

The International Criminal Court in Search of its Purpose and Identity

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7 Has the ICC unfairly targeted Africa or has Africa unfairly targeted the ICC?

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Introduction

On 27 May 2013, the African Union expressed its concern over the misuse of indictments against African leaders,² while Ethiopian Prime Minister Hailemariam Desalegn maligned ICC investigations as some kind of ‘race-hunting’.³ In an address to the African Union on 12 October 2013, Kenyan President Uhuru Kenyatta, whom the ICC charged as an indirect co-perpetrator for the crimes against humanity perpetrated in connection with 2007 post-election violence in Kenya,⁴ stated that ‘African sovereignty means nothing to the ICC and its patrons’,⁵ that people have termed this situation ‘race-hunting’ and that he found great difficulty adjudging them wrong. Kenyatta went on to say that the ICC ceased being the home of justice the day it became the toy of declining imperial powers.⁶

Has the ICC unfairly targeted Africa or, to the contrary, has Africa perhaps unfairly targeted the ICC? One certainly has to wonder. The ICC’s rendezvous with African politics reveals a chasm as wide and deep as the Great Rift Valley. From an optimist’s point of view, one can see Utopia off in the distance where every State has ratified and implemented the Rome Statute. In Utopia, the ICC operates universally, independently and objectively to deter major international

1 I wish to thank Dr Ilaria Bottiglieri, Chief, Research and Learning/Policy Advisor to the Director-General, International Development Law Organization, Rome, Italy, and Dr Triestino Mariniello, for their very valuable comments on earlier drafts of this chapter.

2 African Union Decision on International Jurisdiction, Justice and The International Criminal Court (ICC) of 27 May 2013, Doc. Assembly/AU/13(XXI), 4. Botswana entered a reservation on the entire decision.

3 ‘African Union accuses ICC of “hunting” Africans’ *BBC News* (27 May 2013) (www.bbc.co.uk/news/world-africa-22681894?print=true).

4 *Prosecutor v Francis Kĩrĩmi Muthaura and Uhuru Muĩgai Kenyatta*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-trial Chamber II, 23 January 2012 (*‘Kenyatta Confirmation of Charges Decision’*).

5 Uhuru Kenyatta, ‘Africa: ICC Is a Toy of Declining Imperial Powers – Uhuru’ *Capital FM* (12 October 2013) (<http://allafrica.com/stories/201310130069.html>).

6 Kenyatta, ‘Africa: ICC Is a Toy of Declining Imperial Powers – Uhuru’.

crimes, dispel impunity and safeguard world peace and security, exercising its jurisdiction on all continents with sole regard to the gravity of the crimes and equal respect and concern for human life everywhere. But a glance at everyday life in certain African countries confronts more of a Dystopian system of authoritarian governments, corrupt politicians, in some cases sustained insurgent campaigns, and militia forces of various alliances, clambering for power and launching offensives that torch homes and people. On 16 January 2014, Nigeria's President Goodluck Jonathan dismissed all his military chiefs, while Nigerian jets strafed Cameroonian border posts in a bid to prevent Islamist fighters from Cameroon, Chad and Niger from lending their support to Boko Haram's campaign to take over the northern half of Nigeria.⁷ On 17 January 2014, the Director of Operations for UNOCHA warned that the CAR might slide into genocide, as fighting intensified between Christian and Muslim militias and gangs who were roaming Bangui and other towns looking for people to attack and murder, and property to loot and burn.⁸ The same day, Ugandan President Yoweri Museveni confirmed that his troops had fought rebels in a heavy battle north of Juba, South Sudan, as part of a conflict that had broken out on 15 December 2013.⁹

Recent violence in numerous countries (such as Algeria, Angola, Burundi, the CAR, Côte d'Ivoire, the DRC, Egypt, Eritrea, Ethiopia, Kenya, Liberia, Libya, Mali, Nigeria, Rwanda, Sierra Leone, South Sudan, Sudan, Uganda and Zimbabwe) has, in one way or another, raised the question as to whether domestic courts are up to the task of prosecuting the perpetrators of such violence and ensuring that the rule of law, democracy and human rights do not fall victim to a climate of impunity. As of 1 September 2014, the ICC had begun investigating eight such situations. On 20 December 2013, Egypt's Muslim Brotherhood's Freedom and Justice Party submitted a complaint to the ICC alleging that the regime that had ousted the democratically elected Morsi government was responsible for murder, torture, arbitrary detention, enforced disappearances and systematic persecution of Morsi supporters.¹⁰ Preliminary investigations into the situations in Nigeria and in Guinea were also being undertaken.

Yet in the almost 12 years since its establishment in July 2002, the ICC had, as of 1 September 2014, only commenced investigations into situations occurring in Africa, namely in the DRC, Uganda, the CAR, Darfur (Sudan), Libya, Kenya, Côte d'Ivoire and Mali. The reason for this exclusive focus on Africa was certainly

7 'Nigerian president replaces all his military chiefs' *The Guardian* (16 January 2014) (www.theguardian.com/world/2014/jan/16/nigerian-president-chiefs-defence-army-navy-air-force).

8 'UN official sees risk of genocide in CAR' *Aljazeera* (17 January 2014) (www.aljazeera.com/video/africa/2014/01/un-official-sees-risk-gen); see also Thomas Fessy, 'Central African Republic lynch mob "on the hunt"' *BBC News* (17 January 2014) (www.bbc.co.uk/news/world-africa-25772086).

9 'Yoweri Museveni: Uganda troops fighting South Sudan rebels' *BBC News* (16 January 2014) (www.bbc.co.uk/news/world-africa-25759650).

10 'Egypt Muslim Brotherhood lawyers take case to ICC' *Gulf Times* (7 January 2014) (www.gulf-times.com/region/216/details/376983/egypt-muslim-brotherhood-lawyers-take-case-to-icc).

not that the rest of the world was enjoying a perpetual state of Utopia. There were (and still are) many situations, such as in parts of Afghanistan, Pakistan, Mexico, Syria, Iraq, Bangladesh, Papua New Guinea and Colombia to name a few, that were chronically plagued with serious violations that seemed to qualify as crimes falling under the ICC's jurisdiction. More than a half-century of serious and systematic violations perpetrated by the State of Israel in the Palestinian territories it occupied also appeared to be beyond the ICC's reach. Despite the fact that the domestic authorities in such places failed to prosecute crimes under international law in conformity with international fair trial standards, the ICC had not launched investigations into any of them.

To consider whether the ICC has unfairly targeted countries in Africa, it is first important to note the ICC's application of the complementarity principle, which guides the ICC's role and operation, including the Pre-trial Chamber's decision on the Prosecutor's *proprio motu* application to launch an investigation into the situation in Kenya. Next, it is useful to recall the situations the ICC has been investigating thus far to assess whether the ICC has been unfairly targeting situations in Africa, or to the contrary, whether Africa actually might in fact have been targeting the ICC.

The ICC Prosecutor's strategic direction and the complementarity principle

According to the Rome Statute, the ICC should not exercise jurisdiction over a situation unless and until it is clear that a State Party responsible for prosecuting the crimes in question is unable and/or unwilling to prosecute and punish the perpetrators. Instances of a State referring a situation occurring within its own territory to the ICC (in effect, referring itself), are based on the voluntary decision of that State, and are therefore generally less contentious than instances where the Security Council refers a situation to the ICC or the prosecutor requests to launch an investigation *proprio motu*, because in self-referrals, the State already recognizes its own inability to prosecute. In contrast, Security Council referrals or investigations initiated by the Prosecutor require the ICC's own evaluation of the State's unwillingness or inability to prosecute.

According to Article 17(1)(a) of the Rome Statute, unwillingness and inability are relative and qualitative properties subject to an appreciation of degree. How do these indices guide the actual selection of situations for ICC investigation? Pre-trial Chamber II's decision of 31 March 2010 to approve the Prosecutor's request to launch an investigation *proprio motu* into the 2007 post-election violence in Kenya offers good insight. Presiding Judge Ekaterina Trendafilova, forming the majority with Judge Cuno Tarfusser, observed:

As for the 'reasonable basis to believe' test referred to in article 53(1)(a) of the Statute, the Chamber considers that this is the lowest evidentiary standard provided for in the Statute. This is logical given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the

information available to the Prosecutor is neither expected to be comprehensive nor conclusive, if compared to evidence gathered during the investigation. This conclusion also results from the fact that, at this early stage, the Prosecutor has limited powers, which cannot be compared to those provided in article 54 of the Statute at the investigative stage.¹¹

This relatively low standard is to be contrasted with those applicable to the confirmation of charges phase under Article 61(7) of the Statute. The Article 61(7) standard requires the availability of sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. The highest evidentiary standard, as set out in Article 66(3), requires the Prosecutor to prove the guilt of an accused at trial beyond a reasonable doubt.¹² To evaluate the information that the Prosecutor provided, the Chamber explained that it had to be satisfied that there existed a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed.¹³

The Chamber also underlined the point that at the stage of proceedings concerning authorization of the Prosecutor's request to launch an investigation, the question of reasonable basis to believe relates not to a particular criminal case, but to the situation as a whole in which a crime was alleged to have been committed, notwithstanding that Article 53(1)(b) of the Statute refers to cases rather than situations. This is important because the Court's application of threshold criteria as to whether to approve a request to proceed with an investigation will almost always be more broad, more general and more flexible in relation to a situation, compared to those applied to a case. This is attributable to the fact that an investigation of an individual criminal act *ipso facto* requires safeguarding the suspect's rights, and such a requirement demands greater specificity, precision and clarity in the application of the relevant legal norms – for example, with regard to charges, warrants, and indictments.

