



Making
Human Rights
a Reality

AFRICA LEGAL AID QUARTERLY

Special Edition 2018

ISSN: 1384-282x

'A LEADING VOICE IN INTERNATIONAL JUSTICE'

Commemorating the 20th Anniversary of the Rome Statute of the International Criminal Court

- Broadening the Fight Against Impunity
- 20 Years of the Rome Statute of the ICC
- Strengthening Complementarity as a Cornerstone of the Rome Statute System
- The Boko Haram Situation
- Translating the ICC's Victims' Rights Provisions into Domestic Context
- The Malabo Protocol and Complementarity of International Criminal Justice: Challenges and Prospects
- Bringing Soft Power to a Life's Work: The Professional Trajectory of Judge Sanji Mmasenono Monageng
- A Candid and Inspiring Interview with Judge Howard Morrison

Peer Reviewed



About Africa Legal Aid

Africa Legal Aid (AFLA) is an influential pan-African entity devoted to promoting human rights and international criminal justice. Celebrated for its convening power and its 'flagship' publications, AFLA provides leadership and support to key institutions and organisations working for the respect and recognition of human rights and international justice.

AFLA operates throughout Africa, with a pan-African registered office and platform in South Africa and a small satellite office in the international legal capital of The Hague. AFLA has been at the forefront of universalising international criminal justice and has engaged with stakeholders in Africa and the Global North in this endeavour.

AFLA has a bias for gender equality and gender justice in all its activities, not least because women play a leadership role in the organisation.

AFLA has worked to increase accessibility of the ICC to national actors. It has spearheaded efforts to incorporate much needed African perspectives in the global campaign to promote accountability and end impunity for gross human rights violations. In the process, AFLA has been recognized as a 'leading voice in international justice'.

Under the auspices of AFLA, 'the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: an African Perspective' were adopted in 2002. The Principles enjoy international recognition and are used for advocacy and lobbying initiatives. The Principles have been coined 'the voice of Africa on universal jurisdiction'.

AFLA has convened many high-profile fora, including a 2016 Seminar in Dakar, Senegal, coinciding with the historic judgement of Hissène Habré, the former president of Chad by the Extraordinary African Chambers (EAC) within the courts of Senegal. A Report of the Seminar is available at www.africalegalaid.com/resources.

In September 2016, AFLA issued volume 4 in its Book Series entitled 'The International Criminal Court and Africa: One Decade On', a tome of 27 chapters and 676+ pages with articles by leading international justice figures. The book has a Foreword by Benjamin Ferencz, last surviving prosecutor of the Nuremberg trials, and a Preface by Navi Pillay, former United Nations High Commissioner for Human Rights. A description of the book can be found at <http://intersentia.be/nl/the-international-criminal-court-and-africa.html>.

SUBSCRIBE TO THE AFRICA LEGAL AID QUARTERLY



In a strategic review of AFLA, this is what the external facilitator, Professor Makau Mutua had to say about the AFLA Quarterly: *An important and critical medium for AFLA's work has been its publications. Particularly significant in this regard has been the AFLA Quarterly, the flagship of the organization. The AFLA Quarterly is now considered by many academics and human rights advocates in Africa and abroad to be an important source of information for human rights and legal developments relating to Africa. It is shaping the way academics and advocates think about complex human rights questions. It graces many a shelf around the world, and is boldly expanding and revolutionizing the way both Africans and non-Africans think about African Human Rights issues.*

For only € 100 a year, you will receive four editions of the AFLA Quarterly. Subscription rate does not include yearly postage costs of €15 for the Netherlands, € 25 for Europe and € 30 for the rest of the world.

Please confirm your subscription by e-mailing publications@africalegalaid.com.

Payment Details

Africa Legal Aid
Account Number: 52.16.05.865
ABN-AMRO Bank
Swift Code: ABNANL2A
The Hague, The Netherlands

Alternatively, you can make direct payment on our website via PayPal.

FIRST PUBLISHED IN 1996

EDITOR
EVELYN A. ANKUMAH

Special Edition 2018
ISSN: 1384 – 282x

Letters can be sent to:
The Editor
Africa Legal Aid Quarterly
Laan van Meerdervoort 70
2517 AN Den Haag
The Netherlands
E-mail: editor@africalegalaid.com
Tel: +31 (0) 703 452 842

www.africalegalaid.com

The views expressed in the AFLA Quarterly are those of the contributors, and not necessarily endorsed by Africa Legal Aid, or individual members of its board, the editor, individual members of the Peer Review Panel, or any organizations they are affiliated with.

Contributions in the AFLA Quarterly are original previously unpublished work.

©All Rights Reserved

Peer Review Panel

- Professor Leila Sadat, Professor of Law, Washington University School of Law, Director of the Whitney R. Harris World Law Institute; and Special Adviser on Crimes against Humanity to the ICC Prosecutor.
- Judge Elizabeth Ibanda-Nahamya, Mechanism for International Criminal Tribunals (MICT).
- Professor Nsongurua Udombana, Professor of International Law, Babcock University, Ogun State, Nigeria.
- Stephen Lamony, Senior Advocate, Amnesty International- United Nations Office, New York.
- Angela Mudukuti, International Criminal Lawyer
- Manuel Ventura, Director, Peace and Justice Initiative, The Hague; Associate Legal Officer, Appeals Chamber, Special Tribunal for Lebanon; Adjunct Fellow, University of Western Sydney.
- Professor A.P. van der Mei, Department of Public Law, Maastricht University, the Netherlands.

TABLE OF CONTENTS

EDITORIAL: Broadening the Fight Against Impunity <i>Evelyn A. Ankumah</i>	1
20 Years of the Rome Statute of the International Criminal Court <i>Judge Geoffrey Andrew Henderson</i>	3
Strengthening Complementarity as a Cornerstone of the Rome Statute System <i>Judge Kimberly Prost</i>	8
The Boko Haram Situation <i>Segun Jegede</i>	15
Victims' Rights: Translating the ICC's Victims' Rights Provisions Into Domestic Context <i>Dr. Carla Ferstman</i>	23
The Malabo Protocol and Complementarity of International Criminal Justice: Challenges and Prospects <i>Dr. Robert Eno</i>	30
Bringing Soft Power to a Life's Work: The Professional Trajectory of Judge Sanji Mmasenono Monageng <i>Dr. Leigh Swigart</i>	39
A Candid and Inspiring Interview with Judge Howard Morrison <i>Evelyn A. Ankumah</i>	60

EDITORIAL

BROADENING THE FIGHT AGAINST IMPUNITY

Evelyn A. Ankumah



*Evelyn A. Ankumah**

Dear reader,

Commemorations are occasions not necessarily to celebrate, but more importantly an opportunity to look ahead and reflect on what can be improved, and how. On the occasion of the 20th anniversary of the Rome Statute of the ICC, how can the goal to end impunity be broadened? I will limit myself to two points.

Let me start with the number of states parties. While the current number, 123, is as such not bad, it is clear that there is room for improvement. The world's most powerful and populous states have not joined. Nor have various states where the rule of law is disrespected or under serious threat. In recent years, we have even witnessed a negative tendency of states parties wishing to withdraw from the Statute. These are

matters of concern. Yet, what to do? We have to be realistic, and modest in our expectations of what can actually be achieved in the next twenty years. We can, and we should, continue, to stress the significance of international criminal justice. We must promote the ICC as a particularly important tool for deterring commission of international crimes, and delivering justice for victims. But let's get real, not all stakeholders are likely to have an open mind. We live in a heavily politicized world. Economic interests, power politics, nationalism, and populism rule the world. In today's Internet and social media era, it seems easier to trigger the selfish day-to-day underbelly feelings of people, than to persuade them of the structural need to challenge the powerful, and to show solidarity with the less powerful.

Let me be clear. I am not giving up hope. I am not suggesting that nothing can be done. There are ways that we can broaden and strengthen the ICC. My point here would be to enhance the image of the Court as a body that objectively stands for the a-political rule of law. Whether we like it or not, the Court, too often is seen as a political actor. We may argue that such critique is not right or fair, but the perception does exist. The Court may seek to objectively work on criminal justice, but its legitimacy ultimately depends on whether people believe so. The future success of the Court depends on such subjective perceptions of its work.

In my modest view, there is only one way to positively influence these subjective perceptions; and that is by objectively, and coherently, and consistently, applying the

* Executive Director of Africa Legal Aid (AFLA).

legal standards enshrined in the Rome Statute. As significant as the rights and interests of victims are, criminal justice is also very much about the rights and interests of the accused. In other words, both convictions and acquittals may serve justice well. For all purposes of clarity, I am not expressing concrete views here about the outcome of the Bemba judgment. I am just neutrally observing that the debate between the majority and the minority of the judges in the Bemba Appeal judgement must continue. I believe that continuing this debate, will in the long run, help us achieve consensus on how best to balance the rights of all involved. If the Court is seen as giving too much weight to either the interests of the victims or rather to those of the accused, it will not be seen as a place where the objective rule of law is applied. It might not be an attractive body to join.

My second point is that it is not necessarily the ICC but the fight against impunity that should be broadened. I do believe and fully support a strengthening of the ICC, be it in terms of increasing the number of states parties, intensifying its cooperation with member states or the extension of its jurisdiction with the crime of aggression or

perhaps some other crimes. We need the ICC, but pursuing success of the ICC is not a goal in itself.

The ultimate goal is criminal justice, and as we all know, the ICC does not have monopoly on criminal justice. In fact, the ICC is a default court that only has a role to play when local courts are unwilling or unable to do the job. While the Statute only refers to the ICC's jurisdiction in relation to national courts exercising territorial or nationality jurisdiction, I would submit that the goal and spirit of the Statute also demand respect for the exercise of complementarity by sub-regional or regional courts, as well as universal jurisdiction by national courts. Proper legal standards must of course be adhered to, but the Rome Statute provides for a decentralized system that rests on the notion of justice being done at home, or as close as possible to home. We need a strong ICC that can fill the gaps in criminal law systems, but it is not the only Court able and willing to do so. Hence, the aim should not only be to enhance national cooperation with the ICC's work, but the ICC is well advised to also offer its expertise and resources to other courts seeking that same objective of international criminal justice.

20 YEARS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Judge Geoffrey Andrew Henderson



*Judge Geoffrey Andrew Henderson**

In commemorating the 20th anniversary of the Rome Statute, which was adopted on 17 July 1998, it is important to acknowledge the idea that certain offences cannot go unpunished. The 20th anniversary of the Rome Statute is an extremely important event to mark. What was until then a distant dream became a reality on that day.

The idea that certain offences cannot go unpunished was certainly not new and several initiatives were undertaken in the past to bring perpetrators to justice. In the aftermath of the Second World War, the International Military Tribunals of Nuremberg and Tokyo laid the foundations of international criminal justice and served as a powerful precedent for the establishment of the International Criminal Court. In 2015, the judges of the ICC signalled their recognition and respect for this precedent by holding their first retreat aimed at revising the criminal proceedings

in Room 600, where the Nuremberg Trial had taken place.

This trial was indeed historic and continues to be a permanent reminder that, as famously declared then, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

During the five decades that followed, however, there was no similar endeavour. Instead, important norms and principles were adopted in the areas of human rights and humanitarian law, including provisions intended to expand the basis to investigate and prosecute beyond the confines of territorial jurisdiction. Amongst them, this year the international community will not only mark the 20th anniversary of the Rome Statute but also the 70th anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, with which the Statute is inextricably linked.

However, prosecutions continued to be rare at the national level and non-existent at the international level. While the normative development was extraordinary, impunity flourished as there was no effective enforcement of international law. Progress was frustrated with the breakdown of the collective will, characterized by the Cold War.

It would be more than four decades later that the long-dormant cause of international justice would be furthered with the establishment of the United

* Judge at the International Criminal Court (ICC).

Nations *ad hoc* tribunals in 1993 and 1994, to try the perpetrators of the atrocities committed in the former Yugoslavia and in Rwanda respectively. In 1993 the conflict in the former Yugoslavia erupted and war crimes, crimes against humanity and genocide in the form of ethnic cleansing commanded the attention of the international community. In the following year, the Rwandan genocide (also under the guise of ethnic cleansing) and other crimes against humanity were committed. But before the creation of these two UN *ad hoc* tribunals took place, another important step was taken and the role of Trinidad and Tobago and its former Prime Minister Arthur Robinson, who had pressed for the inclusion of the creation of a permanent court in the global agenda, deserves recognition.

It is an important bit of history and a message that I like to pass on to university students and other audiences whenever I have the opportunity to do so. In my respectful view it is a strong reminder of how each one of us can in our own way, with the strength of our convictions, positively influence global events.

The long road to the Rome Statute and the creation of the International Criminal Court as a permanent court can in part, also be traced back to the early 50s when two young bright men crossed paths at Oxford University. In 1953, a young man by the name of Arthur Napoleon Raymond Robinson from the tiny fishing village of Castara in the then British colony of Trinidad and Tobago was admitted to read for the Bachelor's Degree in Politics, Philosophy and Economics. He immediately joined the Oxford Union where he met and established rapport and friendship with another student Robert Woetzel. Woetzel who was Jewish and who as a child together with his parents fled Germany just before the outbreak of WWII, was then writing his PhD thesis on the subject of the Nuremburg trials. It was

the start of a long friendship which ended in Woetzel's death in 1991. During this period, they partnered in the long haul towards the creation of the ICC. Many years later and as Prime Minister of now independent Trinidad and Tobago, Robinson at the 44th session of the UN General Assembly that took place in 1989, requested that the International Law Commission resume work on an international criminal court. This ultimately triggered the Rome Statute process. In 1994, the General Assembly agreed to create an *ad hoc* committee for the establishment of an international criminal court and Robinson is universally recognized for his unrelenting advocacy and political work at the international level to reactivate, what had become by 1989, a dormant idea for the establishment of a permanent international criminal court.

If you permit me, going back to the *ad hoc* tribunals created to try those alleged to be the perpetrators of the atrocities committed in the former Yugoslavia and Rwanda, the fact that both *ad hoc* tribunals were created by the Security Council under Chapter VII of the Charter reflected an understanding that certain crimes not only offend mankind but are a threat to peace and security. In addition, as clearly spelled out in the constituting resolutions, both tribunals were set up on the belief that they could “*contribute to the restoration and maintenance of peace*”.

The same underlying objectives would guide the negotiations of the Rome Statute. This time, it was not only the Security Council but the international community as a whole that endorsed the premise that grave crimes threaten the peace, security and well-being of the world and that justice is necessary for their prevention. This belief is explicitly reflected in the preamble of the Rome Statute.

While the *ad hoc* tribunals were crucial precedents, the creation of a general and

permanent court was a different and far more ambitious project. By virtue of being general and permanent, the court would not be circumscribed to pre-defined situations but would be able to intervene potentially in *any* future situation of international crimes, within the parameters of the founding treaty. Where to investigate and who to prosecute would be fundamental questions to be answered by the Court itself, not by any group of countries.

Was the international community ready for such a project?

This was an open question at the time of the start of the negotiations. The term “international community” encompasses a broad group of actors with different positions, which may evolve depending on many factors, including the commitment and will of others to lead in the promotion of a particular cause.

This is what happened when a group of like-minded states in partnership with a coalition of non-governmental organisations decided to steer the negotiating process towards the establishment of an international criminal court. The process was fundamentally democratic as it was opened to all states of all continents, as well as the participation of a large number of non-governmental organisations. There was an explicit and deliberate effort to reflect the diversity of regions, legal systems and traditions. This was important.

Through intensive discussions over more than three years, support for the creation of the Court was gradually broadened, including acceptance for certain particular features that were considered to be essential for a strong Court. Early on in the process there was agreement that the Court would be a Court of 'last resort', intended to address situations only when national systems failed to act in a genuine

manner. This principle of Complementarity was the theme of a stakeholders' conference graciously organised by Africa Legal Aid in cooperation with the Office of the Attorney General and Minister of Justice of The Gambia in April 2018.

A careful historical review of the negotiations at Rome must acknowledge the strong and active participation of African States in the drafting and adoption of the Rome Statute. This is helpful given some of the current challenges facing the Court. At the Rome Conference, African states actively participated in the debates and did so with high level participants as their delegations were led by Attorney Generals, Ministers of Justice and Ministers of Foreign Affairs. Among the 31 Vice Presidents of the diplomatic conference, eight were from the African continent, namely Algeria, Burkina Faso, Egypt, Gabon, Kenya, Malawi, Nigeria and Sudan, while the drafting committee was chaired by Egypt.

The process was complex and doubts persisted as to whether it would be possible to adopt the treaty until hours before the conclusion of the conference. Not surprisingly, when 120 states voted in favour of the creation of the Court, those present said that emotions ran high. The global community had, no doubt, made a huge, historic leap forward in the road towards a rules-based international order. It was a legal revolution, according to some. The international community had demonstrated that it was indeed ready for a permanent international criminal court. While the final decision to create the Court was taken by a vote, the overwhelming majority of the Rome Statute provisions were achieved by consensus as it was indeed recognized that the Court could only be effective if based on broad agreements and shared values.

And yet, shortly after the Rome Conference doubts re-emerged. To become a reality, the treaty required a very high number of ratifications, at least sixty. In other words, the achievements attained multilaterally required the individual commitment and confirmation of states.

Were states ready for that?

