there is a risk that if the judges say no to the genocide charge then this will be used to criticize the prosecutor. Sudan will presumably claim that he has overreached. But of course proving genocide requires evidence of special intent, and such intent is particularly difficult to establish. If the Court does not find the genocide charge established, it will simply mean that on the evidence before it in this case, there was not sufficient proof to meet the threshold – nothing more. It certainly does not mean that there has not been genocide in Sudan, and that there cannot be future charges of genocide.

There are also political and legal complications that arise when prosecuting non-signatory countries to



the Rome Statute on a UN Security Council referral. Some critics also claim that Bashir is being treated differently than others because in the case of Ahmed Harun and Ali Kusheb the prosecutor didn't allege genocide, but has done so in his application against Bashir. Sudan might perceive that Bashir is being singled out, which isn't necessarily the case, but one should be aware of the implications of the prosecutor's actions. It would be helpful if Ocampo could do more to explain his strategy of moving directly from Harun to Bashir. One should also understand that the prosecutor faces serious constraints in not having direct access to Sudan in order to get evidence and source materials as he has in other cases.

There are also some issues to consider with regard to the peace process. Sudan has alleged that there will be serious consequences if Bashir is indicted, but we need to take a serious and objective look at what they actually could do. First, Khartoum could certainly make it more difficult for NGOs operating in Sudan. It could also target the IDP camps. And there is some risk of fracturing the country, considering the interests of different parties in economic development and the already tenuous North-South peace agreement.

I think though that we often lose sight of the potential benefits of indictment in this case. This may be one of the only opportunities to actually have those responsible for the violence held accountable. Also the move to indictment might create more political space within Sudan for reform and changes in leadership. It might also go a long way towards convincing Sudan that opposition to the international community is not ultimately a viable strategy. As a result it may drive change in Sudan's confrontational policies, and encourage it to move toward peace.

**Q. What would represent "success" for the Court overall? What are the standards by which we can consider a prosecution successful?**

**A.** For the prosecutor I think success is really measured in the courtroom: having the accused

before the court, following clear procedures of due process, producing robust evidence, and resulting in a judgment that is accepted and respected would all be important for success. The prosecutor says that according to the doctrine of complementarity, in an ideal world, he'd have no job since national courts would handle all the cases. In the real world, however, countries in conflict are often unlikely to have the resources and institutions to mount serious investigations and prosecutions and oftentimes in conflict situations societal coherence does not exist strongly enough to mount fair and impartial trials. So the ICC or other institutions like it will be necessary for the foreseeable future.

If people respect the court and its work then this will of course give them an incentive to send cases forward. Kenya is an interesting example here with the Waki Report. If Kenya doesn't deal with these prosecutions domestically the ICC will most likely get involved. Either way though, in this case the very presence of the Court on the international scene helps to drive the norm of accountability and this can be seen as a success in many respects.

The Court needs to remain aware though that it will continue to have to do work in highly political areas. The prosecutor has to be scrupulous and be conscious about the importance of the perception of fairness.

**Q. How significant is it that the first (and still all) of the cases currently before the Court are against Africans for crimes committed in Africa? How does this affect the perception of the Court in Africa and in the international community more broadly?**

**A.** I think it is significant, but not to the extent that some people think. The reality is that the Court has constraints on where it can act. African countries are one of the largest regional groups to sign the Rome Statute and the Court's mandate only allows it to prosecute crimes that occurred after July 2002. Since that time, most serious violent conflicts have occurred in Africa. These factors combine to make Africa a natural focus for the Court. The Court also has four

active investigations at this point, and it is important to remember that in three of those instances the Court was invited in and in the other instance it received a Security Council referral.

That being said, however, if in five years time we are still only seeing indictments in African cases that will be a more serious problem for the Court. At that time people will start to ask more serious questions about the Court's focus. There could be future investigations in Kenya and Cote d'Ivoire, but also in Colombia, Georgia and Afghanistan, even though none of these countries have had atrocities on the scale of Sudan or Uganda, with the possible exception of Afghanistan.

Moreover, I think the Court is aware of this issue, and that while it will continue to insist that cases meet an appropriate threshold, it will pay serious attention to conflicts outside of Africa.

**Q. Does Article 16 of the Rome Statute effectively give the Security Council authority over the prosecutor's office? On what grounds and in what types of situations should the Council invoke Article 16?**

**A.** It doesn't give the Security Council authority over the prosecutor, but it does ensure that they have an awareness of each other's role. The prosecutor will be conscious that the Security Council can put prosecutions on hold. Ocampo probably suspects that some members of the Security Council would not have wanted him to go after Bashir, and in full-awareness of the possible use of Article 16, proceeded with the indictment. So I think it is going too far to say that the Security Council has authority over the prosecutor.

All of this also plays out in the public arena. The Security Council also has to think about interests other than those national interests of its members. In this case, the question really will be whether the US would support an Article 16 deferral. Considering Bush's statements about genocide in Darfur, and the new Administration's foreign policy team – Susan Rice

in particular has been a strong Darfur advocate – it will be an interesting and important debate. In the present circumstances it would and should be very difficult for the US to even contemplate a deferral, given the lack of effort by the Sudanese government to move towards peace.

There are always going to be political factors at play; consider that there is a movement for a deferral in the Sudan case, but not in Uganda. One way to get around this dilemma is to say that it is the job of the prosecutor to prosecute, and that of the Security Council to consider the more political requirements of peace and security.

I will say also that Article 16 should be used very rarely and as a last resort, otherwise it will undermine the Court. There is currently, in a sense, a presumption against its use and that is a good thing. If and when that presumption is broken it will undoubtedly change the dynamics. It really needs to only be used on a very limited basis concerning issues of peace and security on the ground.

**Q. What do you think will be the outcome of the Court's first set of prosecutions? How influential will these prosecutions be for the Court's future activities?**

**A.** I can say generally that the Court needs to get credible convictions to strengthen its profile and impact. Five years from now if we are still waiting for our first credible conviction this will be a serious problem. The Court needs to demonstrate its effectiveness. It should have ample evidence in the Lubanga case; Sudan will be the most difficult in terms of evidence. Also the concern that even if Bashir is indicted that in five years time he could still be running Sudan is a bit troubling, especially if no other Sudanese officials have been prosecuted. The ICTY had strong NATO support for it, but the ICC doesn't necessarily have the same degree of international support in terms of getting criminals handed over to it. The Court could still be a weak institution in the future if it can't get the people it is indicting. The Court also needs to get serious

convictions beyond just rebel leaders and also show that it can successfully prosecute those people in positions of power like political leaders. I note that some Western backers have not yet given the Court the necessary support to further these goals.

Ultimately, though, it depends on how you look at things. Sure one can be pessimistic looking at individual cases, but if you look at the bigger context of the development of international criminal justice then there have been major success. The ICTR, ICTY and ICC are all up and running with investigations in nine or ten countries. This is a huge advance from even two decades ago, when people said that the establishment of institutions on this scale was unfeasible. Of course there will be bumps along the way, there are bound to be in establishing such important institutions, but in terms of the bigger picture genuine norms of accountability and respect for international justice are emerging. Countries have to create domestic legislation to be in compliance with the Court now, amnesties are being increasingly questioned, and head of state immunity is being eroded. These are advancements in the cause of international justice that are harder to quantify and track, but that are critically important.

The Court has its work cut out for it, but if it achieves core successes to build upon, it can become the powerful institution that its founders hoped it would be. The development of norms of universal jurisdiction, and the promotion of the Responsibility to Protect doctrine will also help to strengthen the Court's acceptance over time.

*Interview conducted by Zachary Manfredi.*



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