Additionally, the Pre-trial Chamber stated that the ICC must determine:

- 1 whether the crimes fall within the *ratione materiae* jurisdiction of the Rome Statute (Article 53(1)(a));
- 2 whether national courts or other fora were already undertaking genuine prosecutions fairly and effectively in which case the ICC would not have to intervene (as per Article 53(1)(b) which refers back to Article 17);

11 *Situation in the Republic of Kenya*, ICC-01/09, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-trial Chamber II, 31 March 2010, para 27 ('Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya').

12 Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya, para 28.

13 *Ibid.* at para 35.

- 3 whether there were any reasons why, in the interests of justice, the ICC should not exercise jurisdiction over the situation (as per Article 53(1)c); and fourth, whether the case appeared to fall within the ICC's jurisdiction (as per Article 15(4)).

On the basis of the information provided by the Prosecutor, the Pre-trial Chamber concluded that with regard to the post-election violence in Kenya, the 'reason to believe' requirement had been satisfied in relation to elements of various crimes against humanity, including murder, rape and other forms of sexual violence, forcible transfer of population and other inhumane acts causing serious injury, within the scope of the Rome Statute. It therefore authorized the Prosecutor to proceed with an investigation of the situation in Kenya, even enlarging the temporal scope of the investigation, from the requested period of 27 December 2007 to 28 February 2008, to the period between 1 June 2005 (when the Rome Statute entered into force vis-à-vis Kenya) and 26 November 2009, the date on which the Office of the Prosecutor filed its request for authorization to proceed.

Judge Hans-Peter Kaul chose not to side with the majority, instead disagreeing with the Pre-trial Chamber's finding that there was a reasonable basis to believe that murder, rape and other serious crimes were committed as part of an attack against any civilian population that was undertaken pursuant to or in furtherance of a State or organizational policy to commit such attack in the sense of Article 7(2) (a) of the Rome Statute. Judge Kaul cautioned that the demarcation between crimes of international concern should not be blurred with the ordinary crime of murder, which should instead be prosecuted under Kenyan criminal law,¹⁴ and he expressed his concern that disregarding the difference between crimes under international law and ordinary crimes would swamp the ICC, ultimately rendering it ineffective.¹⁵ Judge Kaul's hesitation should not be dismissed lightly. Kenya has a functioning court system, an active national human rights commission, a vibrant press, substantial human rights promotion and protection, a strong tradition of the rule of law and democratic governance, although the political party system is admittedly relatively young and in general far from flawless. On the other hand, as will be discussed later, the crimes that were committed were numerous, serious and widespread, and it seems, quite possibly systematic, at least to some degree. By the time of the writing of this chapter, victims had not received adequate redress through any national means. Should the matter have been left to Kenya's national system? Judge Kaul sounds an important caution that the ICC should not take up every situation at hand, even where the violations may be serious, if key elements to prove the crime are weak or missing.

14 Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, paras 4, 7.

15 Ibid. at para 10.

Has the ICC been too quick to jump in when national courts could have fairly, effectively and genuinely investigated and prosecuted Rome Statute crimes? It is important to consider the situations the ICC has been investigating and why, before analysing whether the hostile reactions to the ICC's exercise of jurisdiction might be justified, and ultimately, whether the ICC has unfairly targeted Africa, or whether Africa has unfairly targeted the ICC.

Which situations has the ICC been investigating and why? An overview of preliminary investigations

The Office of the Prosecutor indicated that it was conducting preliminary examinations into:

- **Afghanistan**, which ratified the Rome Statute on 10 February 2003. The Office was assessing whether national efforts to prosecute crimes under international law were genuine;
- **Honduras**, which ratified the Rome Statute on 1 July 2002. The Office concluded that there was no reasonable basis to believe that human rights violations surrounding a June 2009 *coup d'état* met the elements of Rome Statute crimes;
- **Israeli-occupied Palestinian territories**, with respect to the May 2010 raid carried out by Israel on the Humanitarian Aid Flotilla bound for the Gaza strip that involved registered vessels of Comoros, Greece and Cambodia – all Parties to the Rome Statute. The Office stated that it was seeking additional information in order to resolve key factual and legal ambiguities in order to determine whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed;
- **Republic of Korea**, which ratified the Rome Statute on 13 November 2002, regarding the sinking of *Cheonan*, a South Korean warship, on 26 March 2010, and the shelling of South Korea's Yeonpyeong Island on 23 November 2010, both allegedly by the Democratic People's Republic of Korea, and about which the Office continued to seek further information with a view to deciding whether to proceed with an investigation;
- **Colombia**, under preliminary examination since June 2004, with regard to the conflict between the government on the one hand, and the FARC (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*) and ELN (*Ejército de Liberación Nacional*) rebel groups. The Office was consulting the government to ensure that genuine criminal proceedings were being carried out in Colombia including against individuals at the highest levels of responsibility;
- **Georgia**, which ratified the Rome Statute on 5 September 2003, with regard to violations surrounding clashes that took place from 7 to 12 August 2008 between Georgian armed forces and forces of South Ossetia, part of Georgian territory under Russian occupation which hosts an independence movement to break away from Georgia. Since the use of force involved the Russian Federation, the Office qualified the situation as an international armed

conflict. The Office has been monitoring developments since 2008 to discern whether genuine national criminal investigations and prosecutions are being undertaken;

- **Guinea**, which ratified the Rome Statute on 14 July 2003, in relation to a massacre that the Government, which seized power in a December 2008 *coup d'état*, allegedly perpetrated on 28 September 2009 against opposition protestors, as well as other serious violations carried out in the aftermath of the massacre. The Office indicated that it was monitoring national criminal investigations and proceedings to gauge whether they were genuine; and
- **Nigeria**, which ratified the Rome Statute on 27 September 2001, concerning: inter-communal, political and sectarian violence in central and northern parts of the country; violence among ethnically based gangs and militias and/or between such groups and the national armed forces in the Niger Delta; and alleged crimes arising from the activities of Boko Haram, a Salafi-jihadi Muslim group that operates mainly in north-eastern Nigeria, and the counter-insurgency operations carried out by the Nigerian security forces against Boko Haram. The Office indicated that it was monitoring whether Nigeria was carrying out genuine criminal investigations and prosecutions in relation to crimes allegedly committed by Boko Haram.¹⁶
- **Ukraine**, which by 1 September 2014 had signed but not ratified the Rome Statute. On 17 April 2014, the Government of Ukraine requested that the ICC exercise jurisdiction over the situation in its territory with regard to Rome Statute crimes allegedly perpetrated in Ukrainian territory from 21 November 2013 to 22 February 2014. The prosecutor responded by announcing the launch of a preliminary investigation.¹⁷

The Office of the Prosecutor also pointed out that it had completed preliminary investigations into situations in Mali and Palestine. In both situations, the governments of Mali and Palestine referred the situations to the ICC. The situation in Mali has since become a full-scale investigation and the investigation into Palestine was suspended on grounds that it was a matter for the relevant bodies of the United Nations or the Assembly of States Parties to make the legal determination as to whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute, thereby enabling the Court to exercise jurisdiction pursuant to Article 12(1).¹⁸

16 OTP, Report on Preliminary Examination Activities 2013 (November 2013), (www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF).

17 ICC Press Release, ICC-OTP-20140425-PR999, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine', 25 April 2014 (www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr999.aspx).

18 ICC Press Release, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine'.

Investigations

The Prosecutor has conducted investigations in the Democratic Republic of Congo (DRC), Northern Uganda, the CAR and Mali, all four of which were referred to the ICC by the States themselves. Two more investigations were authorized by way of UN Security Council referral: Darfur (Sudan) and Libya. Only investigations into the situations in Kenya and Côte d'Ivoire arose from the initiative of the Prosecutor and were subsequently authorized by an ICC Pre-trial Chamber.