Again, this was an open question that was positively and swiftly answered less than four years later. Support for the new institution had not diminished, nor had the enthusiasm of states and civil society that led a vigorous campaign for ratification. Small and medium sized countries in particular continued to champion the process. Again, history will show the significant role that Africa played. African States were among the earliest to ratify the Rome Statute. Currently of the 123 States Parties, 33 are from this continent making Africa the largest group in the Assembly of States Parties, the oversight and legislative body of the Court.

On 1st July 2002, the Rome Statute entered into force and the Court was set up. The first judges and the first Prosecutor took office. Uganda and the Democratic Republic of the Congo were the first states to deposit their trust in the new institution and triggered with their referrals, the first investigations. Other investigations would follow, initiated upon referrals by other states and the Security Council or, ex officio, by the Prosecutor with the authorization of pre-trial judges. To date, this has resulted in 11 investigations, 25 cases, 8 convictions, 2 acquittals, reparation orders, three ongoing trials and some 14.000 victims participating in the proceedings.

Beyond the ICC courtrooms themselves, the treaty has influenced justice solutions nationally and internationally, notably in the form of domestic legislation passed in numerous states. This is indeed an

encouraging trend that is also fully consistent with the complementary character of the Court. The fight against impunity requires a mutually reinforcing global justice system, in which domestic, regional, international and hybrid institutions coexist and strengthen each other.

However, also by virtue of its permanent and general character, it is clear that the Court has a central and unique role to play as back-up mechanism to prevent impunity. This was a central rationale for the creation of the Court, which continues to be relevant today.

The achievements in international criminal justice in the past decades are truly impressive. There is much to celebrate. And yet, we enter the 20th anniversary of the creation of the Court with – again – some concerns.

We feel that our world is less benign today than it was in the 90s where idealism was at its peak. As populism, bigotry and xenophobia are on the rise, there is a danger of a serious push back with the potential of undermining international criminal justice and more broadly... a rules-based order.

At times, we cannot but wonder whether in this prevailing environment, the Court could be created today. Thankfully the Court has been created. It is not perfect but it has matured, it is delivering and it is improving. The real question is whether the international community is ready to sustain this Court in the next 20 years.

Again, an open question to be answered by states, organisations and civil society, and most specifically by the 123 States that are already parties to the Rome Statute. They must be at the forefront. This ICC community is not yet universal but it does contain a significant majority of the world's states, from all regions. It is for

them to confirm in the first place whether they have the will and the commitment to preserve the achievements of the last decades.

Most importantly, it is for them to confirm whether they are ready to lead the efforts not only to maintain but also to strengthen the Court. Indeed, in order to be effective, legitimate and credible, the ICC system must be strengthened. Participation in the treaty must grow for the Court to be able to address all situations equally and thus contribute to a consistent pattern of accountability.

Cooperation with the Court in situations that are addressed must be enhanced. While the efforts to increase the efficiency of the Court from within must continue, initiatives to foster its effectiveness from the outside are also imperative.

We have come again to a point where it is necessary to engage in renewed debate on the objective and purposes of international criminal justice and the role of the International Criminal Court in the quest for accountability.

The 20th anniversary offers a unique occasion to have this debate and to confirm whether the premises on which the creation of the Court was based remain valid, that is to say whether there is still a belief that justice does not undermine but

rather contributes to a sustainable peace and whether there is the will and the courage to continue building a system fit for the challenges of the 21st century.

In sum, the 20th anniversary offers a golden opportunity to discuss whether the ICC community is ready to sustain in the next 20 years a strong and effective Court capable of prosecuting the gravest crimes for the protection of all victims.

STRENGTHENING COMPLEMENTARITY AS A CORNERSTONE OF THE ROME STATUTE SYSTEM

Judge Kimberly Prost



*Judge Kimberly Prost**

Introduction

The occasion of the 20th anniversary of the Rome Statute allows for reflection on achievements and challenges including in the relationship between the International Criminal Court (ICC) and Africa. It is essential to begin those reflections by recalling the important role that African States and Africans played in the adoption of the ICC Statute. That influence has continued throughout the life of the Court to date with Africans making key contributions as staff members and in principal roles such as President of the Assembly of States Parties,¹ President of the Court² and, of course, Prosecutor Fatou Bensouda whose nine-year term will have spanned a critical phase for the Court.³

Also notable is the fact that the historic amendments to the Rome Statute on the crime of aggression were ‘born’ at the

* Judge at the International Criminal Court (ICC).

¹H.E. Sidiki Kaba President of the Assembly of States Parties (2015-2018).

² H.E. Chile Eboe-Osuji, President of the Court (present).

³ From June 2012.

Review Conference held in Kampala, Uganda⁴ leading to the triggering of the ICC jurisdiction over that crime in December 2017, which amendment took force on 17 July 2018 - the anniversary date of the Rome Statute.

A Time to Recognize the Court

At this juncture in the life of the Court it is critically important to take time – as is being done - to recognize the Rome Statute for the important accomplishment that it is and for the role it has played, and will continue to play, in bringing an end to impunity on a global level. It should not be forgotten that to reach agreement in Rome was an extraordinary accomplishment. Further, to go from the idea and an agreement to a functioning permanent institution is a remarkable achievement.

But it is - at the same time – a fragile one.

These are troubled times for international criminal justice and like other institutions, the ICC faces many challenges from within and without. The task for the international community, going forward from this anniversary, must be to draw from the ICC’s accomplishments to date in order to work to preserve and strengthen the Rome Statute system – for victims, for justice, and for an end to impunity.

There are many issues which will need to be addressed in that context but none more important than the subject of this article - Complementarity.

⁴ Review Conference of the Rome Statute, Kampala, Uganda 31 May -11 June 2010.

Reinvigorating the Rome Statute System

Even after two decades, it bears repeating that what was created in Rome, almost 20 years ago, was not a 'standalone' Court. Rather, it was a system designed to motivate and challenge States to take up their responsibility to investigate and prosecute the most serious crimes known to humans, grave crimes which threaten the peace, security and well-being of the world.

The Court faces many challenges. Perhaps the most significant challenge operationally is with effective State cooperation. By example, the Court has many outstanding arrest warrants which significantly impair its ability to fulfil the mandate of the Rome Statute. Moving into the 21st year of the Rome Statute considerable efforts are needed to improve the situation regarding cooperation and in particular the execution of arrest warrants. Internally, all organs of the Court need to focus on improving efficiency. While all these issues merit attention, perhaps the most significant failing in these first 20 years has been in not paying sufficient attention or giving adequate focus, to this cornerstone of the Rome Statute system – complementarity.

The ICC is a busy court but even with more resources it can investigate and prosecute only a few cases simultaneously. It is a constant challenge for the Prosecutor to prioritize her work within those constraints.

But despite this reality, the expectation has developed that somehow the single justice solution to mass atrocities, which tragically abound in our world today, is the Court alone. If there is one priority in these next few years it must be to change that perception and bring more attention to the issue of how to build up not just the Court,

but also the Rome Statute system as a whole.

These efforts must begin by ensuring that the intent of the Rome Statute and the complementarity system is fully understood.

The first principle should be well known - primary responsibility for investigation and prosecution of these crimes rests with States. The ICC has jurisdiction only when no State is willing and able to genuinely investigate or prosecute.⁵ In terms of the responsibility of States there is general agreement it is always preferable – particularly for victims - that these horrific crimes, any crimes for that matter, are prosecuted in the territory of the State where they occurred. But sadly for a myriad of reasons – ongoing conflict, capacity, unwillingness, – that is often not possible or not possible at least for a period of time.

For that reason, the Rome Statute always contemplated not just territorial State prosecutions but rather the use of all forms of jurisdiction recognized by international law. There was an expectation that all States would have at least some extended jurisdiction for these crimes and would be prepared to use it. The Preamble of the Rome Statute reflects this concept as follows:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

Moreover, Articles 17 and 18 of the Rome Statute, which are at the core of the

⁵ Article 17, Rome Statute.

complementarity principle, are framed to recognize the use of extraterritorial jurisdiction in that they acknowledge the fact that more than the territorial state may have jurisdiction in any particular instance.

On this subject, the Rome Statute does not make specific reference to role of regional courts in terms of complementarity. However, in so far as these clearly involve States in a region combining their jurisdiction, they fall well within the principles and concept of the Rome Statute system. It would be an equally welcome development for regional courts to take up the responsibility to investigate and prosecute these crimes as a reflection of the concept of complementarity.

Capacity is the Key

It follows that if the ICC is to function as a complementary Court, national and regional courts must have the capacity to conduct these investigations and prosecutions and to do so, on the basis of all recognized forms of jurisdiction.

It is evident that to date, little attention has been paid and few efforts have been directed towards capacity building for this purpose. This is despite the fact that the need for, and importance of, capacity building was well recognized by the Assembly of States Parties (ASP) at the Kampala Review Conference. In its resolution on complementarity⁶ the Review Conference acknowledged the need for proper implementation of the Rome Statute in domestic law, for the enhancement of international cooperation and the importance of States assisting each other to strengthen domestic capacity.

To that end the Conference encouraged the Court, States Parties and other stakeholders

to further explore ways to enhance capacity and specifically requested the Secretariat of the ASP to facilitate the exchange of information for that purpose. Some initial efforts were undertaken to implement the resolution. At the 10th ASP session, the Secretariat submitted a List of Actors working in the field of complementarity⁷ in furtherance of the mandate given to it and it continued to provide reports on facilitation efforts for a few sessions. There were also some efforts by States Parties to coordinate assistance mandates in terms of capacity building. However, the initiative seemed to have lost impetus without any concrete results in terms of actual capacity enhancement.

Better capacity is needed at all levels.

Every State, whether a party to the Rome Statute or not, needs to have laws which entrench the core crimes within domestic law. Further there needs to be provisions as necessary allowing for the prosecution of these core crimes with appropriate extended jurisdiction. In terms of legal capacity the aim must be for every State across all the regions of the world to have a legal structure criminalizing the crimes and allowing for prosecution on a territorial or extra-territorial basis.

Also, to effectively implement in terms of extra territorial cases, States must have not just the criminal law but the ability to gather and provide evidence abroad. Each State should also have the full capacity to seek the arrest and surrender of suspects in other jurisdictions and to be in a position to extradite suspects when sought by another State. For this there must be a solid legal base for international cooperation to make and respond to requests for mutual assistance and extradition.

⁶ Review Conference of the Rome Statute, Kampala Uganda, 31 May – 11 June 2010, RC/Res.1.

⁷ https://asp.icc-cpi.int/en_menus/asp/complementarity/List-of-Actors/Pages/default.aspx.

On this point, a group of States - Argentina, Belgium, Mongolia, Netherlands, Senegal and Slovenia – are advancing an important initiative aimed at the negotiation and adoption of a multi-lateral convention on international cooperation in relation to the core crimes.⁸ Sixty States are now supporting the initiative⁹ A Preparatory Conference was held in Doorn, Netherlands, 16-19 October of 2017 and work on a draft text is now in progress with a view to a diplomatic conference for the negotiation of the convention itself. This is an important initiative to fill the international cooperation structure “gap” which currently exists. While there are important multilateral instruments dealing with cooperation for drug crimes, transnational organized crimes, corruption and terrorism, to date there is no treaty which addresses cooperation in a comprehensive way in relation to these, the gravest crimes. It will significantly enhance the capacity of States to cooperate particularly in relation to States which do not have the ability to negotiate bilateral instruments for that purpose.

And finally there must be attention paid to human resource capacity. Without knowledgeable and trained police, prosecutors and judges, there will be no real capacity in States to conduct these investigations and prosecutions effectively. There may be different approaches taken to achieve capacity in this regard including the establishment of special chambers or divisions or the delivery of general training. Whatever method is employed, the key is to have legal system actors who are capable of properly implementing the laws in this area.

⁸ See joint statement to the Assembly of States Parties - https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Netherlands-Joint-ENG.pdf.

⁹ As of 05/17/2018.

Responsibility to Build Capacity

The related, perhaps more difficult, question is - who is responsible for this capacity building? This fundamental question simply does not get sufficient consideration. Some criticize the ICC on this issue. The ICC can, and does, play a limited role - especially the OTP - through engagement with States. But it is first and foremost a court, with a significant mandate and very limited resources. And States Parties have made it clear that this is not the function the ICC should undertake. That is an understandable and sensible position.

Rather, it is for the international community *writ large* – States individually and collectively, the United Nations, other Inter-Governmental Organizations, Non-Governmental Organizations, academics – there needs to be a wide net cast to advance capacity building. There is now much expertise available and much of that is available within Africa. Effective ways need to be found to channel and use it.

In this regard there is an important question that arises with respect to the efforts of the UN itself. There is an office within the UN structure – the United Nations Office on Drugs and Crime. While it carries out good work that is relevant to capacity building in this context – for example on international cooperation – it has no program dedicated to building capacity for the gravest crimes known to humanity. Why is that the case? With the closing of the two Security Council created Tribunals – the ICTY and the ICTR – it is imperative that the UN redirects its contribution in the field of international criminal justice to building state capacity to address these crimes. A program related to international criminal justice within the UNODC would be a critical step towards that goal.

The Willingness Issue

It is clear, however, that capacity alone will not achieve the goals of the Rome Statute system in terms of complementarity. It is also about will. States must be willing to adopt the necessary laws, and to implement them. They must be willing to carry out not only national prosecutions for territorial offences but extraterritorial cases. And they must be committed to regional efforts to allow for such prosecutions to take place elsewhere or in a regional court. But all too often that will is lacking - for political reasons, because of other priorities or as a result of capacity challenges. Whatever the underlying reasons, efforts must be made to reinvigorate the willingness of States to conduct these investigations and prosecutions. States should be infused with the spirit of Rome, where the participants fought hard to ensure and secure the principle of complementarity in order to safeguard the right of States to exercise their jurisdiction to address these crimes. Now the time has come for that principle to be fulfilled by States taking up their responsibilities

Universal Jurisdiction

On a related point, one of the fundamental challenges that the ICC faces is a lack of universal jurisdiction. Because it is a treaty based Court, States decide whether to join the Rome Statute or not. Today 123 States have made that choice. While it is a significant number, it means that the Court can only have jurisdiction in cases where the crimes are alleged to have been committed on the territory of one of those States Parties or by a national of a State Party unless the matter is referred to the Court by the Security Council.¹⁰ There is even more limited jurisdiction with respect

to the crime of aggression.¹¹ Sadly that means that the ICC has no jurisdiction with respect to crimes committed in several of the States where conflicts rage and horrors are played out on a daily basis.

This means the Court cannot investigate or prosecute and equally the pressure which the Rome Statute can bring to bear on a State Party to investigate and prosecute – because of the principal of complementarity - is also not present. Clearly the work of the Court and the fact that it will step in if no action is taken can have an important impact in driving national prosecutions; the realization of complementarity as envisaged by the drafters. For these reasons the quest for universality for the Rome Statute must remain a central goal – no matter how unrealistic it may seem today.

Change the Conversation

In the interim, it is imperative to change the conversation about the ICC and the Rome Statute. A State may be an ardent critic or opponent of the ICC but no State can credibly be a critic or opponent of justice. A State has the sovereign right to decide whether to become a party to the Rome Statute and to remain as a party. But a State also has the responsibility to ensure that the most horrific crime known to humankind is not perpetrated on its soil, by its nationals, and must ensure justice for victims when such crimes occur. That is the aim of the Rome Statute system but it is also a shared goal for all civilized nations.

Therefore the question must be posed to those who oppose or criticize the ICC and even to those who are silent. What is the alternative to the ICC for international criminal justice? What answer is proposed for the victims who call for justice for the worst atrocities known to humanity?

¹⁰ Article 12(2) and 13 Rome Statute.

¹¹ Article 15 *bis* Rome Statute.

Any legitimate answer leads back to exactly the same point – having universal capacity and willingness by States to investigate and prosecute these crimes, which would make the ICC a happily redundant, complementary Court. So the next question must be – if that is the solution what is being done to achieve that solution?

Encouraging Signs

This is a daunting task and the world is far away from achieving this goal. But despite the difficult challenges there are signs of progress, and particular examples of progress in Africa. This is progress which must be continued and enhanced.

While not a case of complementarity strictly speaking - because the crimes pre-date the Court - the Habré trial stands as a stellar example of what can be done – with political will and support - to achieve justice through extraterritorial jurisdiction.

A special Court has been established to try cases in the Central African Republic¹² and there is a proposal for a hybrid court for South Sudan.¹³ There are also examples of special Chambers established to address international crimes such as in Uganda.¹⁴ And a number of States have war crimes/crimes against humanity sections tasked with extraterritorial prosecutions of international crimes. As well, there are interesting and innovative accountability initiatives.

The International, Impartial and Independent Mechanism for Syria¹⁵ established by the UN General Assembly is mandated to gather and preserve

evidence of alleged crimes perpetrated during that conflict for use in domestic investigations and prosecutions and ultimately perhaps one day in an international context. Recently agreement was reached by a group of States whose nationals were victims of the downing of Malaysia Airlines flight 17 over the Ukraine to support a domestic prosecution in the Netherlands in relation to the incident.¹⁶ And there is important work relevant to accountability being conducted within the mandate of other international organizations such as the Organization for the Prohibition of Chemical Weapons, the Human Rights Council and the Office of the High Commissioner for Human Rights. All of these should be seen as positive steps towards building a network for accountability and reflecting the spirit of the Rome Statute in terms of complementarity.

Conclusion

In conclusion, one of the successes of the ICC and the Rome Statute system – which does not receive sufficient attention - is that it has led in ensuring that accountability has become a part of the international landscape. Accountability is no longer seen as a consideration or possibility – it has become an expectation. At times it may be an expectation that is difficult to live up to but nonetheless it is a reality.

