

## ABHANDLUNGEN / ARTICLES

## The International Criminal Court and the question of alternative justice system in Africa: a case of be careful of what you wish for?

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### I. Introduction

Since the signing of the Rome Statute which created the International Criminal Court in 1998, the paradigm of international criminal justice has changed drastically. For the first time in history a permanent court was created to punish those who bear greatest responsibility for serious crimes against mankind such as war crimes, crimes against humanity and genocide. This unprecedented commitment by the international community to allow scrutiny of its member's actions by an independent international institution did not come without a price. Rather it stemmed from the horrors of the Second World War, relative success of the Nuremberg and Tokyo trials, aspirations for democratization and the new language of a human rights culture which constantly called for accountability by way of criminal prosecution of those who ordered and committed serious violation of human rights and humanitarian law<sup>1</sup>. Devastating conflicts like the Balkan crisis of early 1990s and the now permanent scar on the conscious of mankind emanating from the 1994 Rwanda Genocide which claimed close to a million lives and left thousands as refugees<sup>2</sup> emboldened this quest to have a permanent avenue to punish those who bear responsibility for such horrific crimes. With clear intent and resolve to confront the checkered past the decision and commitment of the members of the international community to have Permanent International Criminal Court was bold and incisive<sup>3</sup>.

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<sup>1</sup> *Leila Nadya Sadat*, The effect of amnesties before domestic and international tribunals: Morality, law and politics, in: Hughes/Thakur/Schabas (eds), *Atrocities and International Accountability; Beyond Transitional Justice*, 2007, 225-245, See also *William A. Schabas*, *An Introduction to the International Criminal Court*, Cambridge University Press, 3<sup>rd</sup> Ed. 2007.

<sup>2</sup> To date exact number of those who perished in the Genocide has not been accurately established. But the government of Rwanda in its published report "Denombrement des Victimes du Genocide" estimates the number to be close to one million people. See final report published by the Ministry of Local Administration, Information and Social Affairs (2002), Kigali-Rwanda.

<sup>3</sup> The preamble of the Rome Statute acknowledges this fact.

To create the permanent International Criminal Court, though a novel and timely idea, was not an easy undertaking. Some states were against the idea of global international criminal court simply because it touched the nerve of the nation's existence-sovereignty<sup>4</sup>. Mandating anybody accused of heinous crimes like genocide or war crimes irrespective of his or her position in the hierarchy of the nation to be tried by the court whose composition was of international character was rather a serious commitment which countries had to weigh strategically and carefully. It's no wonder then that some powerful states are yet to join this unique institution while others have clearly shown hostility to its existence.<sup>5</sup>

It is partly because of the failure of some powerful countries to join the court that the argument for alternative justice has gained momentum. United States for example has increasingly argued that countries should be encouraged to pursue justice at home rather than abdicating responsibility to an international body. And where domestic legal institutions are lacking, but domestic will is present, the international community must be prepared to assist in creating the capacity to address the violations. The support may include political, financial, legal and logistical support. In case domestic will is non-existent, the international community can intervene through the UN Security Council, consistent with the UN Charter such as establishing temporary tribunals and hybrid courts consisting international participants and the affected states participants<sup>6</sup>. The idea behind this suggestion seems to be that domestic trials will allow countries to address their past in accordance with their own laws while enhancing their capability of justice delivery. In this article it is argued that continued establishment of other international criminal tribunals to try crimes

<sup>4</sup> See *Lee A. Casey*, The case against International Criminal Court, in: *Fordham International Law Journal* 25 (2005), *Giovanni Conso*, The basic reasons for the US hostility to the ICC in light of the negotiating history of the Rome Statute, *Journal of the International Criminal Justice* 3, (2005) 2, p. 314-322

<sup>5</sup> For this discussion see *J. Mayersfeld*, "Who shall be judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights" *Human Rights Quarterly* 25 (2003), 91-129. Russia, China, India has yet to join the court. The United States withdrew its signature to the Rome Statute and categorically rejected the mandate of the court and has gone a step further to openly undermine the court by signing Bilateral Immunity Agreements with some state parties to the Rome Statute. The agreements purport to shield US personnel who may be accused of serious crimes in the jurisdiction of the ICC. US argues that establishing ad hoc tribunals will in the long run strengthen capabilities of some of these countries emerging from conflicts to address their own problems by building on the infrastructures left behind by these international tribunals at the end of their mandate, rather than have an international court situated far away from countries where crimes were committed.

<sup>6</sup> See *Lincoln P. Bloomfield, Jr.*, US Assistant Secretary for Political-Military Affairs remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, United Nations, New York, September 12, 2003 available at <http://www.state.gov/t/pm/rls/rm/24137.htm>. See also US position on ICC as explained by the US ambassador at large for War Crimes Issues Pierre-Richard Prosper in 2005: US pushes for African Court to Try Darfur War Crimes available at <http://www.voanews.com/english/archive/2005-03/2005-03-01-voa59.cfm>. Last visit November 2008.

already covered by the ICC will be counterproductive and will further marginalization and undermine the Court which was precisely set up to try such serious crimes.

It is further argued that, international community would be expecting too much from countries emerging from conflicts or still in conflicts to prosecute crimes of such high magnitude on their own without international assistance. This is because such countries lack adequate facilities to conduct fair trials meeting international standards. Even when they have such institutions and laws still the authorities might not be willing to go after top officials accused of crimes within the jurisdiction of the court as already seen in Sudan<sup>7</sup>. The faulty with the Security Council initiative to address serious crimes by setting up temporary tribunals on ad hoc basis is that there are no predetermined criteria for establishing international tribunals or hybrid courts rather it depends on the willingness and interests of the Security Council members. It is because of the recognition that the court can not investigate and punish all perpetrators of crimes within its jurisdiction that it is argued in this paper that domestic mechanism of justice delivery should be strengthened and enhanced to ensure that alternative justice becomes a credible complement to the efforts of the international criminal court. This can be achieved by the court and the international community supporting domestic initiatives to punish mid level perpetrators while allowing the international criminal court to try those most responsible for serious crimes and who would otherwise not be tried in domestic courts because of the immunity they enjoy.

## II. The Rome Statute and Alternative Justice System

The International Criminal Court was envisaged to be a court of last resort meant to intervene when and if the national judicial machinery has failed or is unwilling to punish the perpetrators of the serious crimes. It is not the court of first instance<sup>8</sup>. This is among the features which make ICC a “court of compromise”: its role is secondary while national courts have a primary obligation to try and punish the alleged criminals. The Preamble of the Rome Statute<sup>9</sup> clearly states that the effective prosecution of crimes of international concern must be ensured by taking measures at the national level and by enhancing international cooperation while calling upon members to exercise their criminal jurisdiction over those responsible for commission of such crimes<sup>10</sup>. This notion is similar to the long-

<sup>7</sup> For example Article 60 of the Sudanese National Interim Constitution grants immunity to the President and Vice President against any kind of legal proceedings while in office. Also article 31 and 33 of the National Security Forces Act of 1999 allows security personnel to detain people without judicial review while granting them immunity against prosecution for such actions.