Straightaway, the fact that six out of eight situations arose not from the ICC's own initiative, but from either the concerned territorial States themselves or the Security Council, militates against the argument that the Prosecutor has unfairly targeted Africa, particularly bearing in mind ICC preliminary investigations into situations in other continents. However, there is another spin on the argument to the effect that it is not just the ICC itself, but the ICC in collusion with the UN Security Council, which together have unfairly targeted African countries, as evidenced by the fact that:

- the only situations that have proceeded beyond the ICC's preliminary investigation phase have concerned only African countries;
- the Security Council referrals have concerned only African countries;
- the Prosecutor's *proprio motu* investigations have been launched only in African countries; and
- the self-referral of some situations in African countries is the result of international interference and powerful donor country pressure.

Evaluating the broader version of the argument requires a closer look at the situations that have come under ICC purview, to explore whether the Security Council referrals, in addition to the Prosecutor's actions in Kenya and Côte d'Ivoire, show that the international criminal justice system has targeted Africa.

Uganda

The first situation that came to the ICC's attention concerned Uganda, which itself referred to the ICC. Uganda ratified the Rome Statute on 14 June 2002. In December 2003, Ugandan President Yoweri Museveni referred the LRA situation to the ICC¹⁹ when LRA leader, Joseph Kony, walked away from the government's offer of amnesty to the LRA in exchange for a cessation of hostilities. In granting the Prosecutor's application to issue an arrest warrant for Joseph Kony, ICC Pre-trial Chamber III noted evidence from reports of the Government of Uganda, the United Nations and its agencies, foreign governmental bodies,

19 ICC Press Release, ICC-20040129-44, 'President of Uganda refers situation concerning Lord's Resistance Army (LRA) to the ICC', 29 January 2004.

NGOs and world media, concerning the LRA's alleged attacks on the Uganda People's Defence Force and local defence units, as well as attacks carried out against civilian populations since at least 1987. The alleged attacks committed from the entry into force of the Rome Statute on 1 July 2002 included murder, abduction, sexual enslavement, mutilation, mass burnings of houses and looting of camp settlements as well as forcible recruitment of children to support LRA attacks on Ugandan armed forces and civilians.²⁰ Joseph Kony was allegedly Chairman and Commander-in-Chief of the LRA, which operates as an army. He is suspected to have personally committed many of the crimes and also to have ordered the perpetration of other crimes. Arrest warrants for four other LRA commanders have also been issued, but one of these persons, Mr Raska Lukwiya, died on 12 August 2006.

Once one of the ICC's strongest African supporters, and the man responsible for referring the northern Uganda situation to the ICC, President Museveni has recently become one of the ICC's strongest critics. In his speech to the UN General Assembly on 24 September 2013, Museveni bitterly denounced the ICC as a Western tool of neo-colonialism:

The latest manifestation of arrogance is from the ICC in relation to the elected leaders of Kenya. Many African countries supported the setting up of ICC because we abhor impunity. However, the ICC in a shallow, biased way has continued to mishandle complex African issues. This is not acceptable. The ICC should stop. Our advice to them is from very capable actors who know what they are doing and saying. Kenya is recovering. Let her recover. We know the origin of the past mistakes. The ICC way is not the right one to handle those mistakes.²¹

Museveni's statement in New York met with mixed reactions back in Kampala. Mr Norbert Mao, leader of the Democratic Party, for example, called Museveni's position hypocritical, arguing that:

this time Museveni is on the wrong side of history. Only the ICC can stand as a reminder to all perpetrators of impunity that there will be a day of reckoning. Museveni dreads the day of reckoning. That is his real problem with the International Criminal Court.²²

20 See *Prosecutor v Joseph Kony*, ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005, 27 September 2005, paras 5–7.

21 See Statement by H.E. Yoweri Kaguta Museveni, President of the Republic of Uganda at the 68th UN General Assembly, New York, 24 September 2013 (http://gadebate.un.org/sites/default/files/gastatements/68/UG_en.pdf).

22 Norbert Mao, 'Museveni was cheerleader of ICC; what went wrong?' *Saturday Monitor* (22 October 2013) (www.monitor.co.ug/OpEd/Commentary/Museveni-was-cheerleader-of-ICC--what-went-wrong--/689364/2041572/-/j9y241z/-/index.html).

Democratic Republic of Congo (DRC)

On 19 April 2004, the ICC Prosecutor announced that he had received a signed letter from the President of the DRC, referring to the ICC crimes committed anywhere in DRC territory since the Rome Statute's entry into force on 1 July 2002. In his letter, the President also pledged the co-operation of the Government of the DRC.

Like the situation in Uganda, the roots of impunity in the DRC date back many years and involve a series of complicated factors. The UN Office of the High Commissioner for Human Rights' Mapping Report, covering violations committed in the DRC between March 1993 and June 2003,²³ documents the various phases of armed conflict during this period. In a 2007 report, the International Rescue Committee (IRC) stated that 'Based on the results of the five IRC studies, we now estimate that 5.4 million excess deaths have occurred between August 1998 and April 2007', and that an estimated 2.1 million of those deaths have occurred since the formal end of war in 2002.²⁴

In its decision on the Prosecutor's application to issue a warrant for the arrest of Thomas Lubanga Dyilo, Pre-trial Chamber I found reasonable grounds to believe that during various specified periods from July 2002 to December 2003, the FPLC – the military wing of the Union of Congolese Patriots – had repeatedly enlisted children under the age of 15, who were then trained in certain camps, and that Lubanga, as founder and Commander-in-Chief of the FPLC, was personally responsible.²⁵ On 14 March 2012, Lubanga was convicted of the war crime of enlisting and conscripting children under the age of 15 into the FPLC and forcing them to fight in the DRC civil war being waged in Ituri Province. The ICC sentenced Lubanga to 14 years' imprisonment.

On 7 March 2014, Trial Chamber II found Germain Katanga guilty of the crime against humanity of murder and the war crimes of murder, attacking a civilian population, destruction of property and pillaging in the Ituri part of the DRC. The Judgment became final once both the Defence and the Prosecutor discontinued their appeals on 25 June 2014. Proceedings against a number of other indicted persons currently in custody were ongoing at the time this chapter was written.

23 OHCHR Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (August 2010) (www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf).

24 International Rescue Committee, Mortality in the Democratic Republic of Congo: An ongoing crisis (2007) (www.rescue.org/sites/default/files/migrated/resources/2007/2006-7_congo-mortalitysurvey.pdf); but see 2010 Human Security Report, which criticizes IRC's methodology and argues that the death toll in the DRC has been far less (<http://hsrgroup.org/human-security-reports/20092010/text.aspx>).

25 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2, Warrant of Arrest in The Situation in the Democratic Republic of the Congo, Pre-trial Chamber I, 10 February 2006.

Central African Republic

The Government of the CAR, which ratified the Rome Statute on 3 October 2001 and therefore became subject to ICC jurisdiction as of the Statute's entry into force, determined that its national system could not adequately address the high incidence of Rome Statute crimes being committed in its territory. On 22 December 2004, the Government decided to refer the situation to the ICC, but it was not until 22 May 2007 that the Prosecutor announced the launch of an investigation.

On 22 May 2007, when the ICC Prosecutor announced the start of an investigation into the CAR situation, he noted that there were many allegations of rape and other acts of sexual violence perpetrated against hundreds of reported victims, and that his Office would also monitor crimes allegedly committed since the end of 2005:

Some of the worst allegations relating to killing, looting and rape, occurred during intense fighting in October-November 2002 and in February-March 2003. Attacks against civilians followed a failed coup attempt; there emerged a pattern of massive rapes and other acts of sexual violence perpetrated by armed individuals. Sexual violence appears to have been a central feature of the conflict.²⁶

The OTP's press release also referred to credible reports of mass killings and high numbers of rapes committed against civilians, including elderly women, young girls and boys. Rapes were deliberately inflicted with aggravated cruelty, committed by multiple perpetrators in front of third persons with relatives sometimes forced to participate, and they resulted in severe stigmatization of victims and the spread of HIV.²⁷ On the basis of the seriousness and scale of the alleged crimes, the OTP considered that an investigation should be undertaken, particularly in light of the position taken by the Cour de Cassation of CAR in April 2006 that national authorities were unable to get hold of or to prosecute criminal suspects, and that they were also unsuccessful in gathering evidence or conducting investigations.