On the 20th anniversary of the Rome Statute, the remarkable progress made towards accountability with the establishment of the ICC and its system must be remembered – an idea which arose from Nuremberg and before.

Moving forward into the 21st year of the Rome Statute system it is a joint

¹² See www.fidh.org/en/region/Africa/central-african-republic/what-is-the-special-criminal-court.

¹³ See www.hrw.org/news/2017/12/14/south-sudan-stop-delays-hybrid-court.

¹⁴ See www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division.

¹⁵ See <https://iim.un.org/#>.

¹⁶ www.government.nl/latest/news/2017/09/20/jit-countries-confirm-their-support-for-dutch-prosecution-of-mh17-suspects.

responsibility – those working in the Court or outside, within States Parties or non-States Parties, within intergovernmental and non-governmental organizations - to enhance that expectation for justice and redress for victims. Moreover, it is a duty to construct laws and build capacity so as to establish a new world wide web – this one for justice - that will help to attain the ultimate goal of finally bringing an end to impunity for the most serious of crimes in our world today.

THE BOKO HARAM SITUATION

Segun Jegede



*Segun Jegede***

Perhaps, more than any other period in world history, the last two decades have seen a significant impetus in the effort to create an enduring global mechanism to bring to justice those who bear the greatest responsibility for the world's most dreadful crimes.¹

Despite several delays and setbacks, the international community's vision of establishing a widely accepted global criminal justice system was finally realised with the adoption of the Rome Statute of the International Criminal Court on 17 July 1998. Before then, international obligations had always been outdone by

* Founder, Legal Watch and Human Rights Initiative; Special Prosecutor for the Government of Nigeria.

¹ Segun Jegede, *Africa's Distrust of the International Criminal Court*; Published in The Guardian Newspaper, Nigeria, 4- 7 April 2016. <https://guardian.ng/opinion/africas-distrust-of-international-criminal-court-part-3>. Last accessed 18 October 2018.

the doctrine of state sovereignty which affirms the full right and power of a nation state to govern itself without any interference from outside sources or bodies.²

However, two world wars and the unimaginable human rights tragedies that took place in the former Yugoslavia and Rwanda changed all that and propelled the international community to find a way to address the growing impunity in several parts of the world.

The ICC Rome Statute came into force on July 1, 2002, upon 60 ratifications and was ratified by Nigeria on 27th September 2001 along with many other countries, thus creating a new system to deal with the world's most egregious crimes: war crimes, crimes against humanity, and genocide.³ The goal of the Rome Statute is to end impunity for the most serious crimes of concern to the international community as a whole and contribute to their prevention.⁴

With the foregoing as an introduction, it is the modest endeavour of this paper to briefly review the Boko Haram Situation in Nigeria and the ICC's valiant attempt to ensure that the perpetrators of the heinous

² See *Declaration of Principles of International Law Concerning Friendly Nations and Cooperation among states in accordance with the United Nations Charter*: Resolution Adopted by the General Assembly on 24th October 1970.

³ Mohammed Ladan - *An Overview of the Rome Statute of the International Criminal Court: Jurisdiction and Complementarity Principle and Issues in Domestic Implementation in Nigeria*. Afe Babalola University: Journal of Sustainable Development Law and Policy Vol. 1 Iss. 1 (2013) pp. 37-53.

⁴ The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law :UN Chronicle, Vol. XLIX No4 2012.

crimes committed by the group are brought to book. Also, the paper will examine pertinent issues that may undermine State parties' determination to end impunity for the most serious crimes of concern to the international community.

The Boko Haram Situation

The radical Islamist group, *Boko Haram* is believed to have been formed in the town of Maiduguri in northeast Nigeria, where the local residents nicknamed its members "Boko Haram," a combination of the Hausa word "boko," which literally means "Western education" and the Arabic word "haram" which figuratively means "sin" and literally means "forbidden."⁵

Founded around 2001 or 2002, the group claims to be opposed not only to Western civilization and education, but also to the secularization of the Nigerian state. There is a fair consensus that, until 2009, the group conducted its operations more or less peacefully and that its radicalization followed a government clampdown in 2009, in which some 800 of its members were killed. The group's leader, Mohammed Yusuf, was also killed after that attack while in police custody.

Under a radical Islamic agenda, these militants have perpetrated violence across northern Nigeria since about 2009, aiming to rid the country of any "Western influence", particularly western education. The group's *modus operandi* varied according to the intended objective of the respective attacks. Some attacks were carried out by just two or three gunmen on a motorcycle, others by hundreds of fighters supported by tanks and anti-aircraft weapons mounted on trucks. Other Boko Haram attacks included bombings of

civilian areas, such as places of worship, markets or bus stations, often by suicide bombers.

From January 2013 to March 2015, 356 reported incidents of killings can be attributed to Boko Haram in 9 states of Nigeria as well as occasionally in Cameroon and Niger which led to the killing of over 8,000 civilians. The group also abducted defenceless civilians. In 2014 alone at least 1,123 persons were abducted, of which 536 were female victims. From May 2013 to April 2015 alone, the abduction of more than 2,000 women and girls was documented.

The most notorious case is arguably the abduction of 276 girls from the Government Girls Secondary School in Chibok, Borno State on 14 April 2014. Most of the persons abducted by Boko Haram were unmarried women and girls, many of whom were reportedly forced into marriage with Boko Haram fighters. Forced marriages reportedly entail repeated rapes or violence and death threats in cases of refusal. The case of the "Chibok girls" has attracted global attention and condemnation.

It is the brutal campaign mounted by *Boko Haram* and the equally virulent response from the Nigerian Security Forces which has occasioned the *proprio motu* intervention of the ICC Prosecutor in a determined effort to rein in the unbridled impunity which has characterized the conflict.

The Preliminary Examination

Following a spate of ferocious attacks and bombings by Boko Haram in North Eastern Nigeria from 2002 onwards, a preliminary examination was initiated by the Office of the Prosecutor (OTP) on the basis of information communicated by individuals, groups and non-governmental organisations. During the course of its

⁵ Jideofor Adibe, *Explaining the Emergence of Boko Haram*, Tuesday May 6 2014 at <https://www.brookings.edu/blog/africa-in-focus/2014/05/06/explaining-the-emergence-of-boko-haram/>. Last accessed 18 October 2018.

preliminary examination, the OTP analysed information relating to a wide and disparate series of allegations against BOKO HARAM and has recently determined that there is a reasonable basis to believe that crimes against humanity, namely, acts of murder and persecution have been committed by members of the Boko Haram sect in Nigeria and has identified eight potential cases involving the commission of crimes against humanity and war crimes under articles 7 and 8 of the Statute. Six of the potential cases were for conduct by Boko Haram, and two for conduct by the Nigerian Security Forces.

The cases against Boko Haram consist of:

- The policy of Boko Haram to intentionally launch attacks against civilians perceived as “disbelievers”.
- Abductions and imprisonment of civilians, leading to alleged murders, cruel treatments and outrages upon personal dignity.
- Attacks on buildings dedicated to education, teachers and students.
- Boko Haram’s policy of recruitment and use of children under the age of 15 years to participate in hostilities.
- Attacks against women and girls: consisting of abductions, rapes, sexual slavery and other forms of sexual violence, forced marriages, the use of women for operational tasks and murders.
- The intentional targeting of buildings dedicated to religion, including churches and mosques

Concerning the Nigerian Security Forces, the first potential case relates to:

- The alleged mass arrests of boys and young men suspected of being Boko Haram members or

supporters, followed by large-scale abuses, including summary executions and torture.

- Attacks against civilians. In the town of Baga, Borno State, up to 228 persons were alleged to have been killed following a security operation on 17 April 2013.

In time, the preliminary examination has progressed to phase 3 ‘admissibility’, and the OTP is currently assessing whether the Nigerian authorities are conducting genuine proceedings in relation to the situation in order to resolve jurisdictional and admissibility issues.

Though Nigeria is yet to domesticate the Rome Statute, in a most dramatic fashion, positive complementarity has achieved unexpected results by spurring the Government of Nigeria to commence the prosecution of members of the Boko Haram group held in detention for their roles in the spate of attacks, bombings and kidnappings carried out in North Eastern Nigeria. Some members of the Nigerian security forces involved in the abuses identified have similarly been put on trial. Recently, to demonstrate Nigeria’s ability and willingness to address the violations identified by the ICC, the Minister of Justice in a press briefing on the status of cases currently being prosecuted by government revealed that the first phase of 301 cases of Boko Haram suspects has now been concluded with 205 convictions and 96 acquittals.

In the absence of any implementing legislation of the Rome Statute, the crimes allegedly committed by Boko Haram that could fall under the ICC’s jurisdiction are being prosecuted under the 2011 and 2013 Terrorism Acts by the Attorney-General of the Federation.

Criticism of the Trials

Though, the trials have been hailed in certain quarters as demonstrative of the Nigerian government's determination to work with the ICC towards achieving the goal of the Rome Statute to end impunity for the most serious crimes of concern to the international community,⁶ strident disapproval has, nonetheless, trailed the conditions under which the trials were held.⁷ Some have decried what they describe as the secret nature of trials and others, such as Amnesty International, have asserted that the mass trials provide insufficient guarantees for fair trial and consequently risk failing to realize justice. These criticisms may prove to be only a tip of the iceberg as the ICC and state parties to the Rome Statute continue to find a mutually beneficial means of realizing the Court's mandate.

While positive complementarity principle as a strategy for encouraging national governments to undertake their own prosecutions of international crimes looks good on paper, a review of most African countries institutions and judicial systems indicates that they are not prepared to conduct complementarity-based prosecution of international crimes. Some of the challenges faced by African countries in this regard, include the following:

⁶ See report in The Punch, September 2 2018: Trial of Boko Haram suspects, good progress for Nigeria's justice sector – Amnesty International. <https://www.google.com.ng/search?q=Trial+of+Boko+Haram+suspects%2C+good+progress+for+Nigeria>. Last accessed 18 October 2018.

⁷ See This Day: Four Judges Begin Secret Trial of Boko Haram Members, October 10, 2017. <https://www.thisdaylive.com/index.php/2017/10/10/four-judges-begin-secret-trials-of-boko-haram-members>. Last accessed 18 October 2018. See also Human Rights Watch Report of September 17 2018- Nigeria: Flawed Trials of Boko Haram Suspects - Ensure Due Process, Victim Participation. <https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects>. Last accessed 18 October 2018.

Inadequate and Problematic Legal Framework

Under Article 17 of the Rome Statute, the test of a state's willingness and ability to investigate and prosecute international crimes is hinged upon the genuineness of the process, and is further determined by the independence and impartiality of the domestic proceedings. Consequently, one of the assumptions associated with complementarity is that there will be credible institutions at the domestic criminal justice systems to carry out genuine investigation and prosecution of international crimes.

To all intents and purposes, however, an assessment of most African States parties' judiciaries indicates that they are unprepared to implement the complementarity regime at the domestic level.⁸ This is because the complementarity regime of the Rome Statute is over-inclusive - as it assumes to do much more than it can in practical terms.

As a way forward, the ability of African state parties to carry out genuine proceedings must at a minimum begin with the adoption of implementing legislation. Though, even after the Rome Statute's crimes have been incorporated into domestic law, adjudicating on the basis of it may still prove to be a challenge, depending on its status vis-à-vis other laws. For example, in dualist states such as Nigeria and several African countries, international instruments or treaties do not have the force of law except

⁸ Ovo Catherine Imoedemhe- Complementarity Regime of the International Criminal Court – Domestic Prosecutions in Africa Under the Complementarity Regime of the Rome Statute: A Practical Approach. Springer International Publishing AG 2017.

after they have been given such force by the legislature.

Up till now, international crimes have not been incorporated into Nigerian law. In order to meet ICC's admissibility threshold, Nigeria and many African State parties will need to specifically proscribe international crimes, defined as such, in order to carry out genuine domestic prosecutions of international crimes.

Differences between International and Domestic Crimes

At the moment, no crime in Nigeria approximates the crimes against humanity, murder and persecution, which have been allegedly committed by members of Boko Haram. Both the high threshold set for the act and the mental element required for proof of international crimes such as genocide and crimes against humanity remove them from the realm of ordinary crimes. A review of the crimes of genocide and crimes against humanity illustrates that prosecuting them as the ordinary domestic crimes of murder, rape and theft does not meet the objectives of the Rome Statute.

Two components of the crime of genocide are readily apparent from the definition provided in the Rome statute and Genocide Convention. The first is the specific intent (the *mens rea* or mental element) to destroy in whole or in part a national, ethnical, racial or religious group. The mental element of the crime is important in determining whether or not an act constitutes genocide.

Likewise, for an act to constitute a crime against humanity, the specific element requiring that such acts be committed in the context of a widespread or systematic attack must be present. It is important to note that criminal legislation in Nigeria does not include any of the international crimes categorised as such. The crime against humanity of murder is not the same

as the ordinary domestic crime of murder under Nigerian criminal legislation, either in their definition or elements. Also, the crime of persecution is not recognised in Nigeria. Consequently, there are no such crimes as 'crimes against humanity' in Nigeria.

Non-retroactivity of criminal law

The trial of Hissène Habré in Senegal by the "Extraordinary African Chambers", a hybrid court, illustrates the jurisdictional and procedural nightmare that domestic prosecution of international crimes might entail. In a judgment which preceded his trial, the Court of Justice of the Economic Community of West African States held that Senegal cannot use its domestic courts to try Hissène Habré for allegedly committing, from 1982 to 1990, torture and crimes against humanity in Chad. According to the Court, the legislative changes adopted in 2007 by Senegal, incorporating international crimes into its Penal Code and providing for extraterritorial jurisdiction of Senegalese courts over international crimes, would violate the principle of non-retroactivity of criminal law if applied to prosecute crimes allegedly committed by Habré almost 20 years before. Therefore, an ad hoc tribunal should be tasked to try Habré on the basis of general principles of law common to the community of nations. Whatever may be the outcome of the debate as regards whether the trial was conducted in the right forum there is no gainsaying the fact that this single accused trial must have cost Senegal a fortune in its endeavour to address the oddity of non-retroactivity before putting Habré on trial.

Immunity and Death Penalty

Conflicting domestic laws can potentially inhibit national implementation of the Rome Statute. Contrary to the Rome Statute, Nigerian laws allow the death penalty and immunity of the President and

certain other persons in official government positions. Legal incompatibilities such as this affect states' institutional readiness to implement complementarity. It is therefore expedient for Nigeria and other state parties with conflicting provisions to undertake extensive review of its laws including the constitution and provisions relating to immunity and the death penalty to bring them in line with the provisions of the Rome Statute. This amendment could be minor, and may simply consist of the addition of a provision making an exception to the principle of immunity for the Head of State or other officials, should they commit one of the crimes listed under the statute

The Procedure for Appointing Judges and Professional Legal Skills

The unavailability of judges and prosecutors trained in the field of international criminal law or related field may constitute a major drawback to the implementation of complementarity. It is desirable that in addition to the professional legal skills required of a judge, national judges who will adjudicate international crimes should possess additional essential quality of prior training and experience in international criminal law. This is important because judges who have the requisite experience will be more effective when hearing hundreds of cases resulting from mass oriented crimes.

Tackling Corruption

A careful review of Transparency International's 'World Global Report on Corruption' in 2007 illustrates that corruption is undermining justice in many parts of the world and that hardly any country is exempt from the scourge.⁹

⁹ See the Global World Report on Corruption published by Transparency International at

While concerted action is being taken in many countries to address the problem, corruption remains a complex phenomenon in Nigeria and many African countries.¹⁰ Part of the institutional preparedness to implement complementarity involves minimising or completely eradicating corruption from the judicial system. This is critical because due process is achieved through a criminal justice system, with offenders processed from the time of arrest until they are finally acquitted or released from prison after serving a prescribed sentence

Intimidation and Manipulation of Judges

The complementarity threshold of unwillingness, set out in Article 17(2)(c), concerns the independence and impartiality of national proceedings. This article envisages a situation in which a state is ostensibly endeavouring to prosecute an alleged perpetrator but the proceedings are being manipulated to ensure that the accused is not found guilty. This implies that even where a state is able and willing to prosecute and has actually commenced trial, machinations in the process could lead to a finding of unwillingness for which the ICC will intervene.

However, the guarantees offered by the Constitution of most states seem inadequate as the political arm of the government still occasionally manages to exercise influence, and at times openly harass it, thereby making it doubtful if indeed most African countries really

https://www.transparency.org/research/gcr/gcr_judicial_systems/0. Last accessed 18 October 2018.

¹⁰ Abdulmalik A (2012) Nigeria is 35th most corrupt in the world, says Transparency International 2012 Report. Premium Times, 5 December 2012.

<http://www.premiumtimesng.com/news/109853-nigeria-is-35th-most-corrupt-in-the-world-says-transparency-international-2012-report.htm>. Last accessed 18 October 2018.

possess a constitutional system that ensures the insulation and independence of the judiciary from negative manipulations by politicians. On the positive side, however, a few African countries, such as Kenya and South Africa have remained steadfast and unbending in asserting the independence of the third arm of the realm in those countries.