<sup>8</sup> For extensive discussion see *Michael Scharf*, *The Case for Supporting the International Criminal Court in International Debate Series: should the United States ratify the treaty establishing the International Criminal Court?* Vol. 1 (2002).

<sup>9</sup> The Preamble of the Rome Statute of 17 July 1998, U.N. Doc A/CONF. 183/9, 37 I.L.M, 1002, 2187, U.N.T.S 90.

<sup>10</sup> *Id.*

held principle in international law that a State should be given an opportunity to redress the alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question at the international level<sup>11</sup>. The requirement to exhaust local remedies reaffirms the notion of complementarity and subsidiarity between the international criminal justice and domestic justice system.

Criminal prosecution in most cases is considered and regarded as an ideal mechanism of accountability for serious crimes, not only because it ensures accountability but also because it provides fair hearing chances to the victim and the accused and also because of the assumption that such process is premised and informed by internationally recognized principles of fair trial. But because of various reasons such as the need to complement the work of the prosecution machinery especially in countries emerging from conflicts with inadequate judicial capabilities or the need to involve the victims directly in the justice process, other means of punishment taking different forms ranging from reconciliation, commissions of inquiry, amnesties, lustration, reparations and civil sanctions and truth commissions may be adopted<sup>12</sup>. But these measures may not in all cases provide adequate punishment proportionate to the crimes in question, as such criminal accountability for serious crimes is still regarded as the better way to punish the perpetrators of serious crimes which is considered to enhance prospects for respect for human rights and human dignity especially after the period of conflict. Though in reality the mechanism of accountability that a society attempting to reckon with a legacy of mass atrocities ultimately opts for is determined by many factors<sup>13</sup>.

This brings us to the question of the alternative justice system envisaged under article 17 of the Rome Statute which reaffirms complementarity nature of the court and gives primacy of jurisdiction on domestic trials. What constitutes the alternative justice system which the drafters of the Rome Statute had in mind? The Rome Statute was categorical that the court will be complementary to the national efforts of punishing the perpetrators of serious crimes<sup>14</sup>. The national courts and tribunals would consider and punish the crimes falling under the jurisdiction of the ICC using their own laws and statutes and the ICC would intervene only when there is reasonable ground to do so such as unwillingness or

<sup>11</sup> See *A.A. Cancade Trindade*, *The Application of the Rule of Exhaustion of Local Remedies in International Law* 1 (1983).

<sup>12</sup> See *Gerald Gahima*, *Alternatives to prosecution: The case of Rwanda*, note 1, p. 159-181.

<sup>13</sup> *Jeremy Sarkin*, *The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of Gacaca in Dealing with the Genocide* *Journal of African Law* 45(2001), 143-172; see also *Hildegard Lingnau*, *An alternative approach to justice – the Gacaca jurisdiction in Rwanda*, *Verfassung und Recht in Übersee (VRÜ)* vol. 36 (2003), p. 582-589.

<sup>14</sup> *Id supra* note 13.

inability by the state to punish the said crimes<sup>15</sup>. What if the mechanism at the national level do not meet the standards espoused by the Rome Statute itself? This is more true to most developing countries or countries emerging from conflicts whose abilities to conduct investigations and conduct trials for such massive and high profiled crimes like genocide, crimes against humanity or war crimes still lack professional as well as infrastructural competency. The critical challenge facing the court is how to effectively exercise its jurisdiction over serious crimes without hindering or being seen to hinder peace initiatives undertaken to address the conflict.

Article 17 of the Rome Statute recognizes the notion of alternative justice as long as it conforms to the internationally acceptable standards. For example as an alternative to criminal prosecution, state parties may grant amnesty or pardon for past crimes, but such amnesties (especially those covering war crimes, crimes against humanity, genocide or rape) are not a bar to criminal prosecution in international criminal process as such the Court may declare such amnesties or pardon unlawful for the purpose of decision making<sup>16</sup>. Further there is a growing consensus on the unlawfulness of amnesties within the international community irrespective of the circumstances under which such amnesties may be awarded<sup>17</sup>. The United Nations has been at the fore to discourage and discard amnesties arguing that such undertaking indirectly promotes impunity<sup>18</sup>. Further the United Nations Commission of Human Rights issued Resolution to the effect that amnesties should not be given to those who violate international humanitarian law and human rights that constitutes serious crimes<sup>19</sup>. Indeed the United Nations has categorically refused to recognize the

<sup>15</sup> Article 17 (1) (a) of the Rome Statute states that the court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

<sup>16</sup> The question of Amnesties by national authorities and its effect in international criminal prosecution was considered in the case of *Prosecutor v Morris Kallon*, Ebrima Kamara, Case No. SCSL-2004-15-PT AND 2004-16-PT.

<sup>17</sup> For example see the decision by ICTY, *Prosecutor v Furundzija*, Case No. IT-95-17/1-T of December 1998, (1999) 39 ILM, paras 151-157 and Principle 7 of the Princeton Principles of Universal Jurisdiction provides: Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law including war crimes, crimes against humanity and genocide. Available at [http://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](http://lapa.princeton.edu/hosteddocs/unive_jur.pdf). Last visit, September 2008.

<sup>18</sup> For example article 6 of the Special Tribunal for Lebanon established under the auspices of the United Nations states that: An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.

<sup>19</sup> Resolutions adopted by the Human Rights Commission 2002/79 and 2005/81 on impunity by the UN Human Rights Commission. See also *John Dugard*, Is the Truth and Reconciliation Process compatible with International Law? An answered question, *Azapo v President of Republic of South Africa*, South Africa Journal of Human Rights 13, (1997), p. 258-268.

efficacy of amnesties even when they were awarded for the sake of peace making efforts<sup>20</sup>. Arguments have been advanced to the effect that amnesties granted as part of the truth and reconciliation inquiry in which the recipient have been obliged to make full disclosure of his/her criminal culpability while proving that their acts were politically motivated ought to be accepted than those amnesties encompassing crimes outlawed by international practice such as genocide, war crimes or crimes against humanity<sup>21</sup>. Reading this paragraph it may be correctly argued that from the international stand point, there is a growing consensus that options for alternative justice which do not involve criminal prosecution for serious crimes are not acceptable internationally and as such can never be a hindrance for an effective international prosecution. In either way even the Rome Statute do not provide much help as to how the Court should address the question of amnesty which leaves this subject in the preserve of the Prosecutor and the Pre-Trial Chamber to determine<sup>22</sup>.

Article 17 on complementarity clause in the Rome Statute was agreed upon as a compromise to respect sovereignty and to limit international interference in the domestic affairs of nations and this was accomplished by giving primacy to the national organs over international bodies such as ICC<sup>23</sup>. So alternative justice system as will be seen below clearly depends on how it is construed by the respective country in question and also how it is perceived by the international community. What constitutes alternative justice to a European is not necessarily the same to an African or American this is because the traditions which inform their legal systems have and reflect different historical and cultural perspectives. It is also worthy noting that the Rome Statute grants powers to the court to determine jurisdiction and admissibility of the case brought before it or by *sua moto* the Court may determine the same<sup>24</sup>. The Court can make an independent determination on whether any form of alternative justice such as reconciliation, amnesties, lustration or reparations is compatible with the Rome Statute, bearing in mind the provision of Article 17, and competently rule on the unlawfulness or lawfulness of such means of justice.