In his May 2013 report to the UN Security Council on children in armed conflict, Secretary-General Ban Ki-moon indicated that the UN continued to receive reports of grave violations perpetrated against children in the CAR throughout 2012 and that with 416,000 internally displaced persons and 26,000 refugees triggered by the LRA's actions, the armed group remained a serious threat to civilians in the region.²⁸ On 11 January 2014, the situation in CAR

26 ICC Press Release, ICC-OTP-20050107-86, 'ICC Prosecutor receives referral concerning Central African Republic', 7 January 2005.

27 ICC Press Release, 'ICC Prosecutor receives referral concerning Central African Republic'.

28 Report of the UN Secretary-General to the Security Council on children in armed conflict; A/67/845BS/2013/245 of 15 May 2013, 86.

had worsened to the point that foreigners were urgently evacuated from the country.²⁹ President Michel Djotodia, who had seized power in March 2013 and ruled until regional powers pressured him to resign on 10 January 2014, fled to Benin.³⁰

Darfur (Sudan)

Darfur was the first situation that the UN Security Council referred to the ICC. The Government of Sudan signed the Rome Statute on 8 September 2000, but by 1 January 2014 had yet to ratify the Statute.

A series of high-level UN investigative teams were established from 2004 to 2007 to focus on the Darfur situation, each confirming that serious human rights and humanitarian law violations which probably qualified as Rome Statute crimes had been committed, mainly by the Government of Sudan together with the Janjaweed and other pro-government militia. Such crimes included massacres, enforced disappearances, mass rape of women and children, and torture and summary or arbitrary executions.³¹ Importantly, from the point of view of the complementarity requirements for ICC jurisdiction, the High Level Mission's report of 9 March 2007 confirmed that the justice system as a whole was unable or unwilling to pursue justice or prevent attacks,³² reiterating the very same findings previously established by the Security Council's Commission of Inquiry on Darfur.

On 31 March 2005, the Security Council adopted Resolution 1593, which took note of the Report of the International Commission of Inquiry on Violations of International Humanitarian and Human Rights Law in Darfur (S/2005/60). It also declared that the situation in Sudan continued to threaten international peace and security, and invoked Chapter VII of the UN Charter to refer the situation in Darfur since 1 July 2002 to the ICC Prosecutor.

The Pre-trial Chamber found there were reasonable grounds to believe that the Janjaweed had carried out systematic or widespread attacks against the civilian population. It elaborated that during such attacks, the Sudanese armed forces and the militia/Janjaweed carried out persecution, murders, forcible transfers, imprisonment or severe deprivation of liberty, acts of torture, rapes and other inhumane acts against civilians primarily from the Fur, Zaghawa and Masalit

29 'Foreigners to be airlifted from CAR: Thousands of foreign nationals have sought shelter at an airport near the capital, seeking to flee the violence' *Aljazeera* (11 January 2014) (www.aljazeera.com/news/africa/2014/01/foreigners-be-airlifted-from-car-201411162344202215.html).

30 'CAR ex-leader heads for exile in Benin' *Aljazeera* (11 January 2014) (www.aljazeera.com/news/africa/2014/01/car-ex-leader-exile-benin-20141115450653357.html).

31 See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004; see Report of the High-Level Mission on the Situation of Human Rights in Darfur pursuant to Human Rights Council decision S-4/101 (A/HRC/4/80).

32 A/HRC/4/80 (n 30) 46–51.

populations.³³ The ICC's public indictment of President Omar Al Bashir of Sudan on 14 July 2008 was the first time the ICC ever indicted a sitting Head of State. A warrant for his arrest was issued on 4 March 2009.³⁴

The Sudanese Government's immediate reaction was to expel 10 (the number later rose to 13) humanitarian NGOs from Sudan, with 24 hours' notice to leave the country. The UNOCHA immediately highlighted that the expulsion of 10 relief organizations from Sudan would leave hundreds of thousands of the most vulnerable civilians at risk. The organizations, which included Oxfam, CARE, MSF-Netherlands, Mercy Corps, Save the Children, the Norwegian Refugee Council, the International Rescue Committee, *Action contre la faim, Solidarités* and CHF International, had been ensuring that hundreds of thousands of internally displaced persons were receiving food, water and medicine in life-threatening circumstances. The NGOs concerned expressed their certainty that the notice to leave was linked directly to the arrest warrant for President Omar Al Bashir. The International Rescue Committee estimated that the Sudanese Government's closing of its humanitarian assistance programmes in Darfur, and in North and East Sudan, jeopardized the lives of some 1.75 million people of all ages.³⁵

Despite Khartoum's manifestly cruel and vindictive move to punish almost two million of its own citizens by blocking access to urgent humanitarian assistance, the Arab League and the Organization of the Islamic Conference (OIC) expressed their unequivocal solidarity with the Government of Sudan and with President Al Bashir personally. On 18 March, Arab League Secretary General Amr Moussa stated that the Arab League was greatly disturbed by the ICC's indictment of Bashir, and that the League supported Sudan's sovereignty.³⁶ For its own part, OIC Secretary General Ekmeleddin Ihsanoglu met with Sudanese President Omar Al Bashir and, following the meeting, stressed the OIC's solidarity with Sudan, remarking, 'The OIC was a good framework and essential to overcome the Darfur crisis as the conflicting parties in the Darfur region were all Islamic parties.'³⁷

33 *Prosecutor v Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-al-rahman ("Ali Kushayb")*, ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, Pre-trial Chamber, 27 April 2007; See also 'Janjaweed leader is Sudan aide' *BBC World News* (21 January 2008), which reported that the Sudanese authorities had given a senior government position to a man accused of co-ordinating the Janjaweed Arab militia in Darfur (<http://news.bbc.co.uk/2/hi/africa/7199447.stm>, accessed 8 August 2010).

34 *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-trial Chamber I, 12 July 2010 ('Second Arrest Warrant for Al Bashir').

35 'Sudan: Aid agencies react to expulsions' *International Relief Information Network* (5 March 2009) (www.irinnews.org/printreport.aspx?reportid=83311).

36 'Arab League, OIC, AU Reject the ICC Arrest Warrant Against Sudanese President Omar Al-Bashir' *Xinhua News Agency* (29 March 2009) (http://news.xinhuanet.com/english/2009-03/29/content_11095489.htm).

37 'OIC stresses solidarity with Sudan in spite of ICC decision' *Xinhua* (14 March 2009) (http://news.xinhuanet.com/english/2009-03/15/content_11012374.htm).

Sudan's presidential envoy Awad Ahmed al-Jaz said in an interview with Xinhua that the ICC was a manifestation of neo-colonialism and that it created a dangerous precedent. He also said that the arrest warrant for Al Bashir 'did not target the president himself but Sudan as a country that has made major achievement in the peace process on the African continent', clearly implying that the ICC was destroying any chance of peace in Sudan. Further embellishing the point, the envoy imputed sinister motives to foreign elements: 'the neo-colonialists want to take Sudan as an experimental field – once Sudan accepts the charge, they would apply similar penalty to the leaders of other countries whom they deemed "unpopular"'.³⁸ Accordingly, he went on, the Sudanese Government had to reject the ICC's decision firmly right from the start.

The People's Republic of China, a major investor in Sudan's infrastructural development, quickly threw its support behind the Government of Sudan, similarly framing the ICC as a threat to peace.³⁹ Predictably, the Russian Federation entered the fray as well, with the Foreign Ministry intoning, 'It should also be remembered that Omar Al Bashir as the Head of a State which is not a party to the Rome Statute of the ICC enjoys the immunities of a top State official under general international law'; it also expressed its worries that the indictment would hamper peace efforts in Sudan.⁴⁰

Amr Moussa went out of his way to reiterate the Arab League's continuing support for Al Bashir on 30 March 2009 in the following terms, 'We stress our solidarity with Sudan and our rejection of the ICC decision against President Omar al-Bashir.' It was reported that President Omar Al Bashir 'enjoyed warm support from fellow Arab League leaders during the gathering in Qatar' and that 'delegates repeatedly denounced the arrest warrant issued on March 4 by the ICC over alleged war crimes in Darfur'.⁴¹

On 12 July 2010, Pre-trial Chamber I issued a second arrest warrant for Omar Al Bashir, deciding that there were reasonable grounds to believe that Bashir was criminally responsible as an indirect perpetrator of acts of genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction of a national, ethnical, racial or religious group as such within the meaning of the Rome Statute.⁴²

38 'Sudan's envoy: ICC's warrant for Sudanese president manifestation of neo-colonialism' *Xinhua* (28 March 2009) (http://news.xinhuanet.com/english/2009-03/28/content_11089837.htm).