Complementarity as a Double Edged Sword

National courts face some challenges because legislation, institutional capacity and due process may be lacking and trials may be fraught with irregularities and biases. For example, the Specialised Courts in which Sudan purports to prosecute those responsible for the atrocities in Darfur routinely sentenced unrepresented suspects to death after secret trials involving confessions obtained through torture. Complementarity may thus become a 'double-edged' sword. On the one hand, it may reflect the willingness of states to take the lead in bringing the perpetrators of international crimes to justice, while on the other hand, it may expose perpetrators to national judicial systems that are far less likely than the ICC to provide them with due process, increasing the probability of malicious prosecutions and wrongful convictions.

Role of the Prison Service in the Criminal Justice System

Complementarity and cooperation are two pillars upon which the Rome Statute is founded. Thus, the ICC depends on states, not only to arrest and surrender suspects that it seeks to prosecute, but also for states to take up convicted persons to serve prison sentences in their domestic prisons. This is important because there are no international prisons to which individuals convicted of international crimes by the ICC could be sent to serve their prison terms. Nearly all African countries

including Nigeria, require extensive reform of their prisons to bring them in conformity with international standards.

Witness Protection Program

An effective witness program is required to support the trials of persons indicted for the international crimes to be tried domestically by State parties. A witness protection program seeks to encourage a person who has witnessed or has knowledge of the commission of a crime to testify before a court, or before an investigating authority, by protecting him from reprisals and from economic dislocation. Protecting witnesses from the dangerous criminals they implicate does not come cheap. For example, the ICTY and ICTR expended millions of dollars to keep their witness programs going, and was in large measure, responsible for the successful trials conducted by the two tribunals. It is doubtful whether African state parties have the financial capacity to run an effective program required for successful trials of international crimes.

Conclusion

Most African judiciaries seem unprepared to implement the complementarity regime at the domestic level. This is because the complementarity regime of the Rome Statute is over-inclusive. One of the assumptions associated with complementarity is that there will be credible judicial systems and institutions at the domestic level to carry out genuine investigation and prosecution of international crimes. However, for all practical purposes, it is evident that the institutions that should partner with the ICC are either non-existent or grossly inadequate.

Admittedly, for positive complementarity to work, it is not enough to rely on the ICC to inspire national jurisdictions to undertake investigations and prosecutions.

Although such encouragement is significant, positive complementarity may not yield desired results if there is no strong national framework in place enabling states to exercise criminal jurisdiction. Consequently, a more systematic approach towards empowering national legal orders is imperative. It is strongly suggested that proactive

complementarity by which both the ICC and states are actively engaged in on-going processes at the domestic level is necessary for the implementation of complementarity.

VICTIMS' RIGHTS: TRANSLATING THE ICC'S VICTIMS' RIGHTS PROVISIONS INTO DOMESTIC CONTEXTS

Dr. Carla Ferstman



*Dr. Carla Ferstman***

Introduction

The Rome Statute of the International Criminal Court (ICC) (Statute) incorporates an array of provisions on victims' rights. In particular, the Statute sets out a framework for victim participation in ICC criminal proceedings and enables victims to apply for reparations for harm caused as a result of the crimes committed by those convicted by the Court. The Court also recognises the importance of protecting victims and others from reprisals and incorporates provisions to respect victims' dignity and privacy.

This article considers the extent to which these provisions have found their way into domestic legislation implementing the Statute. In this respect, firstly, it reviews the formal requirements of the Statute with

respect to the domestic application of victims' rights: in particular, the complementarity regime – in so far as it engages victims' rights – and the regime for State cooperation with the Court set out in Part 9 of the Statute. With respect to the latter, this article considers State cooperation to ensure victim and witness protection; cooperation in respect of the identification of assets for the purposes of reparations as well as cooperation in the enforcement of reparations awards and the assistance projects of the ICC Trust Fund for Victims. Secondly, this article analyses other requirements which go beyond what the Statute requires directly of States but are implicit in the spirit of recognising that the ICC is part of a wider system of international justice in which ICC States Parties take centre stage. Here, the article looks at the limits of the ICC's mandate and how ICC States Parties can complement it.

The above-mentioned formal requirements and the additional implicit requirements which flow from the Statute are not distinct; there is quite a lot of overlap and synergy between these different aspects. Furthermore, putting in place domestic measures to comply with the particularities of the ICC Statute will have an added and wider benefit for national prosecutions.

Formal requirements under the Statute

a) The Complementarity Regime of the ICC

Article 17 of the ICC Statute makes clear that a case is only admissible before the ICC if, among other criteria, a competent

**Senior Lecturer, School of Law, University of Essex; Former Legal Director of Redress.

State is unwilling or unable genuinely to carry out an investigation or prosecution. At first glance, it would not be obvious whether, and if so, how, this provision relates specifically to victims' rights. But, if the competent local authorities are unable to proceed or progress with domestic investigations or prosecutions because there are no local procedures in place to effectively protect victims and witnesses (and consequently victims and witnesses are reluctant to engage with local investigations or prosecutions), this might be a factor which would militate in favour of the ICC exercising jurisdiction.

This was the view taken by the Pre-Trial Chamber of the ICC in the case concerning Saif Gaddafi concerning international crimes allegedly committed in Libya. While recognising that the role of the Chamber is to assess whether the Libyan authorities are capable of investigating or prosecuting Mr Gaddafi in accordance with the substantive and procedural law applicable in Libya,¹ (as opposed to applicable law before the ICC), and taking note of the extensive 'efforts deployed by Libya under extremely difficult circumstances to improve security conditions, rebuild institutions and restore the rule of law',² the Pre-Trial Chamber concluded that multiple challenges remained. Consequently, it determined that the national system was not yet 'available' within the terms of the Statute. One of the factors taken into account by the Pre-Trial Chamber in reaching this conclusion was the lack of effective measures to protect victims and witnesses:

The Chamber is also concerned about the lack of capacity to obtain the necessary testimony due to the

inability of judicial and governmental authorities to ascertain control and provide adequate witness protection.

...

Libya has presented no evidence about specific protection programmes that may exist under domestic law. It is unclear, for instance, whether the domestic law provides for the immunity of statements made by witnesses at trial. In addition, it is unclear whether witnesses for the suspect may effectively benefit from such programmes. As such, the Libyan Government has failed to substantiate its assertions that it envisages the implementation of protective measures for witnesses who agree to testify in the case against Mr Gaddafi. Therefore, and in light of the circumstances, the Chamber is not persuaded by the assertion that the Libyan authorities currently have the capacity to ensure protective measures.³

It is clear that in many countries, victims and witnesses, and those that assist them, are regularly targeted by persons in positions of political, military or economic power, by their neighbours and even by their own families. The more sensitive the case, the higher the protection risks can be. In cases which have come before the ICC, other *ad hoc* or internationalised criminal tribunals as well as domestic investigations and prosecutions, some witnesses have been threatened with reprisals, while others have been forced to flee their homes. Some have even suffered physical violence, including murder.

¹ *Prosecutor v. Gaddafi and Al-Senussi* (Situation in Libya), Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC Pre-Trial Chamber I, ICC-01/11-01/11-344-Red, 31 May 2013, para 200.

² *Ibid*, para 204.

³ *Ibid*, paras 209, 211.

In order to address these types of *lacunae* at the domestic level, States can put in place domestic laws and procedures to strengthen victim and witness protection, in accordance with Article 68(1) of the Statute.

This would also be consistent with the requirements set out in the UN Convention against Transnational Organized Crime (2000). Indeed, Articles 24-25 of that Convention obliges States Parties to take appropriate measures to provide effective protection to witnesses and, as appropriate, to their relatives and other persons close to them from potential retaliation or intimidation for giving testimony concerning offences covered by the Convention and to afford assistance and protection to victims of crime.⁴ Further, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, provides that '[t]he responsiveness of judicial and administrative processes to the needs of victims should be facilitated by ... Taking measures to ... ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.'⁵ Similarly, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), recognises that in order to 'secure the right to access justice and fair and impartial proceedings' States should, among other things, 'ensure [victims'] safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other

proceedings that affect the interests of victims'.⁶

Many States have already introduced progressively specific protective measures for witnesses and victims. These include steps to minimise the general risks that might be faced by them (introducing good practices during investigations and in the courtroom regarding witness safety and confidentiality), an institutional capacity to respond to particular risks when they arise (such as special protection measures, relocation) and legal measures to address instances of reprisals (such as introducing and prosecuting offences of witness intimidation).⁷

Victim and witness protection has been a particular challenge in Africa⁸ which more and more States are beginning to address. South Africa has had a victim protection programme in place since 1996,⁹ and in 2014 Kenya introduced the Victim Protection Act (which has been subsequently amended).¹⁰ Other States such as Ethiopia have protection schemes in place,¹¹ as do Cabo Verde, Rwanda,

⁶ UN General Assembly Resolution 60/147, adopted on 16 December 2005, Principle 12(b).

⁷ See generally, UN Office on Drugs and Crime, 'Good practices for the protection of witnesses in criminal proceedings involving organized crime', 2008, available at:

<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>.

⁸ See, e.g., Chris Mahony, 'The justice sector afterthought: Witness protection in Africa', ISS, 2010; Jemima Njeri Kariri and Uyo Salifu, 'Witness protection Facilitating justice for complex crimes' ISS Policy Brief 88, August 2016; REDRESS, 'Testifying to genocide: Victim and witness protection in Rwanda', October 2012.

⁹ Mahony, *ibid*, p. 95.

¹⁰ Act No. 17 of 2014, L.N. 43 of 2015.

¹¹ See, Wekgari Dulume, 'Ethiopian Witness Protection System: Comparative Analysis with UNHCHR and Good Practices of Witness Protection Report', (2017) 6(1) Oromia Law Journal 125, available at <https://www.ajol.info/index.php/olj/article/download/158563/148183>.

⁴ UN Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003), Arts 24, 25.

⁵ Adopted by UN General Assembly Resolution 40/34 of 29 November 1985, para 6(d).

Mozambique and Morocco.¹² Uganda has had draft legislation pending for some time. In some countries, like the Democratic Republic of the Congo, there is protection legislation which focuses on particular crimes like sexual and gender based violence. What is crucial is that witness protection mechanisms operate with sufficient autonomy, independence and flexibility, so that they can address the protection needs of all victims of witnesses, regardless of whether the alleged crimes were perpetrated by State or non-State actors. It is also important for States to match specific protection legislation with an adequate operational capacity to afford protection and to clearly stipulate how protection cases are to be identified, who has the power and the obligation to afford protection and under what circumstances, and what to do in cases of a conflict of interest. Similarly, it is important for States to incorporate into their criminal legislation, if they have not done so already, offences against the administration of justice such as witness tampering and intimidation as well as the solicitation of bribes.

b) The Cooperation Regime of the ICC insofar as it relates to Victims and Witnesses

As is well known, ICC States Parties are obliged to cooperate with and enforce the Court's requests and orders. This is set out in Part IX of the Statute. In this respect, much attention has been focused on the role of States Parties in enforcing the Court's arrest warrants. However, Part IX also includes cooperation provisions that are relevant to victims and witnesses in particular:

First, the Statute requires States Parties to assist the Court with the protection of victims and witnesses. In particular, Article 93(1)(j) specifies that States Parties

shall comply with requests by the Court to provide assistance in '[t]he protection of victims and witnesses and the preservation of evidence' in relation to investigations and/or prosecutions. In this respect, the ICC may make specific requests to States Parties which concern particular individuals who require protection. This might involve States Parties in which the Prosecutor has ongoing investigations or active prosecutions. It might also involve other States where victims or witnesses reside or when the Court is seeking State assistance in temporarily or permanently relocating individuals with safety concerns. The ICC has developed framework agreements on witness relocation, but so far, very few States have agreed to relocate witnesses, whether on a temporary or permanent basis. The Court has emphasized the crucial importance of States Parties' cooperation in this area, as evidenced through the signature of relocation agreements or ad hoc arrangements. However, in 2015, the Bureau of the ICC Assembly of States Parties pointed out that 'the current number of agreements was not sufficient and ... the Court [has] approached States Parties in all regions to enhance the capacity. Broad regional capacity would also allow for finding solutions that, while fulfilling the strict safety requirements, would minimize the humanitarian costs of geographical distance and the change of linguistic and cultural environment when relocating witnesses and their families.'¹³

Second, the ICC Statute requires States Parties to assist the Court with the search for, and seizure of, assets. In particular, Article 93(1)(k) of the Statute specifies that States Parties shall comply with requests by the Court to assist with '[t]he identification, tracing and freezing or

¹² Referred to in Njeri Kariri and Salifu (n 8).

¹³ ICC Assembly of States Parties, Resolution, 'Report of the Bureau on cooperation' Addendum II, Annex V: Summary of the Botswana seminar on fostering cooperation (29-30 October 2015), ICC-ASP/14/26/Add.2, 17 November 2015, para 9.

seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties'. Some (though not a sufficient number of) States Parties have put in place mechanisms to comply with these types of financial orders emanating from the Court – both in terms of their domestic legislation but also at the operational level, identifying individuals who can serve as focal points so that precious time is not wasted before cooperation can start. This is important, given that asset seizure processes must be quick if they are to be effective. The ICC Assembly of States Parties has underscored the importance of, and called on all States Parties to put in place and further improve, 'effective procedures and mechanisms that enable States Parties and other States to cooperate with the Court in relation to the identification, tracing and freezing or seizure of proceeds, property and assets as expeditiously as possible.'¹⁴

Other implicit requirements which flow from the Statute

The implicit requirements which flow from the Statute are premised on the spirit of recognising that the ICC is part of a wider system of international justice in which States Parties take centre stage. It is States Parties who have, and will continue to have, the most important role to play to ensure that there is no impunity for crimes of international concern. This is because the ICC has a limited jurisdictional mandate, and its investigations and prosecutions will necessarily be narrow and will never manage – on their own – to bring justice to all victims of the worst crimes. Even in those 'situation countries' in which the ICC is actively engaged, the ICC will only be in a position to proceed

with a handful of cases. The real job of tackling impunity rests with States through domestic investigations and prosecutions, and the implementation of a system of justice that reflects the rights and interests of all those affected by the judicial process.

When it comes to victims' rights, the first key factor has already been canvassed earlier in this paper, namely, victim and witness protection. Victims will only come forward if they feel like the justice system will work fairly for all sides, including for them. Many countries, including many in Africa, are putting in place witness protection legislation. Some of these are based on an organised crime framework. But it is perhaps important to note that international crimes – like crimes against humanity, genocide and war crimes – might lead to a different type of protection problem involving State actors. Therefore, protection legislation, and the framework that accompanies it, should adequately reflect the realities of the crimes at issue and the individuals who will ultimately need protection (and from whom).

Next, there is the important consideration of victim participation. The ICC Statute envisions a system of victim participation in which individuals who have suffered harm as a result of the crimes before the Court have the ability to participate in the legal proceedings to the extent that their rights are directly affected.¹⁵ This can be a complex process, particularly when many victims are involved. Nonetheless, when done well it can be an important means by which victims experience justice and are empowered by the justice process. In recognition of the challenges inherent to victim participation when the number of victims is large, both domestic and international jurisdictions have developed procedures to streamline and make more effective the victim participation process,

¹⁴ ICC Assembly of States Parties, Resolution on cooperation, ICC-ASP/13/Res.3, Adopted at the 12th plenary meeting, on 17 December 2014, by consensus, para 23.

¹⁵ Article 68(3) of the ICC Statute.

including the use of common legal representatives and the use of status conferences to deal with procedural matters.

One might instinctively assume that the victim participation framework set out in the Statute is a product of the laws in place in those countries that follow a Napoleonic code or civil law legal tradition. Indeed, while the Statute contains features derived from the civil law tradition, there are also aspects which come from, and are well recognised in, common law legal systems. This includes, for example, the ability for victims to present victim impact statements at the close of a criminal trial and the possibility for victims to challenge the decision of the police or prosecutor not to proceed with an investigation or prosecution. Also, victim participation derives from the recognition under human rights law of the obligation to keep victims informed about the criminal complaints they file with the competent authorities, the ability for victims to contest a decision not to investigate or prosecute, and the notion that victims have a right to access justice and a right to know the truth. In addition, there is some recognition that for crimes of international concern like crimes against humanity, war crimes and/or genocide, there is a distinct need to ensure that victims feel part of the justice process. In this regard, there are some States in which special measures for victim participation have been put in place in proceedings that involve crimes of international concern. A good example of this is the International Crimes Division of the Ugandan High Court, which has adopted special procedures concerning victim participation.¹⁶ Additionally, there is the extensive experience of victims

engaged in criminal proceedings as civil parties in the States (usually of the civil law tradition) that allow for such procedures. Indeed, it is often the civil parties that are the most instrumental in pushing cases forward and seeing that justice is done. One does not need to look beyond the Democratic Republic of the Congo (in pressing forward military tribunal cases in Eastern DRC) and Chad (in advocating for justice for the victims of the regime of Hissene Habré) to see the important role that victims have played in securing justice for crimes of international concern.

Finally, there is reparations to victims. Inevitably, the process of reparations before the ICC will be limited. This is because only a few instances of victimization will get to the Court, which is in turn due to the fact that ICC prosecutions will only ever represent a fraction of the total criminality committed in a particular location. In addition, as has already been seen with respect to the cases that have come before the ICC, not all criminal prosecutions will result in convictions. This may be because of the unavailability of sufficient evidence to prove the guilt of particular individuals, but it does not necessarily say anything about the credibility or suffering of the victims. Additionally, the ICC only considers individual criminal responsibility, and thus the potential responsibility of States or non-State entities (such as corporations or armed opposition groups) falls outside of the jurisdiction of the Court. This can differ from domestic criminal cases which have addressed reparations at the closure of the case (as is typical in civil law systems). In such cases there has been a tendency to recognise the individual perpetrator and the State as jointly and severally liable or, alternatively, liability has been apportioned between the individual perpetrator and the State. Nevertheless, even in such contexts, States have been

¹⁶ See REDRESS, 'Ugandan International Crimes Division (ICD) Rules 2016 Analysis on Victim Participation Framework', August 2016, https://redress.org/wp-content/uploads/2017/12/1608REDRESS_ICD-Rules-Analysis.pdf

slow to implement in favour of the victims, reparations awards that have concerned them.