Under the Rome Statute it is entirely within the prerogatives of the Prosecutor on whether to proceed with investigations or not. This will depend on whether the prosecution

<sup>20</sup> In 1999 the Representative of the United Nations Secretary General in Liberia Francis Okello appended a statement to the Lome Accord between RUF rebels and the government of Sierra Leone, to the effect that the United Nations shall not recognize amnesty for war crimes, crimes against humanity or genocide.

<sup>21</sup> *Max du Plessis*, South Africa's Implementation of the ICC Statute; an African Example, *Journal of international criminal Justice* 5, (2007), 460-479.

<sup>22</sup> *Id* at p. 478.

<sup>23</sup> See *Darryl Robinson et al*, Informal Expert Paper on the Principle of Complementarity in Practice, prepared for the Office of the Prosecutor of the International Criminal Court in 2003. Available at <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf>. Last visit November 2008.

<sup>24</sup> Article 19(1) states; the Court shall satisfy itself that it has jurisdiction in any case brought before it. The court may, on its own motion, determine the admissibility of a case in accordance with Article 17.

will further the interests of justice or not, in either case his or her decision is independent and depends on his evaluation of the situation. The role of the Pre Trial Chamber in case of the decision by the Prosecutor not to investigate or to investigate is advisory in nature and only binding in case he decides to do so when the request for evaluation has been submitted by the state party or the UN Security Council<sup>25</sup>. Though this is different when the Pre-Trial Chamber by *its own* initiative reviews the decision of the Prosecutor not to proceed, here the decision of the Prosecutor will be subject to the confirmation of the Pre-Trial Chamber<sup>26</sup>. From this provision, what amounts to the interests of justice can only be determined by the Prosecutor and the Pre-Trial Chamber and not the victims or national authorities who may have different views on how to deal with their past. The interest of victims is not just peace it also include other components such as security, reconciliation and compensation. In determination of interests of justice there are no clear set criteria which present another challenge to the Prosecutor when making a decision whether to proceed with the investigations or not<sup>27</sup>. Arguably the fact that the powers to determine interests of justice is vested in two independent bodies that is the Office of the Prosecutor and the Pre-Trial Chambers clearly shows how the drafters of the Rome Statute were aware of the delicacy involved in granting such enormous power in a single body.

Furthermore, as clearly stated by the Prosecutor of the ICC<sup>28</sup>, there are myriad challenges which must be confronted when it comes to the decision as to whether to prosecute or not. For example in a country where alternative justice to the ICC like Uganda has a wide support the court is likely to encounter challenges from various quarters arguing it to give chance to the peace process by suspending its investigations or lifting up the indictments while in case the situation do not attract wide allay of support due to its intractability or because of less attention by the international community like Colombia the court is likely to face accusation of double standards of why not to prosecute<sup>29</sup>.

<sup>25</sup> Article 53 (3)(a) At the request of the State making a referral under Article 14 or the Security Council under Article 13, paragraph (b), The Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

<sup>26</sup> Article 53(3)(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1(c) or 2(c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre Trial Chamber.

<sup>27</sup> See Key Note address, "Integrating the Work of the ICC into Local Justice Initiatives" by the ICC Chief Prosecutor Luis Moreno-Ocampo, reproduced in the AM. U. INT'L Law Review, 21 (2006), p. 497.

<sup>28</sup> Id.

<sup>29</sup> Supra note 27.

### III. The alternative justice system from/ in the African context

The question of alternative justice system is more complex when it comes to Africa whose people for many years have been victims of repressive and dictatorial regimes and majority believe that past wounds are best healed at home through national courts and truth commissions rather than international prosecution in foreign countries<sup>30</sup>. More so, is the fact that the continent has been plagued by endless conflicts whose solution lies equally between the perpetrators of these crimes and the governments in power. Some of the challenges facing justice system in most African countries arise when dealing with perpetrators who are persons often needed for the rebuilding and reconstruction of the war torn societies. At times some of these perpetrators possess knowledge and expertise or political support which is hard to do without, while others occupy important position in the government or transitional authorities and therefore not willing to appear before the court or the truth telling commission when available<sup>31</sup>. Further, there are other considerations which are not legally plausible, but equally can not be ignored; prosecution whether national or international is not so swift that an accused will be apprehended today and convicted tomorrow rather it is a long and tedious process which needs patience and understanding. For victims who have been tormented by decades of conflicts it would be a detachment from reality to assume that justice will be a panacea of their suffering, rather efforts to help them resettle and restart their new lives would constitute an immediate and better option to most of them. As argued by one scholar<sup>32</sup>, societies in transition are a messy place, in which delivering justice is a difficult, laborious and often frustrating process. Large numbers of perpetrators, overwhelmed institutions, poverty and weak social cohesion may make the process of bringing perpetrators to book extraordinarily difficult, even impossible, particularly in the countries where crimes were committed<sup>33</sup>. Thus by focusing less on the overreaching need for post conflict societies to build national political culture grounded on peacemaking and longer term peace building while insisting on the unquestionable duty to prosecute war criminals may in the process perpetuate existing social and political tensions and maintain a situation in which fundamental human rights continue to be denied and threatened at a massive scale<sup>34</sup>.

Domestic criminal proceedings as an alternative to the ICC prosecution are clearly in line with the goal of complementarity as enshrined in the Rome Statute of the court playing

<sup>30</sup> John Dugard, *Dealing With Crimes of Past Regimes: Is an Amnesty Still an Option?* Leiden Journal of International Law 12 (1999), p. 1001-1015.

<sup>31</sup> Peter R. Baehr, *How to come to terms with the past*, in Hughes/Thakur/Schabas (eds), *Atrocities and International Accountability; Beyond Transitional Justice* note, Cambridge 2007, p.9.

<sup>32</sup> Sadat, note 1, p. 239.

<sup>33</sup> Id.

<sup>34</sup> See Helena Cobban, *Transitional justice and conflict termination; Mozambique, Rwanda and South Africa assessed*, note 1, 42-64.



a secondary role to the national efforts at domestic level in prosecution of serious crimes<sup>35</sup>. The ensuing challenge is to determine what kind of alternative justice in domestic arena will the court consider to constitute a genuine investigations and prosecution meeting the standards of international justice as espoused under the Rome Statute hence excluding its involvement. This is because the Rome Statute does not provide specific criteria which define the contours of acceptable national prosecution under complementarity doctrine and neither has the court provided legal framework of what should constitute acceptable domestic justice standards. Perhaps a question to ask oneself would be; does justice entail a specific duty to prosecute? The fact that the Rome Statute does not prohibit nor condone amnesty, may be argued to allow the court to take into account alternative justice mechanisms which maybe non prosecutorial in nature such as amnesty and truth commissions. It is argued that without strong domestic mechanism of justice delivery in Africa the work of the ICC will be inadequate to fight impunity. For example as of December 2008, ICC has three persons in its custody who are accused of serious crimes in Congo. It would be expected that the judiciary in Congo would exercise its primary jurisdiction over those responsible for crimes in the country especially those accused of lesser crimes before the intervention of the ICC. However, the reality suggest that the judiciary in Congo lacks basic infrastructure such as physical infrastructure, adequate prosecutors, magistrates and judges to conduct basic trials leave alone trials meeting international standards of justice<sup>36</sup>. Because of the court's inability to prosecute all those accused of serious crimes, it would be in the broader interests of justice for the court and the international community at large to support alternative justice mechanism to the ICC's prosecution which would enhance the capability of national courts and other institutions to deliver justice through prosecution and non prosecution means.