39 'China regretful, worried about Sudan president arrest warrant' *Xinhua* (5 March 2009) (http://news.xinhuanet.com/english/2009-03/05/content_10946492.htm).

40 See 'Statement by Russian MFA Spokesman Andrei Nesterenko Regarding the Issuance by International Criminal Court of an Arrest Warrant against Sudanese President Omar al-Bashir' Information and Press Department, Ministry of Foreign Affairs of the Russian Federation, 5 March 2009 (www.un.int/russia/new/MainRoot/docs/off_news/050309/newen1.htm).

41 'Arab leaders reject arrest warrant against Sudan's Bashir' *France 24* (30 March 2009).

42 See Second Arrest Warrant for Al Bashir (n 33).

In 2010, the President of the AU,⁴³ then President Bingu wa Mutharika of Malawi, contended that the indictment of Al Bashir was ‘undermining African solidarity and African peace and security’, and that it was unacceptable to issue a warrant for the arrest of a sitting Head of State.⁴⁴

Kenya

When Kenya ratified the Rome Statute on 15 March 2005, few probably would have guessed that the ICC would soon exercise jurisdiction over crimes connected to serious violence that was to follow the 2007 elections. The first multi-party elections in 1992, which were met with widespread scepticism inside and outside Kenya as to their fairness, were followed by serious outbreaks of violence resulting in approximately 2,000 deaths. Throughout the 1990s, party politics has proven highly contentious in Kenya.⁴⁵ The Commission of Inquiry on Post Election Violence (also known as the Waki Commission), established to investigate the 2007 post-election violence, recounted: ‘Although he agreed to multi-party democracy, President Moi did not accept the idea that through this he might lose the presidency. Thus, it was in this period in the 1990s that violence became institutionalized during presidential and parliamentary elections.’⁴⁶ The Waki Commission determined that a total of 1,133 people were killed in the post-election violence, with most of these deaths concentrated in the Rift Valley, Nyanza and in Nairobi Province. The report goes on to detail the number of persons injured, and how, noting that ‘[a] total of 117,216 private properties (including residential houses, commercial premises, vehicles, farm produce) were destroyed, while 491 government-owned properties (offices, vehicles, health centres, schools and trees) were destroyed’. Significantly, the Commission stated that it had received no evidence to suggest that civilians caused any gunshot injuries, which ‘validates the view that police action accounted for a good part of the post-election violence’.⁴⁷ Moreover, the Commission found that the

43 See ‘AU chief condemns Bashir warrants African leaders attack International Criminal Court over moves against Sudan president’ *Aljazeera* (27 July 2010) (www.aljazeera.com/news/africa/2010/07/2010726423699861.html).

44 ‘AU chief condemns Bashir warrants: African leaders attack International Criminal Court over moves against Sudan president’ *Aljazeera* (27 July 2010) (www.aljazeera.com/news/africa/2010/07/2010726423699861.html).

45 See David W. Throup and Charles Hornsby, *Multi-party politics in Kenya: The Kenyatta and Moi states and the Triumph of the System in the 1992 Election* (Athens, OH: Ohio University Press, 1998); Godwin R. Murunga and Shadrack Wanjala Nasong’o, (eds), *Kenya: The struggle for democracy* (London: Zed Books, 2007).

46 Report of the Commission of Inquiry on Post Election Violence (Waki Commission Report) 2008, 35 (http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf).

47 Report of the Commission of Inquiry on Post Election Violence (Waki Commission Report) 2008, 345–346.

post-election violence was strongly ethnically motivated. Contrary to claims that it was primarily spontaneous civilian-to-civilian aggression, ‘the pattern of violence showed planning and organization by politicians, businessmen and others who enlisted criminal gangs to execute the violence’, as indicated by warnings issued to the victims before the attacks, the mobilization and co-ordination of large numbers of attackers from locations outside the place of the attacks, evidence of arrangements to acquire, conceal and transport fuel and weapons, and the targeting of only certain ethnic group members and not others.⁴⁸ Part IV of the Waki Commission report describes the acts and omissions of State agencies and the climate of impunity with respect to the post-election violence. It recommends the establishment of a Special Tribunal for Kenya to ensure prosecution of the ‘persons bearing the greatest responsibility for crimes’ relating to the post-election violence. Fully in line with Kenya’s international obligations under the Rome Statute, and consonant with the ICC’s complementarity principle, the Waki Commission further recommended that if for some reason, such tribunal was not established, or it did not function properly, then the list of individual suspects should be forwarded to the ICC for prosecution.⁴⁹

On 26 November 2009, the ICC Prosecutor requested authorization to open an investigation into post-election violence of 2007–2008 in Kenya under Article 15 of the Rome Statute. Pre-trial Chamber II’s decision, discussed above (p 149) in relation to the practical application of the complementarity principle, approved the Prosecutor’s request to investigate.

On 12 January 2013, in a remarkable turn of events, former rivals Uhuru Kenyatta and William Ruto, who allegedly led their respective Kikuyu and Kalenjin ethnic constituencies into clashes following the 2007–2008 elections, formed the Jubilee Alliance as a four-party coalition to contest the 2013 general elections. The elections, held on 4 March 2013, brought incumbent Kenyatta back to power as President of Kenya with Ruto serving as his deputy.⁵⁰

On 27 May 2013, the African Union objected against the ‘misuse of indictments against African leaders’. It expressed its deep regret that ICC Pre-trial Chamber II and the Appeal Chamber, in decisions handed down on 30 May 2011 and 30 August 2011, respectively, ‘denied the right of Kenya to prosecute and try alleged perpetrators of crimes committed on its territory in relation to the 2007 post-election violence’.⁵¹ It was then that the Ethiopian Prime Minister, Hailemariam Desalegn, stated that the ICC process had ‘degenerated into some kind of race hunting’ of Mr Kenyatta and deputy William Ruto, despite

48 Report of the Commission of Inquiry on Post Election Violence (Waki Commission Report) 2008, 347.

49 Ibid. at 473; see Recommendation, para 5.

50 See ‘Official Election Results, County By County Tally’ *Kenya Today* (14 March 2013) (www.kenya-today.com/politics/kenya-election-results-2013).

51 African Union, Decision on International Jurisdiction, Justice and the International Criminal Court (ICC) of 27 May 2013, Doc. Assembly/AU/13(XXI), 6.

reconciliation between the Kalenjin and Kikuyu ethnic groups.⁵² On 12 October 2013, President Kenyatta himself addressed the African Union, whose fresh attack on the ICC is worth reproducing at length:

Western powers are the key drivers of the ICC process. They have used prosecutions as ruses and bait to pressure Kenyan leadership into adopting, or renouncing various positions. Close to 70% of the Court's annual budget is funded by the European Union. The threat of prosecution usually suffices to have pliant countries execute policies favorable to these countries. Through it, regime-change sleights of hand have been attempted in Africa. A number of them have succeeded. The Office of the Prosecutor made certain categorical pronouncements regarding eligibility for leadership of candidates in Kenya's last general election. Only a fortnight ago, the Prosecutor proposed undemocratic and unconstitutional adjustments to the Kenyan Presidency. These interventions go beyond interference in the internal affairs of a sovereign State. They constitute a fetid insult to Kenya and Africa. African sovereignty means nothing to the ICC and its patrons. They also dovetail altogether too conveniently with the warnings given to Kenyans just before the last elections: choices have consequences. This chorus was led by the USA, Britain, EU, and certain eminent persons in global affairs. It was a threat made to Kenyans against electing my Government. My Government's decisive election must be seen as a categorical rebuke by the people of Kenya of those who wished to interfere with our internal affairs and infringe our sovereignty.⁵³

Kenyatta went on to condemn Western powers for applying double standards as regards their own international criminal adventures in relation to 'Iraq, Syria, Libya, Afghanistan and other places', and denounced the ICC for 'race hunting' Africans:

America and Britain do not have to worry about accountability for international crimes. Although certain norms of international law are deemed peremptory, this only applies to non-Western states. Otherwise, they are inert. It is this double standard and the overt politicisation of the ICC that should be of concern to us here today. It is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us. People have termed this situation 'race-hunting'. I find great difficulty adjudging them wrong.⁵⁴

52 'African Union accuses ICC of "hunting" Africans' *BBC News* (27 May 2013) (www.bbc.co.uk/news/world-africa-22681894?print=true).

53 Uhuru Kenyatta, 'Africa: ICC Is a Toy of Declining Imperial Powers – Uhuru' *Capital FM* (12 October 2013) (<http://allafrica.com/stories/201310130069.html>).