Naturally, national reparations processes do not normally focus exclusively, or mainly, on the outcome of criminal proceedings. A decision to embark on a reparations programme tends to stem from local political considerations, domestic advocacy and, at times, the role of local, regional or international processes – including the recommendations of UN treaty bodies and in the case of Africa, African regional and sub-regional human rights mechanisms. This combination of factors tends to result in a wider process which can take into account more holistically the rights and needs of victims and the range of possible actors that may bear some responsibility for the harms caused. This is important, as it captures the different dimensions of the crime and the different actors who might have been involved.

When considering to put in place reparations programmes at the domestic level, States should take into account the following principles, relevant in particular for reparations involving large numbers of victims. First, States should consult victims as to what they want and need (i.e. their priorities). This is important as it will help empower and engage victims, which is one of the underlying goals of any reparations programme. Also, particularly when the quantum and quality of reparations will never fully repair the harm done to victims, victim engagement serves a particularly important role and is likely to have a positive impact in how victims perceive the reparations they ultimately receive. Second, there is a variety of forms of reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In most situations, a combination of these measures will be required to best address the harm suffered. States should further

ensure that they have the means and mechanisms available to trace, seize and freeze financial assets, and to engage bilaterally with other States where assets might be located. It is important for States to ensure that there is a sufficient budget for reparations, both for putting in place the necessary structures to implement a reparations programme, as well as to fund the reparations measures directly. In this respect, a range of models have been used to raise funds such as special taxes, soliciting contributions from companies who benefitted from the crimes and/or a percentage of the annual budget. Finally, there is a need for the process to be transparent. This will be important for the credibility and acceptance of the reparations programme.

Conclusions

In summary, when considering the complementarity regime under the Statute, it is important not to forget the important connection between the requirements of the Statute and victims' rights – both those rights that are reflected directly in the Statute and those rights that reflect States' wider obligations under human rights law and derive more implicitly from the purpose the Statute is intended to achieve – creating an international system of justice. International justice is not and cannot only be about alleged perpetrators, judges and prosecutors. It is important to reflect upon and to engage with victims of the crimes and the wider communities who have been affected, and to ensure that their rights are respected in the proceedings both in The Hague or back home.

THE MALABO PROTOCOL AND COMPLEMENTARITY OF INTERNATIONAL CRIMINAL JUSTICE: CHALLENGES AND PROSPECTS

Dr. Robert Eno



*Dr Robert Eno***

Introduction

What is now commonly referred to as the Malabo Protocol is actually the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which extends the jurisdiction of the yet-to-be established African Court of Justice and Human Rights (ACJHR) to crimes under international law and transnational crimes. This Protocol was adopted in Malabo, Equatorial Guinea, in June 2014, alongside several other legal instruments of the African Union, including: the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development; the African Union Convention on Cross-Border Cooperation (Niamey Convention); the

***Registrar, African Court on Human and Peoples' Rights.*

Protocol on the Establishment of the African Monetary Fund; the African Union Convention on Cyber Security and Personal Data Protection and the Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament.

So, there were actually 3 Protocols adopted in Malabo in June 2014. It may thus be misleading to refer to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights alone as the Malabo Protocol. It may aptly be referred to as the Malabo International Crimes Protocol or simply, the International Crimes Protocol.

Be that as it may, for the purpose of this article, I will refer to it as the Malabo Protocol.

But why the Protocol...

A lot has been said and written on why the African Union decided to establish a regional Court with criminal jurisdiction, less than two decades after the establishment of the ICC.¹

¹ The Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute) is the treaty that established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome on 17 July 1998 and it entered into force on 1 July 2002.

Many analysts link the genesis of the African Court with a criminal jurisdiction to the concerns that the AU had with the manner in which the West was applying the principle of universal jurisdiction.²

The first mention of vesting the African Court on Human and Peoples' Rights with an international criminal jurisdiction was at the AU Assembly's February 2009 decision which was in response to the "abuse of the principle of Universal Jurisdiction." The Assembly requested the AU Commission:

*"...[i]n consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes and report thereon to the Assembly in 2010."*³

This decision stemmed from an earlier July 2008 decision where the Assembly issued a series of decisions against what it termed the "...abuse and misuse of indictments against African leaders through the universality jurisdiction principle."⁴

The AU considered the targeting of senior government officials who enjoyed

diplomatic immunity, including Heads of State, an affront to the sovereignty of its Members.

While Africa's concern over the application of the principle of universal jurisdiction could be seen as the trigger for the establishment of an African Criminal Court, the AU's apprehension over the operations of the ICC itself accelerated the process. Thus, following the ICC indictment of the Sudanese President, at an Extraordinary Session of the AU Assembly, the latter decided "to fast-track the process of expanding the mandate of the African Court on Human and Peoples' Rights to try international crimes, such as genocide, crimes against humanity and war crimes".⁵

It should be stressed here that the original decision of the African Union referred only to '*international crimes such as genocide, crimes against humanity and war crimes*', crimes, which are also mentioned in the Constitutive Act of the African Union. However, in the elaboration of the Malabo Protocol, its scope was expanded to include not only crimes under the Statute of the International Criminal Court (Rome Statute) and the Constitutive Act of the African Union, but an additional 10 more crimes.

Why expand the crimes under Malabo...

² See for example Ademola Abass, Historical and Political Background to the Malabo Protocol, (2013) European Journal of International Law 24:933–946.

³ See Assembly/AU/Dec. 213(XII) para 9.

⁴ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/14 (XI), Sharm El-Sheikh 30 June – 1 July 2008, 5(iii).

⁵ See Ext/Assembly/AU/Dec.1(Oct.2013) para 10 (iv).

In addition to the international crimes under the Rome Statute, the Malabo Protocol has codified and developed other international crimes. These are the crimes of unconstitutional change of government, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.⁶

A close look at the additional crimes reveal that while the AU may have been responding to the perceived abuse of the principle of universal jurisdiction and concerns over the operations of the ICC, the Malabo Protocol turned out to be an instrument that seeks to provide a regional response in the fight against impunity and enhance international criminal justice from an afro-centric perspective. The additional crimes may be regarded as ‘regional crimes’ which affect Africa, and have had major socio-economic and political consequences on the continent.

A need was thus expressed for a court that can prosecute crimes that are particularly prevalent in Africa, but are of apparently little prosecutorial interest to much of the rest of the world. The Malabo Protocol makes provision for such a Court and gives it jurisdiction to hear and deal with these regional crimes.

This expansion in my view dispels the concerns of those who argue that the Malabo Protocol was solely to frustrate the ICC. Ademola Abbas, for instance, argues that

“...the prospect of the African regional court adjudicating on international crimes portends some troubling times for the International Criminal Court, but more so for international criminal justice in Africa. On the one hand, the International Criminal Court will suffer a major dent to its vital referral mechanism... The impact of this double loss is significant if one recalls that of all the situations currently pending before the International Criminal Court, three were self-referred... and one involved the voluntary (ad hoc) acceptance of ICC jurisdiction...”⁷

Fred Aja Agwu for his part argues that “The decision by the African Union to imbue the African Court on Human Rights with criminal jurisdiction smacks of confrontation with the international community because some of their member states are parties to the Rome Statute that created the International Criminal Court (ICC). The effort is an unnecessary duplication that can only at best give soft landing or shield tyrannical African leaders from

⁶ See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) (2014), Article 28A for all the 14 international crimes.

⁷ See Ademola note 2 supra. See also Gerhard Werle, Moritz Vormbaum (2016), *the African Criminal Court – a commentary on the Malabo Protocol*, International Criminal Justice Series, Vol. 10.

international accountability for their well-known impunity...”⁸

These and many others holding this view may be correct, but it must not be forgotten that Africa’s quest for international criminal justice did not start with the AU’s discontent with the application of the principle of universal jurisdiction and the operations of the ICC. The quest for an African court with criminal jurisdiction could be traced much further back.

Records show that as far back as the 1970s, during the drafting of the African Charter on Human and Peoples’ Rights, the possibility of including a court with international criminal jurisdiction was raised.⁹

More recently, a distinct legal basis for prosecuting international crimes in Africa could be found in the Constitutive Act of the African Union. Article 4(h) of the Act provides for ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a *serious threat to legitimate order to restore peace and stability to the*

Member State of the Union ...’ These crimes are, with the exception of ‘threat to legitimate order’ the same crimes over which the ICC has jurisdiction. Article 4(o) of the Act also calls for, among other things, the ‘rejection of impunity’.

While these articles in the Constitutive Act may not impose a strict legal obligation to establish a court, they demonstrate an acceptance by the AU that it has an obligation to prevent and punish international crimes.

Perhaps the most concrete expression of the AU’S intention to prosecute international crimes is manifested in the African Charter on Democracy, Elections and Governance adopted in January 2007. Due to its prevalence on the continent, ‘Unconstitutional Change of Government’ is codified in this instrument as an international crime. Article 25(5) provides that perpetrators ‘of unconstitutional change of government may ... be tried before the competent court of the Union’.

From the foregoing, it can be argued with some degree of certainty that despite there being no court emerging from these initiatives, it nonetheless pointed to the fact that sooner rather than later, Africa was going to establish a criminal Court to deal with these continental challenges.

I therefore concur with Ademola Abass when he avers that “the proscription of ... international crimes by the AU [Constitutive] Act necessarily implies the obligation to take measures to redress violations. It cannot be the case

⁸ See Fred Aaja Agwu, *the African Court of Justice and Human Rights: the future of international criminal justice in Africa*, African Review, Vol. 6 2014, Issue 1.

⁹ See Report by the Kenyans for Peace with Truth and Justice entitled *Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court*, Nov. 2016.

that with its Constitutive Act the AU legislates on crimes it does not intend its own court to prosecute. ...”¹⁰

The argument that the prosecution of crimes on the continent was never seriously considered until the indictment by the ICC of President al-Bashir in 2009 is therefore not tenable.

Criticisms and challenges

The Malabo Protocol has been met with a lot of criticisms and support from various quarters/sectors of society for various reasons, depending on where you stand. However, the one aspect on which all seem to agree is the immunity clause, which shields sitting heads of state and other senior government officials from prosecution.¹¹

It is also certain that such a Court will face many challenges, not least, the resources to run the Court, the political will, etc.

The above shortcomings notwithstanding, is there anything wrong with having an African Criminal Court alongside the ICC? In other words, can Malabo complement Rome and vice versa?

My immediate response to this question is, there is nothing wrong with establishing an African Criminal Court, and yes, Malabo can complement Rome and vice versa, and both can work together to contribute in the fight against

impunity and enhancement of international criminal justice.

The principle of complementarity is the cornerstone of the Rome Statute. Although the Rome Statute does not define complementarity, a joint reading of para 10 of the preamble and Article 1 of the Statute paints a clear picture that the ICC is “intended to supplement the domestic punishment of international violations rather than supplant domestic enforcements of international norms. The complementarity principle is intended to preserve the ICC’s power over irresponsible States that refuse to prosecute those who commit heinous international crimes”¹².

The situation is graphically illustrated by Evelyn Ankumah¹³ when she says that “the ICC was never created as a court that would sit in the driver’s seat of the car that is expected to drive to the destination of criminal accountability. Quite clearly, the basic assumption underlying the Rome Statute is that the ICC, rather, sits in the back seat. It will, or should, only jump to the front seat when the driver – meaning a national criminal court or system – loses direction or simply refuses to drive in

¹⁰ Ademola supra.

¹¹ Malabo Protocol Article 46A bis.

¹² Mohamed M. El Zeidy, *The Principle of Complementarity in the International Criminal Court’s Statute*. See also Laura Clarke, *Complementarity as Politics*, *Journal of International and Comparative Law*, Vol. 2, 2016.

¹³ Executive Director, African Legal Aid.

the direction of the desired place called: “criminal justice”.¹⁴

Under Article 1 of the Rome Statute, the ICC is *complementary only to domestic courts*. The Statute never contemplated, nor does it contain any provision which envisages complementarity with regional courts.

It is therefore not surprising that the African Union’s decision to establish a regional Court with criminal jurisdiction, similar or comparable to the mandate of the ICC, has attracted international attention and concern. The African Union is the first regional organisation to initiate the project of international criminal justice from a regional perspective.

The Malabo Protocol adopts the complementarity principle of the Rome Statute vis-à-vis domestic criminal jurisdictions, but has expanded the principle to include regional arrangements. Article 46(H) of the Protocol states that “(1) the jurisdiction of the Court shall be complementary to that of National Courts and to the Courts of Regional Economic Communities, where specifically provided for by the Communities”.¹⁵

It is interesting to note that while the Malabo Protocol encourages complementarity between the African Criminal Court and national and sub-regional courts, it is silent about complementarity with the ICC, even though the Malabo Protocol came after the Rome Statute. How then can the two work together to complement each other and enhance international criminal justice?

It is important to indicate that criminal justice, just like the protection of human rights, is the primary responsibility of States (through national institutions). The principle of complementarity is therefore not unique to the ICC or international criminal justice. It transcends many aspects of relations between and among States.

The UN Charter recognises and encourages complementarity through the establishment of regional bodies to deal with issues at the regional level before they spill over. Article 33 of the Charter expressly recognise the principle of regional settlement of disputes threatening international peace. The same principle is expressly reiterated in Article 44 of the International Covenant on Civil and Political Rights (ICCPR) and can properly be extended to international criminal justice.

The international human rights regime is also founded on the principle of complementarity, exemplified by the doctrine of exhaustion of local remedies, which places primary responsibility for protecting human rights on the State and international tribunals as a last resort.

¹⁴ Evelyn Ankumah, *Complementarity Beyond the ICC: The AU’s Malabo Protocol*, AFLA, December 2015.

¹⁵ The Protocol does not however indicate when Courts of RECs may be called upon to intervene to operationalize this complementarity.

So the decision of the African Union to establish a Court with criminal jurisdiction has firm foundation in international law and practice.

The jurisdiction of the African Criminal Court is not limited to only the crimes in the Rome Statute (war crimes, crimes against humanity, genocide and aggression). In addition to these international crimes, Malabo adds more international crimes which may not be of concern to the international community but threaten the sovereignty of African states and the very survival of the African continent. It is therefore normal for the leadership of the continent to react to these challenges.

Besides, there are many advantages that may stem from having a complementary regional criminal justice system.

Experience has shown that despite the universal desire to fight impunity, the primary responsibility to fight crimes rests heavily on the political will of each State. It is at times difficult to negotiate binding obligations and set up international machinery with States of diverse cultures, development and political leanings. Agreement on such matters is easier to achieve between governments within the same geographical region, sharing a common history and cultural tradition.

Given the diversity of the modern state system, it is natural that regional systems would be more readily accepted than universal arrangements. A State cannot be forced to submit itself to a system of international control, and will do so only if it has confidence in the system. It is

most likely to have such confidence if the machinery has been set up by a group of like-minded countries which may likely be partners in a regional organisation.

Moreover, a State will be willing to give more powers to a regional organisation with restricted membership, where the other members are its friends or its neighbours, or are of similar socio-economic and political development, than a worldwide organ in which it and its associates play a relatively small role. Mtiangai Sirleaf¹⁶ argues that “due to the existence of geographic, historical and cultural bonds among States, decisions of regional bodies may meet with less resistance than global bodies. Because the court is linked to the regional political bodies of the AU, this may facilitate stricter oversight.”

At a practical level, it is obviously easier and more convenient for a case to be heard within the region than somewhere else. It would be more convenient, and probably less expensive for all concerned if a case were to be tried in the region rather than say, in New York or Geneva or The Hague. Also, regional arrangements would allow trials to be carried out, in or closer to the places where atrocities or the crimes were committed. This proximity has clear added advantages for investigations by the prosecution, which should have easier access to evidence and witnesses. More significantly, it offers victims and citizens a greater sense of “ownership”

¹⁶ Assistant law professor at the University of Pittsburgh.

of the trial and would probably facilitate greater interest, participation, and reconciliation.

So the establishment of an African Criminal Court does not seek to diminish the role of the ICC, but rather to enhance the fight against impunity and international criminal justice. The two Courts, and in fact other similar Courts, can work together. A number of possibilities have been put forward to enhance the working relationship and complementarity between the ICC and regional Courts, such as the African Criminal Court. This ranges from complementarity based on division of labour to passive or positive complementarity.

Some analysts have argued that since neither Rome nor Malabo make reference to each other, States may be able to choose freely which Court to refer a situation, if they consider themselves unable to exercise jurisdiction. Others have argued that since the Malabo Protocol contains 'regional crimes', the African Court can focus its attention to those crimes and cede jurisdiction to the ICC for those crimes under the Rome Statute. Yet, others have proposed a hierarchical arrangement where the ICC could serve as an appellate Court for regional courts.

The relationship between the two courts can also be bolstered by working together through the exchange of evidence, sharing information obtained in the context of investigations, etc. Cooperation may contribute to a better understanding of their relationship.