In most African countries where ICC is involved and likely to be involved alternative justice is a combination of different elements such as domestic trials, amnesty or other forms of truth and reconciliation which may not necessarily satisfy international justice standards and due process as enshrined in the Rome Statute. Indeed when examining article 17 on complementarity and article 20 which prohibits double jeopardy in the Rome Statute it is evident that any alternative justice enough to bar ICC prosecution must involve certain kind of criminal trials which are consistent with due process and fair trial. Alternative justice system in the form of amnesty, truth telling commissions or forgiveness seem to be accommodated under article 53 of the Statute which allows the prosecutorial discretion not

<sup>35</sup> William Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome Statute, 49 Harvard International Law Journal 53, (2008).

<sup>36</sup> For comprehensive account of challenges facing judiciary in Congo see the Report by the International Crisis Group available at <http://www.crisisgroup.org/home/index.cfm?id=3758>. Last visit November 2008.

to investigate if it is in the interests of justice<sup>37</sup>. Under article 53 the Prosecutor can decline to initiate an investigation in the interests of justice even if there is a reasonable basis in law or facts to do so. In another likely scenario the Prosecutor can also decline to prosecute after investigation if doing so would not be in the interests of justice. It is this provision which compels the Prosecutor to be careful when determining what constitutes interests of justice. This does not suggest that ICC should apply different forms or standards of justice in Africa rather it is the recognition that amnesty and other non prosecutorial means of justice more often play an important role in addressing the aftermath of conflicts. Reconciliation between international demand for prosecution of international crimes and a national appeal for a political compromise involving amnesty could best be achieved by drawing a distinction between permissible and impermissible amnesties and by limiting international recognition of the former<sup>38</sup>. Indeed the ICC Prosecutor has gone on record arguing that calls and suggestions to use his discretionary powers for short term political gains are inconsistent with the spirit of the Rome Statute<sup>39</sup>. As seen from Uganda situation where ICC is actively involved the government has argued that alternative justice in the form of amnesty, truth commission and prosecution in domestic court does not perpetuate impunity rather promotes enduring peace and reconciliation within the country.

#### **IV. Alternative Justice Systems versus international prosecution by the ICC; some lessons from Uganda and Sudan**

Arguably the question of alternative justice features high on the Court's priorities in its current situations where it is investigating notably in Uganda. As seen in this article, ICC is a unique judicial institution in that it deals with ongoing crimes and conflicts. For example, in Northern Uganda the court is not privy to any peace initiative<sup>40</sup> rather it is rightly interested to fulfill its mandate of dispensing justice for crimes committed<sup>41</sup>. But from what may be termed as an irony of unintended consequences, the court has found itself having to contend with realities of peace making. In most cases tyrants in power or armed opposition in the bush have been unwilling to end the conflict without safe passage and assurance that there will never be prosecution to follow them which effectively means immunity for their

<sup>37</sup> See *John Dugard*, possible conflict of jurisdiction with Truth Commissions, in *The Rome Statute of The International Criminal Court: A Commentary*, 727 (in Antonia Cassese et al eds 2002).

<sup>38</sup> *Dugard*, note 30, p. 1009.

<sup>39</sup> Address by Louis Moreno-Ocampo, Nuremberg, 24<sup>th</sup>/25<sup>th</sup> June 2007, Building a future on Peace and Justice.

<sup>40</sup> As of November 2008 there is a UN backed peace process addressing the Northern Uganda conflict led by the Vice President of Southern Sudan H.E Dr. Riek Machar and the former President of Mozambique Joachim Chissano as a special envoy of the United Nations Secretary General.

<sup>41</sup> *Id supra* note 39.

actions<sup>42</sup>. Yet the ICC was founded to deal with exactly this aspect, namely fight impunity in all its form irrespective of the position of the alleged criminal<sup>43</sup>. The cases of Uganda and Darfur can be illustrative of the challenges facing the court.

### 1. *International prosecution vs. national prosecution in Uganda*

Uganda has had a long and protracted civil conflict which has spanned two decades plus between the government and the Lord's Resistance Army (LRA). The war has had profound effects on the people both socially and economically, it is estimated that around 85% of the population in Northern Uganda live in Internally Displaced Camps or protected camps while others are refugees in neighboring countries<sup>44</sup>. The government did try different means including granting amnesty to the rebels to assure them of comfortable reintegration without criminal accountability but with no success<sup>45</sup>. After efforts to negotiate and end the war peacefully between the government and the rebels bore no success, in December 2003 the Ugandan government triggered the jurisdiction of the ICC by invoking Article 14 of the Rome Statute which allows state parties to make referrals to the court though it is the prerogative of the Prosecutor to accept or reject the referrals<sup>46</sup>.

Using its criteria the court started investigations and later issued indictments for the top echelons of the LRA movement which included five commanders of the movement<sup>47</sup>. This move was greatly opposed by different sections both in Uganda and outside Uganda who argued that with ICC indictments the rebels can never come out to negotiate peace<sup>48</sup>. In

<sup>42</sup> See Jack Synder and Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 *International Security* 5, (2003), p. 5.

<sup>43</sup> Article 27 of the Rome Statute.

<sup>44</sup> For extensive discussion of this conflict see Katherine Southwick, *Investigating War in Northern Uganda: Dilemmas for the International Criminal Court* 1 *Yale J. of INT'L AFF.* 105 (2005), Frank Van Aker, *Uganda and the Lord's Resistance Army: A new order no one ordered*, 103 *African Affairs* 335 (2004), and Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Uganda*, 14-36 (2005). This report is available at <http://www.hrw.org/reports/2003/uganda0703>. Last visit November 2008.

<sup>45</sup> See Amnesty Act part II, enacted into law by the Ugandan Parliament in 2000. The amnesty law grants immunity to the rebels against criminal liability in exchange for surrender with no requirement to participate in accountability process for the past crimes.

<sup>46</sup> Article 14 of the Rome Statute state 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 requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with commission of such crimes.

<sup>47</sup> See: ICC, "Prosecutor of the ICC opens an Investigation into Northern Uganda" Press release 29<sup>th</sup> July 2004 and the case of *The Prosecutor v Joseph Kony et. al* available at <http://www.icc-cpi.int/cases/UGD.html>. Last visit August 2008.

<sup>48</sup> See Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long Term Reconciliation (Refugee Law Project, Paper No. 15 2005)

general the reaction to the intervention of the court in the ongoing conflict is mixed between those who see the court as a hindrance to the ultimate solution to the conflict and those who look at the court as a best alternative mechanism available to bring an end to the conflict. The latter argues that the conflict has been ongoing for more than 20 years and since government initiatives failed, then it is better to try another means like ICC<sup>49</sup>. Despite a mixed reaction of criticism and approval and having battled this group for close to twenty years without success, the government decided to chat this avenue in the hope that what the gun failed to achieve, perhaps could be achieved by indictments and subsequent international prosecution.