54 Kenyatta, 'Africa: ICC Is a Toy of Declining Imperial Powers – Uhuru'.

Kenyatta concluded his diatribe with the following: 'The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial power.' He also pointed out that the United States, China, Israel and India (and he could have also mentioned Russia) have all refused to ratify the Rome Statute.⁵⁵

Around the same time, members of the African Union took steps to vest international criminal jurisdiction in the nascent African Court of Justice and Human Rights, basically to set up a regional alternative to ICC jurisdiction.⁵⁶ At the sub-regional level, the Government of Kenya led a drive among members of the East African Community (Burundi, Kenya, Rwanda, Tanzania and Uganda) to confer international criminal jurisdiction upon the East African Court of Justice, and to have the ICC cases concerning post-election violence in Kenya transferred to it.⁵⁷ In principle, the building up of alternatives to ICC jurisdiction to fight impunity should be supported because they fall in line with ICC complementarity, but only as long as such alternatives provide genuine, fair and effective

55 Kenyatta, 'Africa: ICC Is a Toy of Declining Imperial Powers – Uhuru'.

56 Article 28A of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (as revised up to 15 May 2012) would confer international criminal jurisdiction to the Court over 'persons' for: genocide; crimes against humanity; war crimes; the crime of unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking in persons; trafficking in drugs; trafficking in hazardous wastes; illicit exploitation of natural resources; and the crime of aggression. See the Draft Protocol; Exp/Min/IV/Rev.7, (<http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf>); See also Frans Viljoen, 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol' *AfricLaw: Advancing the Rule and Role of Law in Africa* (23 May 2012) (<http://africlaw.com/tag/draft-protocol-on-amendments-to-the-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights>).

57 On 26 April 2012, the East Africa Legislative Assembly, meeting in Nairobi, Kenya, resolved that the East African Community Council of Ministers would request the transfer of proceedings for the four Kenyan individuals which the ICC accused in relation to the 2007 Kenyan post-election violence, from the ICC to the East African Court of Justice for violations of the East African Community Treaty. See Resolution of the Assembly Seeking the EAC Council of Ministers to Implore the International Criminal Court to Transfer the Case of the Accused Four Kenyans Facing Trial in Respect of the Aftermath of the 2007 Kenya General Elections to the East African Court of Justice and to Reinforce the Treaty Provisions, Hon. Dan Wandera Ogalo (www.eala.org/oldsite041111/key-documents/doc_details/266-resolution-seeking-to-try-kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.html); See also 'Statement by the East Africa Law Society on the East Africa Legislative Assembly Resolution Seeking the East African Community Council of Ministers to Implore the International Criminal Court to Transfer the Cases of the Accused Four Kenyans Facing Trial in Respect of the Aftermath of the 2007 Kenya General Elections to the East African Court of Justice and to Reinforce the Treaty Provisions' (www.eala.org/oldsite041111/media-centre/press-releases/349-rejoinder-statement-by-eals-on-ealas-resolution-seeking-the-transfer-of-the-cases-from-icc-to-eacj.html); See further several rejoinders between the East African Council of Ministers and the East African Law Society, (www.eala.org/oldsite041111/media-centre/press-releases/349-rejoinder-statement-by-eals-on-ealas-resolution-seeking-the-transfer-of-the-cases-from-icc-to-eacj.html).

prosecution and punishment of Rome Statute crimes. If international criminal jurisdiction were to be conferred upon either the African Court of Justice and Human Rights or the East African Court of Justice, their respective secretariat budgets, expertise and human resources would have to be increased massively to match their expanded responsibilities. One has to wonder whether Kenyatta and Ruto really intend to face international criminal justice at all, whether conducted by the ICC, the East African Court of Justice, or any other forum. On 26 October 2013, the East African Community's Legislative Assembly heard a motion for a resolution to urge the ICC to defer the prosecutions against Kenyatta and Ruto.⁵⁸

Libya

The situation in Libya blew up during the Arab Spring protests that swept the Middle East and North Africa. By mid-February 2011, demands for reform in Tunisia, Egypt and some of the Gulf countries emboldened Libyans to call for constitutional reform and to mobilize against Colonel Muammar Gaddafi, who had ruled Libya for almost 42 years. The Gaddafi regime's severe reaction to peaceful protestors only consolidated the political opposition. Opposition leaders formed a provisional government in Benghazi called the National Transitional Council, which declared its intention to overthrow Gaddafi's government and prepare the country for democratic elections.

On 25 February 2011, the UN Human Rights Council expressed its concern over gross and systematic human rights violations in Libya that included extrajudicial killings, arbitrary arrest and detention, systematic torture and armed attacks on civilians, which the Council warned could constitute crimes against humanity.⁵⁹ The Human Rights Council established an international commission of inquiry to investigate the violations and to make recommendations for additional measures in order to ensure the accountability of perpetrators.⁶⁰

The next day, the Security Council unanimously adopted Resolution 1970 which referred the situation to the ICC,⁶¹ enforced an arms embargo upon all UN Member States on direct or indirect supply of arms to Libya,⁶² put in place a

58 East African Community Legislative Assembly Motion for a Resolution Urging the International Criminal Court (ICC) to Defer the Criminal Cases Against the President and Deputy President of the Republic of Kenya; moved by Hon. Christophe Bazivomo and seconded by Hon. Mike K. Sebalu.

59 Human Rights Council resolution on the situation of human rights in the Libyan Arab Jamahiriya, A/HRC/S-15/1 of 3 March 2011, adopted on 25 February 2011.

60 Human Rights Council resolution on the situation of human rights in the Libyan Arab Jamahiriya, 11.

61 Human Rights Council resolution on the situation of human rights in the Libyan Arab Jamahiriya, 4–8.

62 Human Rights Council resolution on the situation of human rights in the Libyan Arab Jamahiriya, 9–14.

travel ban on 16 members of the Gaddafi family and persons close to the regime,⁶³ and froze the assets of six Gaddafi family members.⁶⁴ In resolution 1973, adopted on 17 March, the Security Council condemned ‘the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions’, and urged the Libyan Government to comply with its humanitarian law obligations.⁶⁵ Resolution 1973 also imposed a no-fly zone, took measures to ban flights inside and outside Libya, put in place further asset freezes and named specific individuals subject to these restrictions.

A Commission of Inquiry fielded by the Human Rights Council reported in June 2011 that the Government and National Transitional Council estimated that between 10,000 and 15,000 people had been killed. Part IV of the report documented the Libyan Government’s numerous violations, which include:

- (i) excessive use of force against demonstrators;
- (ii) arbitrary detention and enforced disappearances;
- (iii) torture and other forms of ill-treatment;
- (iv) systematic denial of access to medical treatment;
- (v) suppression of the freedom of expression;
- (vi) attacks on civilians, civilian objects, protected persons and objects;
- (vii) use of prohibited weapons;
- (viii) use of mercenaries;
- (ix) abuse of the human rights of migrant workers;
- (x) sexual violence; and
- (xi) use of children in the armed conflict.⁶⁶

The ICC Prosecutor then conducted a preliminary examination of the situation in Libya. It concluded on 3 March 2011 that there was a reasonable basis to believe that Rome Statute crimes had been perpetrated in Libya since 15 February 2011 and thereby launched a full investigation. On 16 May, the ICC Prosecutor applied to Pre-trial Chamber I for the issuance of warrants for the arrest of Muammar Gaddafi, his son Saif Al-Islam Gaddafi⁶⁷ (who acted as *de facto* Prime Minister of Libya), and Abdullah Al-Senussi, head of Libyan intelligence, for crimes against humanity (murder and persecution) committed in Libya since 15 February 2011. Colonel Gaddafi was captured and killed by rebel forces in Sirte on

63 Human Rights Council resolution on the situation of human rights in the Libyan Arab Jamahiriya, 15, 16; see Annex I to the resolution.

64 Human Rights Council resolution on the situation of human rights in the Libyan Arab Jamahiriya, 17–21; see Annex II to the resolution.