Conclusions

The Malabo Protocol, just like many other international instruments, including the Rome Statute, is not perfect, and there is a lot of room for improving it. But just like the ICC, the African Criminal Court is here with us, or will be in a few years' time, so rather than fight it, we should seek to support it and see how to make it work.

The intention of the African States to create a court with criminal jurisdiction is noble, and given the required support, such a court has the potential to provide a strong African option to achieving justice for the victims of international and other serious crimes on the continent.

The Malabo Protocol, however, has a number of weaknesses. The most serious of these is the immunity clause, which grants immunity from prosecution to sitting heads of state and other senior officials. Given that the type of crimes to be prosecuted by the Court include those that tend to be committed by powerful individuals in and out of government, the granting of immunity to them would seem to undermine the *raison d'être* of the Court. This has cast a dark shadow on this noble initiative even before it kicks off. However, the establishment of a regional criminal Court is work in progress, an initiative which should not be thrown away with the bathwater. Improvements are possible.

The absence of any mention of collaboration with the ICC is also telling, and efforts must be made to

provide a framework for cooperation between the African Criminal Court and regional and international courts, notably the ICC, in order to provide for a holistic and universal approach to fighting

impunity on the continent that complements rather than undermines global efforts.

BRINGING SOFT POWER TO A LIFE'S WORK

The Professional Trajectory of Judge Sanji Mmasenono Monageng

Dr. Leigh Swigart



Judge Sanji Monageng**

*'I came into the ICC with the basic knowledge of being a judge. I had tried thousands of cases and so, to that extent, I considered myself competent to sit as a judge in the ICC. Of course, having worked domestically as a judicial officer, I know that complementarity is crucial. I appreciate that justice is better served when the recipients see and literally feel it.'*¹

Introduction

In a tastefully furnished and orderly office, Judge Sanji Mmasenono

Monageng sits as if on a stage, the back lighting provided by the multiple windows of her corner location creating a kind of aura around her face and figure. Outside, the dunes of Scheveningen are solid and intractable, a reassuringly unchanging backdrop to the sleek permanent premises of the International Criminal Court (ICC). Inside the Court, by contrast, there is an ever-shifting swirl of visitors in the building's public spaces, and one hears the constant hum of low-pitched conversation from the many staffers moving along the corridors of the separate areas housing the principal organs of the Court: Judicial Chambers, the Office of the Prosecutor, and the Registry. These areas are linked by the central Courtroom Tower, the place where the often lengthy preparatory activities of these distinct organs finally converge in the form of public trials. These "dramatic performances" show the world's spectators – whether they attend in person in The Hague or follow via electronic media – that the perpetrators of grave crimes will be held accountable and that victims can "have their day in court."

It is in these courtrooms that Sanji Monageng has performed the most high-profile work of her long career, work that would almost certainly have seemed impossible from the perspective of a young girl growing up in rural Botswana. Or even from that of a recent

**Former Judge of the Appeals Division at the International Criminal Court (ICC).

¹ Interview conducted by the author with Judge Sanji Mmasenono Monageng in person on June 23, 2016 in The Hague, Netherlands, on file with the author. Cited in subsequent endnotes as "Author interview 2016."

law graduate in the capital city, Gaborone. But then again, the ICC did not yet exist during those years, and it was a distant dream even for those familiar with the attempts made over the 20th century to create a permanent court that would address the worst crimes known to humanity – war crimes, crimes against humanity, genocide, and the crime of aggression.²

Upon first meeting Monageng, one is struck by her welcoming smile, pleasantly round features, soft voice, and lilting English, inflected with the tones of her native Setswana. Yet behind the lenses of her spectacles, she watches carefully with eyes that can be steely, never hesitating to voice her opinion even when it is at odds with those around her. Monageng appears to embody a kind of “soft power,” a capacity to achieve her goals through perseverance, strategic planning and gentle demonstration of her skills. This personal attribute has allowed her to make the long, challenging, and at times unpredictable journey from village girl to international judge.



*Judge Sanji Monageng and Dr. Leigh Swigart***

This chapter will explore various aspects of her journey. It starts with Monageng’s upbringing, education and early professional activities in Botswana, moves on to her regional work with both the African Commission on Human and Peoples’ Rights and in the judiciaries of two other African countries, and culminates with her judicial service on the International Criminal Court. This account shows that there are constants in her professional trajectory, all of them related to her soft power: the ability to spot an opportunity and act upon it; the willingness to take risks and assert herself; and her consummate adaptability to different social, cultural, and work settings. In her judicial career, in particular, Monageng has managed with aplomb to negotiate “the dilemma of difference” (Minow 1987:12), demonstrating forcefully “how women

² The first three categories of crime are enumerated and defined in Part II, Articles 5-8 of the Rome Statute. The definition of the crime of aggression was adopted through amending the Rome Statute at the first Review Conference of the Statute in Kampala, Uganda, in 2010. The Amendments entered into force on 17 July 2018.

^{**} Director of Programs in International Justice and Society, International Center for Ethics, Justice, and Public Life Brandeis University.

can be both equal to and different from men” (Kenney 2010: 433).

Early Years and Education

Sanji Mmasenono Gochani was born in 1950 in Serowe, a village in Botswana’s Central District. She grew up mostly in rural villages, following her mother as she was posted to teach in various primary schools across the countryside. Monageng notes that this was a common profession for educated women of her mother’s generation, and, indeed, many of the Judge’s aunts were teachers as well. Monageng attributes the success of her mother, who later also trained as a nurse, to her being a very strong woman. Her mother also benefitted from an acquaintance with Lady Ruth Khama – the British wife of Sir Seretse Khama, Botswana’s first post-Independence president who was also from Serowe – a controversial figure daring to marry across the race line who devoted herself to women’s issues in her adopted country.³

Of her primary education, Monageng recalls:

My mother was a primary school teacher, and therefore attending school was a given. The fact that she was

a teacher was also very helpful because she gave me extra lessons after school and she followed my progress intimately by talking to teachers and actually attending some of my classes when she was free. Moreover, she was a disciplinarian, and therefore I had to apply myself fully to my schoolwork. Fortunately, I was on the brighter side and most times avoided the corporal punishment allowed during those days.⁴

Unlike many of her peers, Monageng had the opportunity to continue on to secondary school. Entrance was based on a competitive exam, and enrolment meant leaving home at the age of 13 to live in a distant boarding school. She remembers:

It was an exciting time. Students came from all over the country and beyond the borders of Botswana. I had grown up predominantly in villages and rural areas, and the exposure to other tribes and also to foreigners was awesome. This was a mixed gender college, but male students were more than females. The education system, the policies, socialization, etc. always favoured boys.⁵

³ Read more about the life of Ruth Khama in her May 29, 2002 obituary in *The Guardian*: <https://www.theguardian.com/news/2002/may/29/guardianobituaries>. The circumstances of her marriage with Seretse Khama also became more widely known through a 2016 feature film entitled "A United Kingdom."

⁴ Author interview 2016.

⁵ Author interview 2016.

At the end of her secondary education, Monageng's life took an unexpected detour. When her father fell ill, she took on the responsibility of supporting the family and consequently entered the working world. Although she initially thought this would be for just a few years, she instead spent ten years working in a bank in Gaborone, the capital of Botswana. During this period, she also married a man with the surname of Monageng and had three children. The subsequent dissolution of her marriage became another turning point in her life; in addition to the personal disruption it caused, her divorce demonstrated how Botswana laws disadvantaged women on matters of family and inheritance. This is perhaps not surprising, given Botswana's continuing gender inequality across many spheres of society, including all three branches of government (Bauer and Ellett 2016). Her experience also occurred more than a decade before the groundbreaking 1992 case in the Botswana High Court and later Court of Appeal, *Attorney General of Botswana v Unity Dow*.⁶ This case shed light on the gender-based discrimination found in customary law and held that "the Constitution of Botswana must be interpreted to include sex as a ground of discrimination" (Masengu, 2015: 4). Monageng's direct encounter with discriminatory laws was to inform her later work in both legal and civil society spheres.

⁶ *Attorney General v Unity Dow* (1992) BLR 119.

Choosing the Law

Despite the many years that had elapsed since leaving secondary school, Monageng's success in the banking field gave her the confidence to enroll at the University of Botswana in Gaborone in 1982. She opted to study law, inspired, in her words, by her personal experience with the legal system:

What sold [the study of law] was when I parted with my then husband, the injustice where I had to get out of that house, with my clothes, the children's clothes, blankets, and nothing else ... So that's when I decided, it's time for me to act, it's time for me to do a subject that will properly assist other women in a similar situation.⁷

This five-year course of study entailed spending two years in Edinburgh, Scotland, through a cooperative arrangement between the Universities of Edinburgh and Botswana. Monageng found the experience of living abroad exciting: "The whole thing was new to us... This was a huge city. Even the type of lecturing was different; the style of writing our assignments was different."⁸ This change of academic setting notwithstanding, most of the lecturers at the University of Botswana at the time of Monageng's studies were also foreign nationals. One of the founders of the University of Botswana's law program,

⁷ Author interview 2016.

⁸ Author interview 2016.

and coordinator of the Edinburgh program for students from Botswana and Swaziland, was Alexander McCall Smith, who is perhaps best known as the author of the popular detective novel series set in Botswana, “The Number One Ladies Detective Agency.”⁹ African nationals were also represented among the foreign lecturers in Gaborone; one of Monageng’s professors was Judge Daniel David Ntanda Nsereko of Uganda, who served as an ICC judge from 2007 to 2011 and is currently on the Appeals Chamber of the Special Tribunal for Lebanon. Despite the fact that many young women at the University of Botswana in that era were pushed into “soft courses”¹⁰ – by this she meant the historically feminine fields of teaching and nursing – Monageng felt that the university was generally supportive of women students and treated them as equal to their male counterparts. Nonetheless, by her final year of law studies, she was the only woman remaining in a class of ten students.

Domestic Judicial and Legal Experience

Monageng’s goal upon graduation was to become a judicial officer, unlike most of her peers who headed into private practice. Along with one other student, she was recruited by the Botswana

Department of Justice to become a Magistrate. The Judiciary of Botswana comprises several levels: Magistrates Courts, which include small claims courts; High Courts; and the Court of Appeal. According to the Botswana Administration of Justice website, “[t]he Magistrates Court performs a very pivotal role in the Judiciary of Botswana. They try the bulk of the offences committed in this country and attend to the bulk of common disputes between ordinary citizens of Botswana.”¹¹ The area of law that Monageng found most exciting during her studies was criminal law, and this interest stood her in good stead when she became a Magistrate. She explains:

Magistrates do everything except capital punishment offenses like murder. They also do not try attempted murder, manslaughter, or sedition cases. But then they do all other criminal cases from rape to common assault. And then, of course, they still do civil cases, although they have a mandatory ceiling in monetary value. And Magistrates are the ones who do maintenance cases for children born out of wedlock and women and children who have separated from their spouses, until their cases are finalized by the High Courts. All the

⁹ Anyone familiar with the series will know that the main character is a Botswana woman coming out of a bad marriage who establishes herself as a private detective although her gender and background are against her. One can’t help but think of the parallels with Monageng’s life.

¹⁰ Author interview 2016.

¹¹ See www.justice.gov.bw/about%20us/about-magistrate-courts.

maintenance cases... from divorce or even cohabitant people.¹²

At this time, in the late 1980's, Monageng was the only woman Magistrate in Botswana and only the third woman to have ever held this position.¹³ Gender balance in the lower ranks of the judiciary has changed radically since then – in 2010, 56% of Magistrates were women (Bauer and Ellett 2016). She describes the work of Magistrate as “killing”¹⁴: it entailed hearing multiple cases a day, researching the relevant legal issues, and then writing an often lengthy judgment for each case. She was sometimes purposely assigned cases involving women's and family issues, as were the female Magistrates appointed after her, because of their reputations for being “compassionate” and “asking respectful questions” of the women appearing in court.¹⁵

Monageng found hearing cases that touched on the welfare of women and children, and enforcing laws that protected them, the most rewarding aspect of her work. The treatment of victims of rape, in particular – by police officers, by medical professionals, and in the courtroom – evolved during that time, spurred on in part by the rapidly increasing rate of HIV infection in

Botswana in the 1990's, and the need to administer prophylaxis to victims within 72 hours of sexual contact with a possible carrier. She noted of that time:

We worked very, very hard in Botswana to change... first of all, the mindset of the police themselves that kept some of the women away from reporting their [rape] cases. We worked until the police agreed that when a woman comes to report rape, she will be attended to by a female police officer, and there was a dedicated room away from everybody else.¹⁶

Monageng's account of her magistracy years supports what some scholars have found in their research on the impact of gender on judging at the domestic level: that while women may not necessarily render decisions in a particular way because of their gender, their presence in courts is nonetheless important on many fronts. As O'Connor and Yanus have written of the U.S. context:

...although there is no persuasive evidence for a 'woman's judicial voice,' the representation of diverse women judges on our nation's courts has powerful implications for public policy favorable to women. Moreover, and perhaps more importantly, we argue that having multiple women

¹² Author interview 2016.

¹³ The first two women, Ms Daphne Briscoe and Ms Mphathini Motsemme, had subsequently gone into private practice (personal communication with Sanji Monageng).

¹⁴ Author interview 2016.

¹⁵ Author interview 2016.

¹⁶ Author interview 2016.

judges on a court may be important for socialization and collegiality (O'Connor and Yanus 2010: 441).

The Botswana experience also echoes what Mack and Anleu found in their study of the lower Australian courts, where “women may sometimes perform their judicial role in subtly different ways than their male colleagues” (2012: 730). While all Australian judicial officers consider impartiality, integrity and fairness the highest values of their profession, “women magistrates generally place a higher value on a range of interactive qualities, particularly in relation to the qualities of communication and being a good listener, in sharp contrast to male judges” (2012: 746).

Monageng had served as Magistrate for ten years, and heard thousands of cases, when another opportunity presented itself. With the passage in 1996 of the Legal Practitioners Act,¹⁷ Botswana established a law society (i.e., bar association) to oversee and regulate the training and practice of lawyers. The website of the Law Society of Botswana states that it “discharges a dual role”: to regulate its members while also representing the professional welfare of its members.¹⁸ As the first Chief Executive Officer of the Law Society, Monageng did everything for the organization in its early years, including

the bookkeeping, a skill she brought with her from the banking sphere. Indeed, she was associated so closely with this new endeavor that the public, very pleased to have a watchdog for the law profession, often referred to the Law Society simply as “Monageng’s office.” “Today the Law Society is synonymous with my name,” she has stated publicly.¹⁹ She recalls of that time:

I was the chief spokesperson of the Society, its liaison officer with the government of Botswana and national and international organizations, and the chief accounting and administrative officer. I was responsible for spearheading the society’s professional development program, the human rights unit, discipline, and generally was in charge of the day-to-day running of the Society. I quickly introduced the Society to organizations like the Commonwealth Magistrates’ and Judges’ Association, the Commonwealth Lawyers Association and the International Bar Association, and we became members.’²⁰

Her time at the Law Society took advantage of Monageng’s many skills

¹⁷ Legal Practitioner’s Act of Botswana, 1996. See https://www.jstor.org/stable/745675?seq=1#page_scan_tab_contents.

¹⁸ <http://www.lawsociety.org.bw/>.

¹⁹ See video interview with Monageng by the International Association of Women's Judges: <https://iawj-womenjudges.org/hon-sanji-mmasenono-monageng/>.

²⁰ Author interview 2016.

and allowed her to take them to a new level. But it also served as critical preparation for her move into international legal work. As she describes it, “the exposure to both new ideas and skills, as well as to diverse professional organizations, catapulted me into the international scene; hence, I believe, my ability to become competitive for high-powered positions.”²¹

Beyond Botswana: The African Commission for Human and Peoples’ Rights and other African Judiciaries

Monageng’s first forays into human rights occurred shortly before and during her Law Society years. Although she had not been exposed to human rights during her law studies, she later became involved with Ditshwanelo – also known as the Botswana Centre for Human Rights – an organization established in Botswana in 1993 which describes itself like this: “DITSHWANELO is an advocacy organisation with a key role in the promotion and protection of human rights in Botswana society. The Centre seeks to affirm human dignity and equality irrespective of gender, ethnicity, religion, sexual orientation, social status or political convictions.”²² Her evolving interest in the field of human rights eventually led to work and advisory positions with various regional bodies, including the Open Society Institute of South Africa (OSISA) and Southern African Litigation Centre. In 1994, she

also served as the Deputy Chief Litigation Officer for the United Nations Observer Mission to South Africa, a mechanism established “to observe and report on the transition from apartheid in South Africa to a non-racial democratic society.”²³ Through such activities, she became involved with projects promoting not only women’s rights but also freedom of expression, education, social justice, and HIV/AIDS.

In 2003, Monageng was contacted by the Botswana government, which wished to nominate her for a position with the African Commission on Human and Peoples’ Rights (hereafter the Commission). The Commission consists of eleven members who are elected by the African Union (AU) Assembly from among human rights experts nominated by AU State Parties. The Commissioners serve six-year renewable terms on a part-time basis. The aim of the Commission is to protect human and peoples’ rights; promote human and peoples’ rights; and interpret the African Charter on Human and Peoples’ Rights.²⁴ Although the Commission was inaugurated in 1987, this continent-wide body was not particularly well known at the time of Monageng’s nomination. In her words, the response she gave to the government was: “‘Give me a day or two, I’ll come back to you.’ And I quickly did my research, and yeah, I found that it was quite interesting.”²⁵ After a short and relatively painless “campaign,” she was

²¹ Author interview 2016.