It is after the issuance of indictments by the court that rebels came out to talk peace arguing that they are now ready to face the government and discuss available options to bring peace in the country<sup>50</sup>. The government agreed and the Juba Peace Process kicked off. Ironically, the indictments issued by the ICC were high on the agenda of this process, the rebels argued that unless the indictments are dropped they can never sign a peace deal. The government and the rebels agreed on the five agendas namely (i) cessation of hostilities (ii) comprehensive solutions (iii) accountability and reconciliation (iv) disarmament, demobilization and integration and (v) final cease fire<sup>51</sup>. The government assured the rebels that it will talk to the ICC to drop the indictments in favour of the domestic justice system. Indeed the President argued that since it is the government which asked ICC to come in then it will be the same government to ask the court to leave<sup>52</sup>. The president does not shun accountability rather he says the rebels will face a combination of traditional and formal justice at a domestic level rather than retributive justice which is the hallmark of the ICC.

The proposed alternative justice mechanisms in Uganda apparently include truth commissions, traditional methods of reconciliation, reintegration of the rebels into the local community and criminal accountability in a special High Court division to be established to try those who bear most responsibility for the crimes committed<sup>53</sup>. The proposed means of accountability largely elevates forgiveness and reconciliation over criminal punishment for serious crimes which is inconsistent with the Rome Statute. The government of Uganda has further argued that the work of the special court is not meant to supplant the work of the

<sup>49</sup> Id, p. 1-28.

<sup>50</sup> *Adam Branch*, Uganda's Civil War and the Politics of ICC intervention, 21 *Ethics and International Affairs*, 179 (2007) and Refugee Law Project (RLP), *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda* (Working Paper No. 11, February 2004).

<sup>51</sup> Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement signed on 29<sup>th</sup> June 2007.

<sup>52</sup> See Museveni Says Uganda Rebels Will Not Face International Criminal Court, available at <http://www.voanews.com/english/2008-03-11-voa67.cfm>. Last visit August 2008.

<sup>53</sup> See letter from the Acting Solicitor General of Uganda to the Registrar of the International Criminal Court on 27<sup>th</sup> March 2008.

international criminal court rather all those individuals who were indicted by the court will be tried by the special division of the High Court<sup>54</sup>. While the rebels have consistently argued that the withdrawal of ICC indictments is a pre requisite for the final settlement of the conflict<sup>55</sup>. Strangely the rebels have not claimed immunity from criminal prosecution rather they argue that ICC should be excluded in all accountability options available.

This prompts a question as to whether the court process can be triggered and suspended at the convenience of the parties. The position of the government of Uganda collides with that of the ICC. On the one hand the government claims that it has a right to do what it takes to bring to an end the conflict, while the court argues that it can dent its credibility<sup>56</sup> if state parties are allowed to use the court as a bargaining chip to attain their political goals<sup>57</sup>. The international criminal court has categorically stated that there can be no amnesty for crimes under the jurisdiction of the court namely war crimes, crimes against humanity and Genocide<sup>58</sup>. The Court further argues that the Ugandan government as a state party is bound to respect the Rome Statute by arresting and surrendering the indicted persons. On a different note the Ugandan government has denied any attempt to condone impunity by offering amnesty to the rebel groups<sup>59</sup>. Rather the government says, it will try the indicted persons using laws and courts of Uganda relying on Article 17 of the Rome Statute which gives primacy of jurisdiction on domestic justice machinery. The differences between ICC and the Ugandan government are not on accountability rather it is the kind of accountability mechanism appropriate that is in contention.

Further the court argues that if at all the government wishes to punish the perpetrators of serious crimes committed on its territory it can still do so by dealing with mid level commanders who are equally responsible for atrocities. The Prosecutor has gone further to accuse the rebels as people not interested in peace making rather they are buying time from the peace talks while regrouping to cause more harm to the civilians<sup>60</sup>. Despite the court being bold on its stand asking the government to honour its obligation, but still it looks

<sup>54</sup> Ibid.

<sup>55</sup> See The Security Council Up to date Report on Uganda, No. 1, of 11<sup>th</sup> April 2008. Available at, <http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.4018489/>. Last visit November 2008.

<sup>56</sup> See ICC Integrity sitting At the Crossroads available at <http://allafrica.com/stories/200803180808.html>. Last visit August 2008.

<sup>57</sup> See Uganda: West Angered by Museveni's Call for ICC to Pardon Kony Group, available at <http://allafrica.com/stories/200803171480.html>. Last visit August 2008.

<sup>58</sup> Supra note 39.

<sup>59</sup> See statement by Francis Butagira, Permanent Representative of Uganda to the United Nations given to the Sixth Assembly of State Parties to the Rome Statute of the International Criminal Court 3<sup>rd</sup> December 2007 in New York.

<sup>60</sup> See the address by the ICC Prosecutor to the Assembly of the State parties 12 November 2008. Available at [http://www.icc-cpi.int/library/organs/otp/speeches/2008-11-14\\_speech.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/2008-11-14_speech.pdf).

upon on the same government to arrest and surrender the accused because the court has no police of its own to do so.

This method leaves many questions unanswered such as what will be the role of the ICC in the process of accountability because it seems that this agreement excludes any involvement of the court in the accountability process. Recognizing the central role of the court as being one to deal with those who bear greatest responsibility for the crimes committed, perhaps the agreement would have left the top commanders in the jurisdiction of the ICC while the domestic initiatives invoked to punish the rank and file. Clearly the situation and current stand off between the ICC and Uganda reaffirms the continued problem of balancing a need to address justice requirement at a domestic level while honoring international treaty obligations like those arising from the ICC especially for countries in Africa which have been plagued by conflicts for many years. As seen from the arguments of Ugandan government, it's not the rejection of accountability for perpetrators of mass crimes which is a sticking point rather the method and avenue of such accountability process.

Again the change of mind by the Ugandan government raises a question as to why did the government refer the matter to the ICC in the first place. Was it interested to use the court as a bargaining chip in its negotiation with the rebels? Did it believe genuinely that the court in The Hague could bring peace and justice in Uganda? Because even before the government sought the intervention of the ICC, it was aware that the current options of prosecution in Uganda or traditional justice system did exist. After all ICC is the court of last resort. Further, the argument of Uganda that it can not arrest and surrender the indicted persons to the court because they are beyond territorial borders of Uganda<sup>61</sup>, do not hold. Because in the first place if Uganda with its law enforcement machinery like the army and police could not arrest the rebels for more than twenty years, how did it expect the court with no police or army to do it? Clearly the government position hardly reflects on genuine efforts to work with ICC to address the conflict. To have the ICC already investigating the situation and only to change the rules of the game in the middle of it, it doesn't help the court and it clearly shows that even the state parties to the Rome Statute must take their obligations seriously and responsibly. If the court acts in good faith to heed to the request of the state party seeking its intervention while behind the curtain the government is mapping another motive of using the court as a bargaining chip to lure the protagonists to come to the negotiating table, this can greatly tarnish the credibility and effectiveness of the court. The court can not afford to be used as a bargaining chip or involve in politics of compromise or exigencies with state parties rest it deviates from its original founding mission of ending impunity<sup>62</sup>.