65 Security Council Resolution 1973 of 17 March 2011, S/RES/1973 (2011).

66 See Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, A/HRC/17/44 of 1 June 2011, Summary.

67 The ICC seems to have departed from the UN standard spelling of ‘Qadhafi’.

20 October 2011.⁶⁸ As rebel forces gained the upper hand in Libya, Saif Al-Islam tried to escape to Niger with the help of four of his aides, but he was captured on 19 November about 650km from Tripoli and transferred to Zintan.⁶⁹ On 23 January 2012, Libya announced that it intended to try Saif Al-Islam rather than to surrender him to the ICC for prosecution.⁷⁰

The ICC's warrant for Saif Al-Islam's arrest and Libya's declaration to try him put Libya and the ICC on a collision course over the issue of complementarity, in particular, concerning whether Saif Al-Islam could get a fair trial in Libya. Embarrassingly for Libya, Saif Al-Islam remained in the hands of militia in Zintan, who refused to surrender him to Libyan authorities in Tripoli for trial. This stand-off called into question Libya's effective control over its own territory as well as its ability to enforce criminal responsibility fairly and effectively for Rome Statute crimes.⁷¹ On 31 May 2013, Pre-trial Chamber I ruled on the admissibility of the case against Saif Al-Islam Gaddafi. It noted that Libya was not yet able to secure his transfer from the custody of the Zintan militia to Libyan authorities and that the Libyan Government was proposing to train Zintan brigade members to form a special judicial police contingent capable of guarding Gaddafi for transfer to Tripoli. The Chamber noted that the stalemate between the Zintan militia and Libyan authorities in Tripoli had not ceased since Saif Al-Islam Gaddafi's arrest on 19 November 2011 and that '[t]he Chamber is not persuaded that this problem may be resolved in the near future and no evidence has been produced in support of that contention'.⁷² In addition to Libya's inability to get hold of the suspect, the Chamber also expressed its doubts regarding Libya's ability to obtain testimony and to appoint defence counsel, concluding, 'Libya has been found to be unable genuinely to carry out the investigation or prosecution against Mr. Gaddafi'.⁷³ Saif Al-Islam made brief court appearances in Zintan in May and December 2013, when the case was adjourned until February 2014, and by 1 September 2014, he had still not been transferred to Tripoli.⁷⁴

68 See 'Muammar Gaddafi killed as Sirte falls' *Aljazeera* (20 October 2011) (<http://english.aljazeera.net/news/africa/2011/10/20111020111520869621.html>, accessed 20 October 2011).

69 Chris Stephen and David Batty, 'Saif al-Islam Gaddafi captured in Libya: Interim Tripoli government says son of Muammar Gaddafi was arrested while attempting to flee to neighbouring Niger' *The Guardian* (19 November 2011) (www.theguardian.com/world/2011/nov/19/saif-al-islam-gaddafi-captured).

70 Ali Shuaib, Sara Webb, Oliver Holmes and Ben Harding, 'Libya says it, not ICC, will try Gaddafi's son Saif al-Islam' *Reuters* (23 January 2012) (www.reuters.com/article/2012/01/23/us-icc-libya-idUSTRE80M1V820120123).

71 'Saif Al-Islam Gaddafi transfer for Tripoli hearing blocked' *BBC News* (19 September 2013) (www.bbc.co.uk/news/world-africa-24161544).

72 *Prosecutor v Saif al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Pre-trial Chamber I, 31 May 2013, para 207.

73 *Prosecutor v Saif al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Pre-trial Chamber I, 31 May 2013, para 216.

74 'Gaddafi's son briefly appears in Libyan court' *Associated Press* (13 December 2013) (www.emirates247.com/news/gaddafi-s-son-briefly-appears-in-libyan-court-2013-12-13-1.531250).

Abdullah Al-Senussi, the former Libyan head of intelligence wanted by the ICC for crimes against humanity, managed to get to Morocco and then fly to Mauritania in March 2012, where he was then arrested upon arrival at Nouakchott Airport. On 5 September, he was deported back to Libya for trial after assurances were given by Libya's Prime Minister Abdurrahim el-Keib that 'Abdullah Al-Senussi will have a fair trial according to international standards for human rights, the rights from which Libyans were deprived'.⁷⁵ However, on 11 October 2013, Pre-trial Chamber I ruled that Libya was genuinely willing and able to prosecute Al-Senussi, and declared that the case was therefore inadmissible before the ICC.

Côte d'Ivoire

Long before the November 2010 elections, the Security Council had been concerned about the situation in Côte d'Ivoire. Following Côte d'Ivoire's first elections in 10 years, held in November 2010, the nation's Electoral Commission declared opposition leader Alassane Dramane Ouattara the winner over incumbent President Laurent Gbagbo. This declaration was backed by the UN Secretary-General, the European Union High Representative of the Union for Foreign Affairs and Security Policy, and several other governments. However, President Gbagbo rejected the election results and on 3 December, the Constitutional Court declared him the winner.⁷⁶ With this contradictory development, certain tribal groups lined up behind the contending political parties and began to carry out massacres. In the first months of 2011, there were reports of systematic murder, torture, rape, summary executions and other atrocities.⁷⁷ By February 2011, the UNHCR estimated that around 40,000 refugees had crossed into Liberia and another 38,500 had been displaced from their homes in the western part of Côte d'Ivoire, but had not yet left the country.⁷⁸

On 25 March 2011, the Human Rights Council adopted Resolution 16/25, deciding to send an international commission of inquiry to investigate the post-election violence in Côte d'Ivoire and to identify individuals responsible for such acts with a view to bringing them to justice.⁷⁹ A few days later, the Security Council

75 'Mauritania deports Libya spy chief Abdullah al-Senussi' *BBC News* (5 September 2012) (www.bbc.co.uk/news/world-africa-19487228).

76 'Ivory Coast poll overturned: Gbagbo declared winner' *BBC News* (3 December 2011) (www.bbc.co.uk/news/world-africa-11913832, accessed 1 October 2011).

77 See e.g. Amnesty International, 'Côte d'Ivoire: Warning of "human rights catastrophe" as forces reach Abidjan' (31 March 2011) (www.amnesty.org/en/news-and-updates/c%3%B4te-d%E2%80%99ivoire-warning-%E2%80%98human-rights-catastrophe%E2%80%99-forces-reach-abidjan-2011-03-31, accessed 1 October 2011).

78 Mamadou Dian Balde, Jeff Crisp, Ewen Macleod and Vicky Tennant, 'Shelter from the storm: A real-time evaluation of UNHCR's response to the emergency in Côte d'Ivoire and Liberia' UNHCR, PDES/2011/07, June 2011.

79 Human Rights Council Resolution 16/25 on the Situation of Human Rights in Côte d'Ivoire, A/HRC/16/25 of 25 March 2011.

condemned the serious violations of human rights and humanitarian law in Côte d'Ivoire and referred to the responsibility of parties to armed conflicts in order to protect civilians and ensure humanitarian access.⁸⁰ In its June 2011 report, the Commission of Inquiry laid the blame for the serious violations of human rights and humanitarian law squarely on Gbagbo's rejection of the election results, and it indicated that some of the violations might constitute war crimes and crimes against humanity.⁸¹

Côte d'Ivoire was not then a party to the Rome Statute (it has since ratified the Statute), but on 3 May 2011, President Ouattara requested that the ICC Prosecutor open an investigation.⁸² On 3 October 2011, ICC Pre-trial Chamber III authorized the Prosecutor to commence an investigation in Côte d'Ivoire with respect to crimes committed since 28 November 2010.⁸³ On 3 June 2013, Pre-trial Chamber I adjourned the hearing to confirm the charges against Gbagbo, and at the time that this chapter was finalized, proceedings were still ongoing.⁸⁴

Mali

In April 1959, Senegal joined with French Sudan to form the Federation of Mali as a self-ruling territory and by March 1960, France assented to full independence to the Federation. On 20 June 1960, France recognized the Federation of Mali as a fully independent country with Modibo Keita as its first President, and when Senegal withdrew from the Federation in August 1960, Mali declared its independence as the Republic of Mali on 22 September 1960.⁸⁵

Since independence, the Tuareg people, concentrated in the northern part of the country, have carried out a series of rebellions against the Malian government – most notably in 1962–1964, 1990–1995, 2007–2009 and 2012.

80 Security Council Resolution 1975 of 30 March 2011, S/RES/1975 (2011), 10.

81 Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48 of 14 June 2011, 91.

82 On 23 June, the Prosecutor then requested ICC judges for authorization to initiate a criminal investigation into war crimes and crimes against humanity committed in Côte d'Ivoire since 28 November 2010. In his request for authorization, the Prosecutor cited reports that more than 3,000 individuals had been killed, 72 disappeared, and 520 people subjected to arbitrary arrest and detention in Côte d'Ivoire following the November 2010 election. More than 100 cases of rape were reported, but the Prosecutor indicated that the number of unreported incidents of rape was believed to be much higher. See *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-3, Request for Authorization of an Investigation Pursuant to Article 15, Pre-trial Chamber III, 23 June 2011.

83 *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Côte d'Ivoire, Pre-trial Chamber III, 3 October 2011, para 212.

84 *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-432, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, Pre-trial Chamber I, 3 June 2013.