²² See <http://www.ditshwanelo.org.bw/>.

²³ See <https://search.archives.un.org/united-nations-observer-mission-in-south-africa-unomsa>.

²⁴ See <http://www.achpr.org/>.

²⁵ Author interview 2016.

voted in as a Commission member at the African Union summit in Maputo, Mozambique in July 2003.

Monageng served as a Commission member from 2003 to 2009. She chaired the Follow-up Committee on torture and other inhumane and degrading treatment from 2003 to 2007 (now known simply as the Committee on Torture), and acted as chairperson of the entire Commission during the final two years of her mandate. She is proud of what she accomplished during her leadership:

First, when I took over the Chairmanship of the Commission, I fought for and convinced the African Union to increase the budget of the Commission from about 750,000 US Dollars per annum to 6 million US dollars, and this meant that the Commission was able to undertake more promotion and other missions during the intersessions. This also meant that the number of staff increased significantly, and therefore that the Commission was able to discharge its mandate better. The Commission was also able to respond to situations of serious human rights violations on time, if it was called upon to do so. The backlog of cases was also being pushed and the Commission was able to complete very important communications, for

instance the Endorois indigenous peoples' case, of which I was the Rapporteur.²⁶

Indeed, Monageng considers her work on the Endorois case, formally titled *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (ACHPR 2009), to be the highlight of her Commission experience. She described the case this way when she presented it to participants of the 2012 session of the Brandeis Institute for International Judges:

The Endorois are an indigenous population in Kenya that was evicted from its ancestral lands around Lake Bogoria in the 1970's by the state to make room for a game lodge and other touristic infrastructure. In return, individual members of the group were offered minimal compensation and relocated to lands that could not support their livestock (lacking water, vegetation, and salt licks), that did not have the plants used for their traditional medicines, and that separated the Endorois from sites of religious and cultural significance (Brandeis Institute for International Judges, 2012: 33-34).

²⁶ Author interview 2016.

In its judgment, the African Commission found violations of the rights to freedom of religion, property, health, culture, religion and natural resources under the African Charter on Human and Peoples' Rights. It also found a violation of the right to development, the first time that an international body had made such a determination (Williams 2010). The Commission recommended that sweeping restitutions be made to the dispossessed Endorois population. This groundbreaking decision was meticulously based on international and regional human rights standards and jurisprudence, particularly that of the Inter-American Court and Commission of Human Rights (Williams, 2010; BIIJ, 2012). Given the non-binding nature of ACHPR rulings, however, there is always the question of whether a state deemed to be in violation of its human rights obligations will comply with the Commission's recommendations. Kenya has, in fact, been slow to implement the restitutions so carefully laid out in the Endorois decision, despite the efforts of civil society groups such as ESCR-Net.²⁷

During the later years of her service on the African Commission, Monageng left the Law Society and returned to judicial work, this time at the highest levels. This was not, however, in her native Botswana. She instead applied to, and after an extensive and competitive

vetting process was selected by, the Commonwealth Secretariat in London to serve on the benches of the High Court of the Republic of Gambia (2006-07) and the High Court of the Kingdom of Swaziland (2008-09). According to Bauer and Ellett, "It is noteworthy that Monageng did not sit at the High Court in Botswana. There is no record of Monageng herself suggesting she was deliberately overlooked for the High Court bench, but others have suggested that this is the case" (2016: 42). When asked if she would have liked a comparable position in the judiciary of Botswana, Monageng replied, "as a servant of that community, I would have."²⁸ She added of her experience in Gambia and Swaziland:

"I was a judge and, in my mind, I was gaining experience. And one day I'd go back home, and they wouldn't have any reason to say 'no' to me."²⁹ Significantly, it was human rights activist and lawyer Unity Dow, the same person involved in the groundbreaking case about gender discrimination under customary law in 1992,³⁰ who was appointed as Botswana's first female judge of the High Court in 1998.³¹

²⁷ See "Implementing the ACHPR's ruling on the Endorois case", posted October 2, 2014, at the website of ESCR (Economic, Social and Cultural Rights)-Net. Available at <https://www.escr-net.org/news/2014/implementing-achprs-ruling-endorois-case>.

²⁸ Author interview 2016.

²⁹ Author interview 2016.

³⁰ Ibid. note 6.

³¹ See the website of African Success: People Changing the Face of Africa, at

It is both telling and ironic that Monageng reached these lofty levels of judicial service outside of her own country. Telling because Botswana continues to have very low female representation in its High Court – only 6% as of 2010, compared to 25% in Swaziland and 65% in Lesotho (Bauer and Ellett 2016). It was thus perhaps an easier task for her to join the highest courts of nations other than her own.³² Ironic because Botswana has had a particularly hard time “indigenizing” its own judiciary since independence from Britain (Bauer and Ellett 2016),³³ and Monageng’s service in Gambia and Swaziland ultimately contributed to the expatriate presence in *those* countries’ courts.

Furthermore, this expertise-sharing arrangement among African countries begs the question of how important it is that “a judge... possess knowledge of the culture and language of the people upon whom he renders justice” (Lekgowe and Motswagole 2011, cited in Bauer and Ellett 2016). This is a

<http://www.africansuccess.org/visuFiche.php?id=733&lang=en>.

³² The Commonwealth Magistrates and Judges Association has its own “Gender Section,” which expresses concern not only about bias against women in the justice systems of its 52 member states, but also about the numbers of women who serve there as magistrates and judges. See <http://www.cmja.org/gendersection.html>.

³³ According to the official website of the Botswana Administration of Justice, “Up until 1992, Judges of the High Court were expatriate Judges who were appointed on short contracts of 2-3 years. However this has since changed, and today, out of the 16 permanent judges, only one is expatriate.”

question that, not surprisingly, has also been raised in relation to the work of the International Criminal Court, given its global jurisdiction and current focus on non-Western situations (Swigart, 2015 & 2016.)

The International Criminal Court

a) Election to the Court

As it turns out, Monageng’s most high-profile, and arguably her most important, judicial work was not to be performed on a domestic bench, in her home country or anywhere else, but instead on that of an international body, the ICC. The idea of an ICC judgeship was first planted, she recounts, through a conversation she had with South African Judge Navanethem Pillay at the 2004 session of the Brandeis Institute for International Judges.³⁴ Pillay, who was at that time herself an ICC judge and had previously served as both judge and president of the International Criminal Tribunal for Rwanda, encouraged Monageng to think about the 2009 ICC judicial elections and to begin talking to her government.

Monageng approached the Botswana government in 2008, while serving on the High Court of Swaziland, asking that they nominate her as an ICC candidate. This request was quickly met with an enthusiastic response from government.

³⁴ Monageng first attended the Brandeis Institute for International Judges while still serving on the African Commission on Human and Peoples’ Rights. While awaiting the inauguration of the African Court on Human and Peoples’ Rights, the BIIJ included commissioners among its participants.

Monageng explains the reaction thus: “I was popular for some reason, and by that time I had a good record, being a Commissioner and an employee of the Commonwealth Secretariat, both continental and international. When I got the judgeship through the Commonwealth Secretariat, there was really a celebration in Botswana. So when I came in with the request for the ICC, there was virtually no problem.”³⁵

The ICC describes the qualifications of its judges thus: The judges are chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. They have either established competence in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings: or have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. All are fluent in at least one of the working languages of the Court, English and French (ICC, “Judges of the Court”: n.d.).

Monageng was nominated as an expert in international humanitarian law and human rights, the so-called “List B.” She considers that her experience with the African Commission has afforded her a

deep appreciation of the rights of both accused persons and victims, and of the need to balance those rights with the responsibilities of fact-finding and adjudication. Such appreciation has made her, in her words, “a better judge.”³⁶ Her long experience on domestic courts was also a critical part of her profile, of course:

I came into the ICC with the basic knowledge of being a judge. I had tried thousands of cases and so, to that extent, I considered myself competent to sit as a judge in the ICC. Of course, having worked domestically as a judicial officer, I know that complementarity is crucial. I appreciate that justice is better served when the recipients see and literally feel it.³⁷

Monageng’s professional qualifications were clearly recognized. Not only was her candidacy endorsed by the African Union (ICC, “Note verbale”: n.d.), but she was also elected after only the fourth round of voting by members of the Assembly of States Parties. (There were eleven African candidates in 2009, out of nineteen candidates total. Two African judges were ultimately elected over nine rounds of voting.³⁸) The

³⁵ Author interview 2016.

³⁶ Author interview 2016.

³⁷ Author interview 2016.

³⁸ See

<https://web.archive.org/web/20120919210937/http://www.icc-cpi.int/Menu/ASP/Elections/Judges/2009/Results/Final+Results.htm>. The outcome of the various

assistance of the Botswana government was an important part of Monageng's successful "ICC campaign": they prepared and printed a beautiful brochure about her qualifications that was circulated to the ambassadors of States Parties, supported her travel to The Hague and New York, and accompanied her to meetings with States Parties representatives.³⁹ Such government support is critical for the eventual election of a judicial candidate for the ICC (as well as other international courts), as has been noted by various scholars (Terris et al, 2007; Mackenzie et al, 2010).

It is also clear that Monageng's gender, like that of other women judges at the ICC, worked to her advantage during the 2009 election. Unlike most international courts and tribunals, the ICC has explicit statutory language calling for "fair representation of female and male judges" (Rome Statute, Art. 36 8. a) (iii)). It also specifies that "States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children" (Rome Statute, Art. 36 8. b)). Scholar Nienke Grossman has documented the significant impact of such statutory language on the election of women to the benches of international courts and tribunals:

For courts where states were required by statute to take sex into account when

nominating or voting for judges, a higher percentage of women sat on the bench in mid 2015. Examples include the International Criminal Court (ICC), the European Court of Human Rights (ECHR), the African Court on Human and Peoples' Rights, and the ad litem benches of the International Criminal Tribunals for Rwanda and the Former Yugoslavia (ICTR and ICTY, respectively). Thirty-two percent of the judges on these courts were women in mid 2015. Where a "fair representation" of the sexes was not aspired to or required, women made up only 15 percent of the bench (Grossman 2016: 82).

Furthermore, Grossman notes that when courts practice an institutionalized screening of judicial candidates after nomination, to ensure that they meet the stated qualifications, it results in an increased gender balance on the bench (Grossman 2016). Civil society groups may also monitor the nomination and election of candidates for international judgeships. For example, the Coalition for the International Criminal Court (CICC), a group of 2500 civil society organizations across 150 countries, invites ICC candidates to articulate their qualifications by answering a long and complex questionnaire, parts of which query their stance and experience on gender-related issues.⁴⁰ This outreach to candidates contributes to CICC's stated aim of "[a]dvancing the nomination and election of the most qualified officials

rounds is no longer available on the ICC site but has been captured on Wikipedia:
https://en.wikipedia.org/wiki/International_Criminal_Court_judges_election,_January_2009.

³⁹ Author interview 2016.

⁴⁰ Monageng's completed questionnaire is 17 pages long, and her entire CICC submission with supporting documents (sample judicial decisions, etc.) comprises 87 pages. On file with author.

within the system and ensuring the most independent and transparent elections process.”⁴¹

As of January 2017, one-third of ICC judges were women, a real accomplishment for an international court. Even more impressive, 47% of ICC judges elected between 2002 and 2015 were women (Grossman 2016), and it even hit the high mark of 57% female representation on the bench after the 2013 judicial elections (Chappell 2016). This contrasts sharply with some other international judicial institutions. The International Court of Justice (ICJ), for example, has no language pertaining to the gender of those standing for judicial election; it has had only four women judges out of the more than 100 who have served over its 70-year history, three of whom are currently serving. As for the African Court on Human and Peoples’ Rights (ACtHPR), its protocol calls for “adequate gender representation” on the bench (Protocol Establishing the African Court on Human and Peoples’ Rights, Art. 12 2.), a vague goal that some feel is far from being achieved – of the 26 judges who have served over the Court's ten-year history, only eight have been women. However, as of this writing in September 2017, five members of the eleven-member ACtHPR bench are women, four of them having been elected in the past 15 months. The Court is thus moving close to the ICC bench in terms of gender balance⁴².

⁴¹ See <http://www.coalitionfortheicc.org/>. However, the number of women judges at the ICC since March 2018 is 6 out of 18 judges.

Women judges can be seen as contributing to their benches, courts, and the greater society in a number of positive ways, some of which have been noted above – for example, bringing increased sensitivity to the plight of women and children, communicating effectively with parties before the court, and bringing out positive changes in public policy. Such contributions may well apply not only to their work on domestic but also international courts. The latter carry, however, an additional burden – that of needing to justify their own authority in the absence of an overarching framework of support and legitimization that domestic courts take for granted (von Bogdandy and Venzke 2012; Grossman 2012). As Grossman observes, international courts interpret and shape international law, which in turn impacts people around the globe. “This authority requires justification, and democratic values such as representation provide a meaningful justification. Both women and men are the beneficiaries of the work of international courts and should be involved in judicial decision-making for these institutions to possess justified authority” (2015: 9). The ICC thus benefits not only from the service of competent and experienced women judges, but their presence also undergirds its very status as a court designed to serve the global community.

b) Work at the Court

Monageng joined the ICC in 2009 when it had been in operation for seven years. The institution had by then moved beyond some of the more difficult

periods of its “infancy,” when procedures were still being worked out and established, and its initial cases prepared. The judges had also had the opportunity to work toward “tightening... the judicial culture” – through reconciling their diverse nationalities, professional backgrounds, legal traditions and worldviews – “in order to form a united approach to justice” (Terris et al, 2007:65). This was fortunate, as the Court was seeing a rapid expansion of its workload around this time, which resulted in increased activity by the Pre-trial, Trial, and Appeals Chambers.

When Monageng joined Pre-Trial Chamber I upon her arrival in The Hague, she immediately became involved in a number of cases concerning both highly publicized world events and high-profile figures. These included: violence in the Darfur region of Sudan, which resulted in charges of war crimes and crimes against humanity against multiple suspects, among them Sudanese President Al-Bashir (who was later additionally charged with the crime of genocide);⁴³ alleged war crimes and crimes against humanity committed in the context of armed conflict in the Democratic Republic of Congo (DRC),⁴⁴ giving rise to six separate cases, one of them *The Prosecutor v. Thomas Lubanga Dyilo*,⁴⁵ the ICC’s inaugural trial centering around the recruitment and use of child soldiers; and crimes against humanity allegedly committed in

Libya by Saif Al-Islam Gaddafi and two other suspects.⁴⁶

Monageng’s involvement with one of the Darfur cases, *The Prosecutor v. Abdallah Banda Abakaer Nourain*,⁴⁷ furthermore brought into focus for her the difficulties associated with ensuring the rights of accused persons when they speak a so-called “language of lesser diffusion.” Banda spoke only his native Zaghawa, a Sudanese language with fewer than half a million speakers, no written tradition, and for which no trained interpreters were available (Swigart 2015)⁴⁸. The obligation to read charges to and conduct proceedings against an accused in a language that the accused both understands and speaks (ICC Rome Statute, Article 67(1)(a) & (f)) – which Monageng approvingly observed that the Court takes very seriously (Swigart 2015) – led to long delays in the opening of the *Banda* trial (War Crimes Research Office 2015; Smith van-Lin 2016). By the time that the necessary interpretation services for the trial were in place, the accused did not respond to requests to appear in The Hague. The *Banda* trial will only start if and when the accused appears voluntarily or is arrested. As the Court is bound to face similar linguistic challenges with other accused persons,

⁴⁶ See <https://www.icc-cpi.int/libya>.

⁴⁷ See <https://www.icc-cpi.int/darfur/banda>.

⁴⁸ See Smith van-Lin, L. “When We Don’t Speak the Same Language: the Challenges of Multilingual Justice at the ICC.” In *The International Criminal Court and Africa: One Decade On*, Evelyn A. Ankumah (ed.). Cambridge, Antwerp, Portland: Intersentia, 2016.

⁴³ See <https://www.icc-cpi.int/darfur>.

⁴⁴ See <https://www.icc-cpi.int/drc>.

⁴⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

the *Banda* experience will certainly prove instructive.

One of the most appealing aspects of ICC work for Monageng has been the collegiality and mutual respect characterizing the collective work of judges. She proclaims herself proud of “being part of a group of international men and women with diverse experiences who are adjudicating the worst crimes known to mankind.”⁴⁹ This does not mean, however, that there has never been a difference of opinion among colleagues. For example, Monageng found herself dissenting from her two Chamber fellows in the confirmation of charges proceeding against Callixte Mbarushimana, a DRC national whom the Prosecution sought to charge with five counts of crimes against humanity (murder, inhumane acts, rape, torture and persecution) and eight counts of war crimes (attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property and pillaging).⁵⁰ As the presiding judge on this case, Monageng was intimate with its details. In her dissent, she writes:

The Majority concludes that there are not substantial grounds to believe that the Suspect contributed to the crimes committed by agreeing to conduct an international media campaign in support of them. However, when viewing the totality of the evidence, I see

a clear line of reasoning in the Prosecution's case. ... The case against Mr Callixte Mbarushimana is not a conventional one, but what the Majority sees as "insufficient evidence" I see as "triable issues" deserving of the more rigorous fact finding that only a Trial Chamber can provide (ICC-01/04-01/10: (f) Conclusion 134).