<sup>61</sup> Supra note 59.

<sup>62</sup> See arguments by *Michael Reisman*, who argues that ICC is a judicial body and not a political body as such it should do justice and not politics; Prospects for The Functioning International Criminal Court contained in: Mauro Politi / Giuseppe Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* ((2001), pp. 299-307.

## 2. *Addressing conflict while pursuing justice: A case of Sudan*

The situation in Sudan is different from the one in Uganda, precisely because the situation in Darfur was referred to the Court after the recommendations made by the International Commission of Inquiry into the violations of human rights in Darfur – and not by the Sudanese government<sup>63</sup>. It was after this report that the United Nations Security Council adopted Resolution 1593 to refer the matter to the court<sup>64</sup>. The complexities facing the court in Sudan are equally pressing as in Uganda. The government of Sudan has categorically rejected the jurisdiction of the court arguing that it has neither failed nor been unable in its duty to prosecute those responsible for alleged crimes in Darfur. In other words Sudan is invoking the complementarity doctrine. In fact after the referral of the situation to the Court, the government established the Special Criminal Court for Events in Darfur and Special Chambers in each of three states in Western Darfur meant to try alleged criminals in Darfur<sup>65</sup>. The Sudanese government also argues that it is not a party to the Rome Statute and thus outside of its jurisdiction. However, this argument does not hold simply because the referral was made by the United Nations Security Council<sup>66</sup>. Interestingly, the fundamental argument of Sudan on the rejection of ICC is not centered on the culpability of the alleged perpetrators rather it is founded on capability and willingness to try and punish the perpetrators if any and non ratification of the Rome Statute<sup>67</sup>. Sudan believes that its judicial system is capable to administer justice without recourse to international bodies like ICC. The court argues that its investigation focus is different from what Sudanese court's are addressing<sup>68</sup>. To date the Court has issued two arrest warrants with a pending application for the arrest warrant of the President Mr. Omar Bashir<sup>69</sup>.

<sup>63</sup> The Commission was established by the UN Security Council Resolution 1564/2004 adopted under Chapter VII of the UN Charter.

<sup>64</sup> Resolution 1593/2005. The Resolution was adopted by 11 countries in favour (Tanzania, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russia and United Kingdom) while four abstained (USA, China, Algeria and Brazil).

<sup>65</sup> The court was established by the decree of the Chief Justice and the President of the Supreme Court in June 2005.

<sup>66</sup> Article 13 (b) of the Rome Statute states: "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if, a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."

<sup>67</sup> See statement by the Sudanese government: Sudan releases Darfur war crimes suspect wanted by the ICC available at <http://www.sudantribune.com/spip.php?article24036>. Last visit August, 2008.

<sup>68</sup> See Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593/2005, available at [http://www.icc-cpi.int/library/cases/OTP\\_ReportUNSC\\_3-Darfur\\_English.pdf](http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf). Last visit October 2008.

<sup>69</sup> See ICC Prosecutor presents a case against Sudanese President Bashir for genocide, crimes against humanity and war crimes in Darfur. Available at [www.icc-cpi.int/pressrelease\\_details&id=406&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=406&l=en.html).

The African Union and the Arab League have rallied behind the government asking the court to withdraw its case against the Sudanese President for fear that the indictment would jeopardize peace process in Darfur. In fact the African Union has gone extra mile by adopting a resolution calling for appointment of High Level Panel comprising of distinguished Africans with integrity to explore possibility of establishing truth and reconciliation commissions and alternative courts to try those accused of crimes in Darfur within Africa<sup>70</sup>. African Union has stated that they are not against accountability for war criminals or condoning impunity rather the organization support justice in Sudan through Truth and Reconciliation Commissions, trials conducted by the national government or with assistance from the African Union<sup>71</sup>. Which effectively sidelines the court. Examining these efforts of the African Union to thwart the work of the court in Sudan one can convincingly argue that these efforts do not stem from a genuine belief that alternative mechanism to the court can achieve justice in Sudan or within Africa rather can be seen as a political move to shield the Sudanese President from international prosecution. This is because in its first case in Sudan when the court issued an arrest warrant for Harun and Kushayb<sup>72</sup>, no institution (including the AU) raised an objection to protest the move by the court to indict one of the senior government officials. Further these efforts by AU and Arab League do not address the pending arrest warrant issued by the court against two Sudanese persons rather they focus on the likely arrest warrant against the President.

The arguments advanced by Sudan to oust the jurisdiction of the court on the basis of non ratification of the Rome Statute do not hold merit because the situation was referred to the court by the UN Security Council which renders moot the requirement of ratification. Further, in 2008 Sudan amended its Criminal Procedure Act of 1991 to include crimes within the jurisdiction of the court but nevertheless several laws including the Constitution still grants immunity to the President and other senior government officials which would virtually close any avenue of domestic accountability for these officials. Further Sudan did sign<sup>73</sup> the Rome Statute, among the obligations accompanying its signature is to refrain from acts which would defeat the work of the court<sup>74</sup>. Considering such existing obligations binding Sudan, then the country has no sound legal basis for refusing to cooperate or obstruct the work of the court simply because the basis of the court's jurisdiction in Sudan stems from the Security Council mandate. Unless Sudan emends its domestic laws to strip immunity granted to senior officials whom the court is focusing on such as the President

<sup>70</sup> Communiqué PSC/MIN/Comm(CXLII) issued on 28<sup>th</sup> July 2008 by the Peace and Security Council of the African Union in Addis Ababa, Ethiopia.

<sup>71</sup> Id.

<sup>72</sup> See case ICC-02/05-01/07, *The Prosecutor v. Ahmad Muhammad Harun* ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb).

<sup>73</sup> Sudan signed the Rome Statute in September 2000.

<sup>74</sup> Article 18 of the Vienna Convention on the Law of Treaties. Entered into force on 27<sup>th</sup> January 1980.



himself it can not claim to oust the jurisdiction of the court invoking the complementarity doctrine.

#### **V. How should the International Community support the work of the International Criminal Court?**

The International community has an important role to play to make the mission of the ICC a reality. This role among other things requires them to respect their obligations to the Rome Statute such as assisting the court in its investigations and collection of evidence when possible. International community can take various initiatives to support domestic justice mechanisms especially in transitional countries where the court is likely to focus by providing requisite funding and technical support to strengthen and enhance justice delivery. This will ensure that countries address serious crimes within their jurisdiction before the court intervenes. Indeed the importance of countries addressing crimes before the intervention of the court was reaffirmed by the ICC Prosecutor when he argued that “as a consequence of complementarity, the number of cases that reach the court should not be a measure of its efficiency. On the contrary, the absence of trials before this court, as a consequence of a regular functioning of national institutions would be a major success”<sup>75</sup>. The court has no police or any other enforcement mechanism for its decisions as such its success will greatly depend on the willingness of the international community to enforce the court’s decisions. But as seen in Uganda and Sudan when the authority is not willing to cooperate with the court by arresting and surrendering the perpetrators, the court can do little to address the situation. Further the presence of the court should not be the basis for inaction when action is required to stop atrocities as it is happening in Darfur. International community cannot ask the court to intervene in a conflict when it can not facilitate the work of the court by way of funding its activities, aiding the safety of the court’s personnel or arresting those wanted by the court. As put by one writer, when the international community through the United Nations fail to intervene to stop atrocities because of disagreement among its members, it is seen as a well prepared institution to protect perpetrators of crimes by ensuring their due process while affording their victims no protection<sup>76</sup>.