85 Mahamadou Maiga, *Les peuples maliens et africains: 50 ans d'indépendance ou de dépendance?* (L'Harmattan 2012).

The rebellions have mainly been due to the lack of economic development for the north, perceived decades of neglect, and a severe lack of public services such as hospitals, schools or police. The most recent rebellion, which eventually led to Mali's self-referral to the ICC, began on 16 January 2012 and involved a number of Tuareg groups fighting for greater autonomy in the northern part of Mali, which is referred to as Azawad. On 22 March 2012, mutinous soldiers overthrew Malian President Touré due to his weak response to the crisis only a month before presidential elections were to take place. The soldiers set up the National Committee for the Restoration of Democracy and State and suspended the Constitution.⁸⁶ By April 2012, the National Movement for the Liberation of Azawad (MNLA) established control over the Azawad region, including the cities of Kidal, Gao and Timbuktu, and declared independence from Mali.⁸⁷

What was a primarily local conflict suddenly transformed into a matter of international concern with the intrusion of Ansar Dine, an extreme Islamist group that insisted on imposing Shari'a Law, and which had ties to the Movement for Oneness and Jihad in West Africa (MOJWA/MUJAO), allied to al-Qaeda in the Islamic Maghreb. In effect, by mid-July 2012, the MNLA felt that its movement for autonomy had been achieved and it called an end to its military offensive. However, its efforts were then hijacked by more extreme Islamist groups that favoured carrying out more extreme hostilities.⁸⁸ The remarkable success of al-Qaeda in the Islamic Maghreb alarmed the international community and impelled the Government of Mali to request urgent military assistance to regain control over the northern part of the country. Responding to this request, French forces began attacking rebel positions on 11 January 2013, followed by a deployment of the African Union, which returned control over Azawad to the government of Mali by 8 February. In October 2013, UN and French forces launched large-scale military operations to prevent a resurgence of terrorist elements in northern Mali.⁸⁹

Mali ratified the Rome Statute on 16 August 2000. In a letter dated 13 July 2012, the Minister of Justice of Mali asked the ICC Prosecutor to investigate the situation with regard to serious violations of human rights and humanitarian law committed in the country since January 2012, including summary executions of Malian soldiers, rape of women and girls, massacres of civilians, recruitment of child soldiers, torture, pillage, enforced disappearances, destruction of hospitals,

86 'Mali mutiny "topples" President Toure' *Aljazeera* (22 March 2012) (www.aljazeera.com/news/africa/2012/03/201232251320110970.html).

87 'Mali Tuareg rebels declare independence in the north' *BBC News* (6 April 2012) (www.bbc.co.uk/news/world-africa-17635437).

88 'Analysis: al-Qaeda goes full circle with attempt at political hijack of the Sahara' *The Telegraph* (13 February 2013) (www.telegraph.co.uk/news/worldnews/africaandindianocan/mali/9868595/Analysis-al-Qaeda-goes-full-circle-with-attempt-at-political-hijack-of-the-Sahara.html).

89 'UN and French forces in "large-scale" operation in Mali' *BBC News* (24 October 2013) (www.bbc.co.uk/news/world-africa-24658349).

courts, schools, headquarters of NGOs and international humanitarian organizations, churches, mausoleums and mosques, and war crimes.⁹⁰

Conclusion

To return to the question posed by this chapter's title, Africa has not unfairly targeted the ICC, nor has the ICC unfairly targeted Africa. Many African governments supported the establishment of the ICC, making it as much their institution as that of any other continent. Several African governments, confronted with intractable campaigns of violence, insurgency, civil war, and severe, widespread, systematic and mass crimes, had the wisdom to refer situations in their territory to the ICC, to fight impunity and to appeal when necessary to the international community for military, economic and humanitarian assistance. The world might be less Dystopian if leaders in Afghanistan, India, Pakistan, Mexico, Syria, Iraq, North Korea, Myanmar, Bangladesh, Papua New Guinea, Colombia, the Philippines, Thailand, Peru, Turkey, China, Yemen and the Russian Federation showed the same commitment to the fight against impunity as have those African leaders who supported the ICC.

European colonial domination, together with extreme human rights violations including centuries of slavery, perpetrated against millions of Africans, left deep psychic scars in the African cultural landscape, and this naturally forms a part of African political consciousness. Yet as struggles for independence against foreign domination fade from the horizon, African political leaders are less and less able to use colonialism as the ever-ready excuse for all of Africa's current ills.⁹¹ Many post-independent African political leaders have concentrated power relentlessly in their own hands and imposed authoritarian rule that cannot credibly be blamed on the colonial legacy. Politicians in certain African countries have unscrupulously exploited the politics of resentment over double standards and African suffering from centuries of racism, to deflect attention away from the modern African Dystopia of governance without rule of law.

Even if the ICC has not unfairly targeted Africa, ICC Prosecutor Ocampo's thoroughly inept prosecutorial strategy made it seem that way. Issuing an open indictment instead of a sealed one against President Omar Al Bashir of Sudan put Al Bashir on full notice of the ICC's intention to prosecute him and made it very difficult to arrest him. Predictably, Al Bashir refused all co-operation with the ICC and made its rejection a cause célèbre among certain African countries that could not afford to alienate Sudan economically, politically or diplomatically. It remains to be seen if and when the ICC will fully recover from the damage.

90 See Letter from Malick Coulibaly, Minister of Justice and Guardian of the Seal, 'Renvoi de la situation au Mali' (13 July 2012) (www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf).

91 See Chielozone Eze, 'Resentment and the African Condition: An Inquiry' (2005) 2(1) *GEFAME Journal of African Studies* (<http://quod.lib.umich.edu/g/gefame/4761563.0002.105/--resentment-and-the-african-condition-an-inquiry?rgn=main;view=fulltext>).

As discussed above, the ICC has launched preliminary investigations in many countries outside Africa, but disconcertingly, for one reason or another, such efforts had not advanced significantly by the time this chapter was completed on 1 September 2014. Part of the reason could be attributed to the fact that in a number of the non-African situations, the domestic court systems and the capacity to investigate and prosecute Rome Statute crimes generally appeared to be in much better shape than those in the African countries under review. However, this did not seem to explain fully why *none* of the preliminary investigations outside Africa had proceeded further.

Africa has not unfairly targeted the ICC, but some African political leaders, together with the African Union, the Arab League and the Organization of the Islamic Conference, most certainly have. The attacks on the ICC as a neo-colonialist tool that hunts Africans, voiced by Sudan's President Omar Al Bashir, Kenya's President Uhuru Kenyatta, Ethiopian Prime Minister Hailemariam Desalegn and, more recently, even Ugandan President Yoweri Museveni, are inherently contradictory and nonsensical for several reasons.

- 1 They treat the governments of the self-referral countries of Uganda, CAR, the DRC and Mali as hapless dupes of the neo-colonial bogeyman and imply that their leaders have been so naive and weak so as to be capable of being manipulated in such a manner.
- 2 The attacks peddle a Utopian vision of Darfur and Libya as places where violations were not really serious enough to warrant Security Council referral to the ICC, and where domestic courts could adequately enforce the criminal law, despite all credible and reasonable indications to the contrary.
- 3 The attacks launched by certain African political leaders belie their claims to prioritize individual criminal responsibility, human rights, the rule of law and democratic governance, over their own personal and political self-interests.
- 4 The complaints about the ICC have not come from victims or their representatives, nor in most cases from the general public, but from the very persons implicated in the crimes and sought by the ICC for prosecution, and by some of their closest supporters. The motives of persons indicted by the ICC to try to discredit the ICC should be painfully obvious.
- 5 The ICC cannot be credibly attacked for applying the Rome Statute's complementarity principle to situations where UN Security Council and Human Rights Council investigative missions, UN special rapporteurs, UN human rights treaty bodies, governments, independent experts, think tanks, NGOs and humanitarian aid agencies have all thoroughly documented in detail the government's inability or unwillingness to prosecute Rome Statute crimes. Moreover, it is cynical in the extreme, for example, for Kenyatta and Ruto to claim that their cosy political agreement somehow makes it unnecessary either to enforce criminal responsibility for crimes against humanity or to provide full and meaningful redress for the victims and survivors of the post-election violence.

- 6 The attacks on the ICC imply some sort of secret conspiracy on the part of Western countries to subjugate African countries. This is a nonsensical claim directly contradicted by the full range of diplomatic, economic, political, security and humanitarian engagement upon which both African and non-African countries depend to build prosperity, strengthen international and regional peace and security and to counter terrorism and other threats.
- 7 Above all, the attacks of some African leaders show complete disregard for the thousands or millions of victims who deserve to see the perpetrators prosecuted for their crimes as well as for future generations who deserve to live in a society free from the fear of a repetition of genocide, war crimes and crimes against humanity, to enjoy their basic human rights and fundamental freedoms, and to be free of the oppressiveness of authoritarian government.

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