Unfortunately the international support for the court is still lukewarm and divided between those who strongly believe in its mission and those who look at it as another tool of the Western hegemony to punish the weak especially in the global south with serious deficiency of democratic accountability for its judges and prosecutors<sup>77</sup>. Simply because many don’t believe that one day a person from the developed world will ever stand trial

<sup>75</sup> Statement by Luis Moreno Ocampo when taking oath of office on 16<sup>th</sup> June 2003.

<sup>76</sup> See *Jeremy Rabkin*, *Global Criminal Justice: An Idea Whose Time Has Passed*, 38 *Cornell Int’l Law J.* (2005), p. 763.

<sup>77</sup> See *Lee A. Casey*, *The Case Against the International Criminal Court*, vol. 25 *Fordham International Law Journal* (2002), pp. 840-872.

before this court<sup>78</sup>. This argument is premised on the fact that most of the Western countries have relatively better legal and judicial structures capable to effectively exercise their permissive jurisdiction on a complementarity doctrine by addressing the crimes in the jurisdiction of the court before any intervention of the court is sought.

Another problem facing international criminal justice at the international platform is the notion of selective justice and the failure of the powerful countries to accept to be bound by the same rules which they strongly prescribe for others. This is no more true than the Iraq Special Tribunal which was established under the US occupation in Iraq, among other things, this court was permitted to exercise jurisdiction over Saddam Hussein and his associates for violations of international humanitarian law and human rights, but it was deprived jurisdiction over US soldiers or civilians accused of mistreating Iraqis or Iraq detainees in Iraq prisons such as Abu Ghraib for committing more less the same crimes<sup>79</sup>. This has also been manifested even in the United Nations itself, as a price for international consensus the Security Council had had to exempt some people from the arm of the international criminal justice<sup>80</sup>. It is such kind of international politics that less powerful countries especially in the global south view the enterprise of international justice as project meant for the selected few-unfortunately the weak<sup>81</sup>.

Further state members should not use the court as a convenient platform to address their political concerns when it best suits them. If a country believes that its domestic justice system is credible enough to try crimes within the jurisdiction of the court then it should not refer the matter to the court only to ask the court to withdraw when it no longer fits its political expediency. For example in 2004 the highest court in Central African Republic determined that domestic courts were incapable to try crimes which were committed in the country in the ongoing conflict as such the government decided to refer the situation to the ICC<sup>82</sup>. In 2008 the government requested the UN Security Council to defer the ICC work in the country because continued ICC investigation was seen as jeopardizing Peace Agreement between the government and the rebels. The main argument of the government is that its domestic courts are capable to try such crimes without involvement

<sup>78</sup> *Id.*

<sup>79</sup> *Sadat*, supra note 1, p. 228-238.

<sup>80</sup> Para 6 of Resolution 1593 of 2005 which referred Darfur situation to the ICC exempts nationals of non state parties to the court from the jurisdiction of the Court, while aware that even Sudan itself was not a state part to the court.

<sup>81</sup> For example, see the Statement by the President of the International Progress Organization titled, Double Standards in International Criminal Justice: The Case of Sudan, Vienna, 2<sup>nd</sup> April 2005, available at <http://www.i-p-o.org/Koechler-Sudan-ICC.pdf>. Last visit August 2008.

<sup>82</sup> See the Prosecutor receives referral from Central African Republic available at [http://www.icc-cpi.int/pressrelease\\_details&id=87&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html). Last visit December 2008.

of the court and continued investigations by the court can negatively affect peace process<sup>83</sup>. Here again one would ask what was the intention of the government making the referral to the ICC? Was it genuine or it was meant to scare off the rebels to come and negotiate peace? Either way the trend of making referrals only to retreat back and ask the court to suspend its work in the middle of the way is not helpful to the court.

## **VI. How should the ICC enhance and strengthen alternative justice in Africa?**

Alternative justice is one of the most important mechanisms of complementing the work of the ICC because of the reality that the primary responsibility to prosecute massive crimes rest with the state concerned, nevertheless this obligation must be translated from commitment into a living reality. It would be worthy to acknowledge that most of these countries emerging from conflicts or still in conflicts (potential focus of the court) hardly have strong and credible judicial structures to cope with the enormous task of trying such massive crimes within their jurisdictions which leave the court as the main alternative available to deal with the perpetrators of serious crimes.

The court has taken commendable efforts to disseminate its work on the continent through partnership with various NGOs and Civil Societies<sup>84</sup>. Nevertheless the court must be seen as a true partner in the administration of justice in the African context especially in the eyes of the rank and file citizens on the street who have endured a blunt of these conflicts. Because of the high stakes of its subject matter and the threat that its decision can pose to powerful national and international interests, the court can easily be branded as a political institution remote from both the rule of law and the places where the crimes it deals with occur<sup>85</sup>. Thus a Prudent decision on when to intervene will mostly be the key to its success. The court must be prepared to face serious challenges that will question its independence from political institutions, its legitimacy as an authentic interpreter of international norms, and its accountability to the states that created it and whose nationals face prosecution within its courtroom<sup>86</sup>. Otherwise it may find itself as it is now in conflict with peace initiatives and be seen as an obstacle to the full realization of peace which has constantly evaded the larger part of the continent for quite some time now.

<sup>83</sup> Interview with Marie-Edith Douzima coordinator for the Central African coalition for the ICC. Available at [http://www.iccnw.org/documents/AfricanNewsletter\\_Issue10\\_nov08\\_eng\\_final1.pdf](http://www.iccnw.org/documents/AfricanNewsletter_Issue10_nov08_eng_final1.pdf). Last Visit November 2008.

<sup>84</sup> Most notable efforts to publicize the work of the court are those undertaken by the coalition of the NGOs in various parts of the world. For more details see [www.iccnw.org](http://www.iccnw.org). Also see outreach report for the activities of the court prepared for the Assembly of the State Parties. Available at [http://www.icc-cpi.int/library/Outreach\\_report-2008-en-LR.pdf](http://www.icc-cpi.int/library/Outreach_report-2008-en-LR.pdf). Last visit November 2008.

<sup>85</sup> See *Allison M. Danner*, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 AM. J of INT'L LAW, (2003) pp. 510-552.

<sup>86</sup> Id.

Further the court should take concrete steps to work with national authorities to enhance and strengthen alternative justice mechanisms especially in countries where it is involved. This factor not only signifies the understanding and need of the court to focus on those who bear greatest responsibility but it also reflects on the resolve of the court to support domestic justice mechanisms to address serious crimes and over all criminal justice delivery. Support by the court can range from sharing information with local courts and tribunals, training opportunities for investigators and prosecutors to enhance their skills in handling complex cases, preservation of evidence techniques and case filing and management. This kind of support can gradually enhance the capability of African countries to try crimes within their own countries before seeking intervention of the court. The court should strive to establish and improve ties with regional institutions such as SADC, ECOWAS, ACJ, and AU among others. This is to dispel the notion of “African defendants for European Justice” a long held views by most of those opposed to the court<sup>87</sup>. For example, while abstaining from UN Security Council Resolution referral of Darfur situation to the court, Algeria argued that the role of accountability in Darfur would have been better performed by African Union or any other body with AU mandate which, could while undertaking accountability, also strengthen justice delivery capability on the continent than a court in The Hague<sup>88</sup>.

As a permanent court, the ICC should consider opening regional offices within Africa to conduct its trials. This suggestion stems from the understanding that arresting alleged criminals and flying them to The Hague to face trial hardly helps the image of the court as a global institution. Conducting trials in Africa not only will it allow the victims to follow closely the court proceedings but it will also give an opportunity to African governments to appreciate the conduct of international criminal justice in their own backyard. It would also enable many officials from domestic justice institutions to learn from the court on techniques of handling high profiled cases involving serious crimes without necessarily going to The Hague. It is no wonder then that in the UN Security Council referral of the Darfur situation to ICC the resolutions authorized the court to conduct its hearing within the region where people can follow proceedings<sup>89</sup>.

## VII. Conclusion

The question of alternative justice will continue to feature high in the administration of international criminal justice in Africa especially now that ICC is operational. This is so because of the devastating and long running conflicts on the continent which have

<sup>87</sup> For example see *David B. Rivkin Jr. and Lee A. Casey*, “Darfur’s Last Hope,” *The Washington Times*, February 4, 2005, A19.

<sup>88</sup> See Press Release, Security Council Refers situation in Darfur Sudan to the Prosecutor of the International Criminal Court U.N Doc SC/8351 (statement by the Algerian Representative to the UN).

<sup>89</sup> Security Council Resolution 1593/2005.

destroyed national judicial capabilities of many countries to try serious crimes. The creation of the ICC clearly reaffirms the fundamental belief by the international community that human suffering must be brought to an end irrespective of the entity committing the crimes. The existing differences between various legal systems should be seen as a catalyst rather than a hindrance to the administration of international criminal justice. For those who are keen to avoid the “long arm of the court” will likely advance the notion of alternative justice as a relative term whose operation must be informed by the traditional and customs of the respective society. This is problematic because, despite the fact that Rome Statute is an international agreement but still it can not afford to ignore these concerns. As seen in Uganda, one who killed and maimed hundreds and thousands of people will claim that in Africa restorative rather than retributive justice is a norm than exception. People will continue attempting to use the court as a bargaining chip to advance their concerns of discussing peace while burying their criminal responsibility under the carpet.

But more important is the fact that if at all the question of alternative justice is to make practical sense in its realization, then the international community must devote considerable resources to support the national efforts especially in transitional countries or countries emerging from conflicts to strengthen their domestic legal structures to enable alternative justice system to become a realistic means in complementing the work of the ICC in the administration of the international criminal justice. For it would be counterproductive to the whole notion of justice to concentrate on the few individuals who bear greatest responsibility for atrocity crimes leaving hundreds of those who presided over anarchy to be tried by non existent or weak domestic legal machinery. In other words the efforts and resources being devoted in the quest to have a strong ICC should be equally the amount devoted to support national legal structures in these countries.

As seen in Sierra Leone, when international justice is domesticated within national jurisdiction that is, the trials and proceedings are conducted in the country where crimes were committed, the nation and its people tend to benefit immensely. The benefit is not only on the physical infrastructure left behind by the court, but also by the knowledge transfer between international personnel and the local cadre. In this regard ICC with support of state parties to the Rome Statute could explore possibilities of having regional presence in Africa and other regions of the world so that apart from taking its services closer to the presumptive beneficiaries but also it would enable personnel from local judiciaries from these war torn countries to attend proceedings of the court, gain additional investigatorial skills and acquaint themselves with the necessary knowledge and skills of dealing with such high profiled crimes like genocide, war crimes and crimes against humanity. The engagement and support of ICC in this area is crucial and indispensable to build strong domestic legal machineries.

Arguably the International Criminal Court will neither address all atrocities which have haunted and devastated mankind especially in Africa nor be a panacea to human rights and humanitarian law violations. But its presence will continue to symbolize international resolve against impunity and challenge the notion of selective justice for selective catego-

ries of people, a badge much identified with ad hoc tribunals whose establishment have much depended on the would be powers of the day than the actual suffering. ICC is a court which can truly be said to embody common values of humanity and a reminder that international community have a common obligation and interests to fight impunity and address suffering of mankind anywhere in the world. But what is clear is that the dream of a strong and effective ICC will not be realized if the international community delegates its right and responsibility to be at the battle front in the war against impunity to the court. ICC can only succeed if state parties and the United Nations want it to succeed. For example, the Security Council can not expect the Court to bring peace and justice in an ongoing conflict like Darfur, when it has failed to fund the work of the court, to stem violence by sending strong peacekeeping force and arresting the suspected perpetrators already indicted by the court. For Africa, the court will continue to be a strong partner in its quest to address its dark past while forging ahead to its promising future, a goal which can not be realized if domestic efforts to establish strong legal administrative structures are not equally supported by the international community.

## ABSTRACTS

### **The International Criminal Court and the question of alternative justice system in Africa: a case of be careful of what you wish for?**

By *Charles Majinge*, Dar-Es-Salaam / Heidelberg

This article attempts to analyze the role of the international criminal court in prosecuting serious crimes in Africa vis a vis the whole concept of alternative justice or complementarity principle as enshrined in the Rome Statute. In this article it is argued that for Africa to move forward and realize its development potential then the work of the international criminal court will be critical in the fight against impunity to consolidate rule of law and democracy. It is further argued that the court should be cautious when determining whether alternative justice system used by countries to address past crimes meet the standards of justice espoused by the Rome Statute because countries have different understanding of justice as such it may create conflict between countries whose support the court cannot succeed without. It is argued that alternative justice mechanisms which do not condone impunity for crimes within the jurisdiction of the court should be accepted as long as the aim is to further justice and reconciliation.

It is further argued that the court must balance between the legitimate desire of countries to achieve peace and justice after conflict through their domestic means with the international legal duty of countries especially parties to the Rome Statute to genuinely prosecute international crimes falling in the domain of the court. The success of the court will partly depend on how successful it manages to form and sustain strong partnership with important organizations like African Union, IGAD or SADC among others not only for these organizations to take proactive steps to encourage member states to address violations of serious crimes within their countries but also to garner their support in enforcing the court's decisions. Further, the court should support domestic justice mechanisms by offering assistance to the national institutions such as judiciary and national human rights commissions in areas such as investigation techniques, ant impunity strategies, collection and storage of evidence and general knowledge sharing. This partnership can in a long term enhance the capability of these institutions to address serious crimes at a national level and in the process fostering peace and justice without involvement of ICC.

Lastly, the article emphasizes the need of the state parties to take their obligations and commitments seriously by affording the court assistance it may need to fulfill its mandate and also avoiding signing peace agreements which they well know to be inconsistent with their obligations to the Rome Statute.