When Monageng left Pre-Trial Chamber I in 2012 to join the Appeals Chamber, she sat on other DRC-related cases of note. In *The Prosecutor v. Mathieu Ngudjolo Chui*, which Monageng presided, the Appeals Chamber confirmed Trial Chamber II's acquittal of the defendant, who had been accused of leading an attack on the Ituri District village of Bogoro during which some 200 people, including women and children, were murdered and raped. This was the first acquittal to be handed down by the ICC, and its confirmation upon appeal demonstrated that an accused at the ICC would not be convicted when there was reasonable doubt that he had command responsibility over those committing the crimes in question.⁵¹ (Ngudjolo himself did not deny that the crimes had taken place.) Also notable among Monageng's Appeals work was the judgment in the *Lubanga* case, which touched upon a subject close to her heart, the rights of children (in particular, those of child soldiers).

⁴⁹ Author interview 2016.

⁵⁰ See <https://www.icc-cpi.int/pages/item.aspx?name=PR798>,

⁵¹ See www.ijmonitor.org/2012/12/ngudjolo-acquitted-by-icc/.

c) *An African judge in an “anti-African” institution?*

Monageng, along with many other Africans serving on the ICC bench or across diverse units and offices of the Court, have faced a particular challenge in recent years – that of working for an institution that is characterized by some critics as biased toward their continent. Whether one sees this allegation as well founded, given the ICC’s prosecutorial choices during its first decade, or alternatively considers it an expedient strategy adopted by certain African leaders to undermine the Court, the resulting distress created for ICC staff remains much the same. Monageng has spoken movingly of this dilemma, which was particularly acute when she served as First Vice President of the Court from 2012 to 2015.

The relationship between my mother continent Africa and the ICC has been at a very low point during the past few years, especially in that it became worse during the years when I was the First Vice President of the ICC. I do understand [African states’] criticisms and frustrations. But a lot of people don’t realize just how affected we [African nationals] are. We are part of this institution and the problems come from our continent. You just wish you could go to bed, wake up and find this relationship normalized. And of course, for those who have an opportunity to talk to [African] governments, we do know that this relationship can improve. But it has been very, very difficult for us. Because first and foremost you are a

judge, and that balance can be quite daunting.⁵²

As Monageng has pointed out elsewhere, African state resistance to the ICC was perhaps unexpected in the early days of the institution, given that “it is African states which participated in the drafting of the Rome Statute and to this day constitute the largest regional block amongst states which have voluntarily signed up to the Rome Statute” (Monageng and Heinze, 2016:67).

As to the proposal that a criminal jurisdiction be added to the existing African Court on Human and Peoples’ Rights,⁵³ thereby providing an African alternative for the prosecution of “ICC crimes,” Monageng believes that it would be viable provided the institution is “fully empowered to discharge its mandate.”⁵⁴ She also finds encouraging the recent prosecution of former Chadian dictator Hissène Habré by the Extraordinary African Chambers (EAC) established within the courts of Senegal. “I was part of the men and women in Africa who fought hard through the

⁵² Author interview 2016. Since the time of this interview, tensions between the ICC and Africa have escalated even further, with three countries – Burundi, Gambia and South Africa – having declared their intention to withdraw from the Rome Statute in late 2016. As of this writing in September 2017, however, only Burundi has continued down this path.

⁵³ The plan for a merged African Court of Justice and Human and Rights was adopted by the African Union Assembly of Heads of State and Government in June 2014. The so-called “Malabo Protocol” is available at <https://www.amnesty.org/en/documents/afr01/3063/2016/en>.

⁵⁴ Author interview 2016.

African Commission for Senegal to ultimately agree to take this case, so I am very pleased that our efforts bore fruit."⁵⁵

This first prosecution of an African head of state in an African country should be taken as a good omen. Indeed, it has been argued that the EAC and other “exceptional judicial configurations, practices and innovations found in Africa should be recognized internationally for what they are: expressions of a significant consensus on the part of legal practitioners, jurists, and activists – if not always the powers that be – about the need to protect fundamental human rights and challenge impunity on the African continent” (Swigart 2017:13). African judges at the ICC are perhaps the only members of the bench who have the necessary dual viewpoint – as Africans and also practitioners of international law – to evaluate the source and weight of critiques emanating from their home countries.

Looking back, looking ahead

What lessons does Sanji Monageng take from her varied life experiences as she approaches the end of her nine-year term at the ICC? What does she conclude about the impact of gender on judging and what it takes for a woman to become an international judge? And what lies ahead for her after her term at the ICC ends in March 2018?

Despite extensive study and scholarship on the effect of gender on judging, no definitive assessment of its role seems possible. Many female judges declare that their “gender perspective” is an important part of how they approach their work. Among these are eminent women who have served on the benches of international courts and tribunals, such as Navanethem Pillay (Terris et al, 2007), Elizabeth Odio Benito (Chappell, Durbach and Odio Benito, 2014), Patricia Wald (Wald, 2011), and Cecilia Medina Quiroga (Terris et al, 2007). Monageng agrees with this view in general, having experienced in Botswana that “male judicial officers at times trivialized [women’s] issues.”⁵⁶ At the same time, the responsibilities of impartiality and distance remain paramount: “What happens inside the courtroom has to be done within the confines of the law, although sensitivities to a traumatized woman will always be there” (quoted in Dawuni, 2016: 21-22). In response to the direct question of whether men and women judge differently, Monageng was non-committal: “Although it is not always so, I have had impressions in the past that this could be the case.”⁵⁷

It is interesting that the objective view of some scholars of international criminal law may be at odds with the subjective experience of women international judges. For example, Chappell has observed, “While the presence of women on the bench sends an important signal about women’s capacity to adjudicate on

⁵⁵ Author interview 2016.

⁵⁶ Author interview 2016.

⁵⁷ Author interview 2016.

matters of international significance, it does not guarantee more sensitive judging on sexual and gender-based violence issues, and so it has proven to be the case at the ICC” (2016). Indeed, Chappell believes the ICC is far from achieving its gender mandate, so carefully orchestrated during the design of the Rome Statute:

As the early years of the ICC has shown, overturning the deeply embedded gender legacies of international law is no easy task. Even with the best rules in the world, the actors responsible for implementing these rules – prosecutors, judges, lawyers – sometimes work to resist change or more benignly, too easily forget ‘the new’ and remember ‘the old’. To realize its potential, and maintain its legitimacy in the eyes of its core gender justice constituency, the ICC must now redouble its efforts through gender-sensitive investigations, the collation of convincing evidence, targeted charges, bold judging, and adequate financing (2016).

It should not be forgotten, however, that women do not only sit on international courts whose jurisdictions cover gender-based crimes and other crimes that disproportionately affect women, nor should they. Inter-state dispute resolution courts such as the ICJ and International Tribunal for the Law of the Sea, courts of regional integration such as the European Court of Justice and the Court of Justice of the Economic Community of West African States, the World Trade Organization Appellate Body and others should all seek the fair representation of women on their

benches. Harkening back to Grossman’s statement cited above, international courts, whatever their subject matter jurisdiction, need both women and men involved in decision-making to justify their authority (2016). In this way, among others, Monageng has contributed personally to strengthening the legitimacy of the ICC.

As for younger women who may wish to follow in her footsteps, Monageng recommends that they “prepare themselves, obtain the necessary qualifications, grab opportunities, ask for support, identify mentors and generally become marketable.”⁵⁸ She rightly observes that opportunities in the field of international criminal justice are evaporating with the closure of various ad hoc tribunals. “It is therefore crucial that women are ready to bolt at all times.”⁵⁹ She also points out that patience may be necessary; indeed, her path to the ICC took a long time and careful planning: “For five years, I was waiting quietly and preparing myself for my government to nominate me. If you are looking for a job, demonstrate to your government that you are ready. If it is a competition, compete. Write good judgments that cannot be overturned on appeal and this makes you a strong candidate” (quoted in Dawuni, 2016).

Monageng’s penchant for planning ahead has been exhibited once again as she prepares for her post-ICC life. She enrolled for a course in International Commercial Arbitration, seeing this as a

⁵⁸ Author interview 2016.

⁵⁹ Author interview 2016.

field where she could continue to use her legal knowledge and judicial skills. On top of her heavy workload at the Court, she studied the principles of arbitration and prepared for a series of three examinations, which she sat in Rotterdam. When interviewed for this chapter, Monageng had just learned that she successfully obtained her Diploma and is now a Fellow of the Chartered Institute of Arbitrators, London, United Kingdom. When she leaves The Hague, she will come full circle and return home and once again serve her native country: “There is need for alternative dispute resolution in Botswana, so this is what I will hopefully focus on.”⁶⁰

Conclusion

What do the life experiences of a judge like Sanji Mmasenono Monageng have to teach us? Why is it important to tell her story? Like some other African women serving on the benches of international and regional courts, Monageng has faced a formidable set of challenges to arrive where she has: as a rural girl whose chances to achieve advanced education were statistically slim; as a woman who had to insert herself strategically into positions historically held by men; as a judge from the Global South upon whom it was incumbent to adapt to an institution of the Global North, applying law that some might argue is a European artifact and working in a language that is a colonial legacy; and finally, as a human rights expert hailing from a continent where activism on behalf of women,

children, and other vulnerable populations has often been met with state resistance.

This author has argued elsewhere that international criminal justice needs just such individuals to judge complex cases involving accused persons, witnesses and victims who represent a diverse range of nationalities, ethnicities, and language groups, and whose worldviews have been shaped by these realities: “These important actors should possess the intellectual flexibility to imagine what it means to see the world in different ways and to express that world through different languages. This flexibility is cultivated through being pushed outside of one’s native linguistic and cultural frame, experiencing the resultant disorientation, and reimagining what one assumed to be the norm as instead one possibility among many” (Swigart, 2016: 216). An African woman judge in an international court, through both her sociocultural positioning and personal experiences, may possess the widest range of perspectives possible among her colleagues, and her judging may be all the better for it.

It is also a difficult task, however, to operate in a profession that oftentimes seeks a single unassailable truth when one sees the world through multiple perspectives. This is where Monageng’s soft power enters once again, allowing her to listen carefully, read the situation, and negotiate differences of opinion. The result is that she has made significant contributions throughout her legal and judicial career, and will long be

⁶⁰ Author interview 2016.

remembered as an important figure in the International Criminal Court during its early formative years.

A CANDID AND INSPIRING INTERVIEW WITH JUDGE HOWARD MORRISON

Judge Howard Morrison speaks with **Evelyn Ankumah** on human rights and justice issues, starting from how his work as a high school teacher in Northern Ghana, at age 18, impacted his worldview. He also answers a question about the decision to acquit Jean Pierre Bemba.



*Judge Howard Morrison***

'When courts acquit people they do so because the court is of the view that there is not sufficient material admissible evidence to sustain a conviction beyond a reasonable doubt. It is up to the prosecutor to obtain and present that evidence. A court cannot be measured either by the number, or percentage, of convictions or acquittals. It will be measured by its fairness'.

Judge Howard Morrison

Judge Howard Morrison: I start by making it plain that the answers to all the questions are purely my personal observations. They are not, and are not intended to be, any reflection of ICC policy nor the views of any other person.

Evelyn Ankumah: You travelled to Ghana and taught high school in Bawku, in the Upper East Region of Northern Ghana, at only 18 years of age. What was that like, and how has this experience shaped your worldview?

HM: Teaching as a volunteer at Bawku Secondary School was probably more of an education for me than it was for my students. I was fresh out of school at 18 and still had a good knowledge of my subjects and the exam system. I had lived in the UK, Egypt and Germany as a child following my father in his work, but this was my first time in sub-Saharan Africa. The most valuable lessons for me, apart from living on less than \$2 a day, came from observing the symbiosis that ordinary African people had with each other, their deep-rooted cultures and their relationship with the surrounding flora and fauna. I was instantly struck by the sheer hard work of rural agricultural life when you saw women tilling in the fields with babies wrapped to their backs. My pupils were hardworking and saw education as a vital key to their future; that made teaching

*Judge at the Appeals Chamber of the International Criminal Court (ICC).

more demanding but also more rewarding. That year had a real impact upon my views of those in the world in less secure positions and how we need to work together.

EA: You have had a successful career in international criminal law, practicing at one time on the Midland and Oxford Circuit, including in courts-martial and for the Crown Prosecution Service, later as a defence counsel at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal For Rwanda (ICTR), and now as a judge at the International Criminal Court (ICC). How has this journey shaped your philosophy on international criminal law at this critical time?

HM: My fairly broad experience of international criminal and humanitarian law as a practitioner, trial and appeal judge and part-time academic has been a privilege. It has not been the easiest of journeys but it has come to make me better understand the vital contribution of international criminal and humanitarian law to the broader scope of human rights and the essential role of the rule of law and good governance. The lessons of history all point in one direction: without the rule of law domestically and internationally we will inevitably see the continuance of conflicts, dictatorships and the repression of minority groups for whatever reason or excuse. The bedrock of good governance and fair societies is the rule of law in all its aspects: criminal, civil, commercial, family, employment and every other facet of due legal process. Concentrating, as I do, on international criminal and humanitarian law, the core of what might be termed my philosophy is that of the crucial individual responsibility for leaders born of the selfless exercise of duty, the

humane exercise of power and the recognition of their accountability for their acts or omissions in office.

EA: You've held multiple roles in the international criminal justice system: you've worked on the side of the prosecution, worked as defence lawyer, and as a judge. What key lessons have you learnt from each of these roles?

HM: I see the role of all three, prosecutors, defenders and judges having common aims and, ultimately, a common purpose. By having experience of all three roles at senior levels it becomes easier to see that common purpose which is to provide due process trials according to the international standards of fairness. All participants have a role to play but none must lose sight of the crucial aim of the process being as fair as human wit can achieve. If everyone approaches their task with professional fairness and strict regard for the fair trial provisions then trials are as fair as they can be.

EA: International criminal law is growing in substance and influence since the Nuremberg trials in 1945. How do you compare the achievements of Nuremberg, Tokyo, the later ad hoc Tribunals, and the permanent International Criminal Court?

HM: Nuremberg and Tokyo were an essential start in the bid to hold individuals accountable for egregious crimes. The trials had their detractors and there were inevitable complaints of 'victor's justice,' but the reality in 1945 was that both the German and Japanese high command and military had serious cases to answer. The ad hocs were set up to deal with relatively geographically contained [although atrocious] crimes in the Balkans and Rwanda. My own view is that both the Yugoslav and Rwanda tribunals were

successful and paved the way for the ICC. Much credit for that must go the late Judge Antonio Cassese and the late Professor Cherif Bassiouni, both of whom I was privileged to have as friends for many years. It is not easy to make accurate comparison between the ad hocs and the ICC and many make inaccurate ones. The ICC has a worldwide mandate, no independent police or investigators beyond its own resources, no direct access to Chapter 7 powers and an ASP (Assembly of States Parties to the International Criminal Court) which does not mirror all members of the UNGA (United Nations General Assembly). Unlike the ad hocs it had no group of likely suspects when it was created and has to deal with a plethora of cultures, languages and situations all within the framework of relying entirely upon mature state cooperation with a limited budget. It would be best to look at each case at the ICC almost as a separate ad hoc trial, as that in practice is what it is.

EA: You once spoke at Chatham House and mentioned that the ICC is not a ‘PhD factory’ but a ‘senior criminal court.’ What did you mean by this?

HM: By that I meant that the Court was created as a criminal court to try individuals for egregious core crimes according to international due process safeguards. Although it applies human rights principles it is not a human rights institute and although there is much erudite research it is not an academic institution either. It has a duty to fairly investigate and, if proper to do so, try cases according to plain and applicable due process provisions with a fair and balanced appellate safeguard for all parties.

EA: 2018 marks the 20th anniversary of the Rome Statute. The Court has made great strides towards achieving its objective of

trying perpetrators of heinous crimes. What are some of the challenges the Court is facing that may not be apparent?

HM: The main challenges that the Court has, but not necessarily in this order, are budgetary and resource sufficiency, cooperation by States, not least members of the ASP but also non-state parties who nevertheless support the international rule of law. Active cooperation at all levels is the key to the success of the ICC, as it is with most treaty-based entities. There is also the challenge that the relative instancy of modern information gives rise to. If the information is true and accurate that is usually beneficial. If not, it can be very problematic if in some way it permeates issues that come to be matters of evidence. Fake news is nothing new in the world; it used to be called propaganda. What is new is the speed and volume of information and the ability of some to distort it to their own advantage.

EA: The ICC has been criticised as being a court that was set up to prosecute African leaders. How do you respond to such criticisms as a judge of the Court?

HM: It is plain, in my view, to anyone who attended the preparatory sessions of the Rome Statute that the suggestion that it was set up to single out any defined group is nonsense, and it would have been immediately obvious if that had been the intent or even a remote suggestion. I would not participate in any discriminatory process and nobody I know at the ICC would do so either. The Court was set up to remove impunity for serious criminal offences and to try any suspects from any continent fairly upon the evidence. It must not be forgotten that the Rome Statute gives primacy to national jurisdictions and that the ICC is, in effect, a default court to take jurisdiction only where and when

no other fair and proper adjudication is available or intended within the complementarity provisions.

EA: You were one of three judges who voted to acquit Jean Pierre Bemba. How would you respond to those who say that the acquittal of Jean Pierre Bemba highlights the shortcomings of international criminal law as a means to fighting impunity?

HM: When courts acquit people they do so because the court is of the view that there is not sufficient material admissible evidence to sustain a conviction beyond a reasonable doubt. It is up to the prosecutor to obtain and present that evidence. A court cannot be measured either by the number, or percentage, of convictions or acquittals. It will be measured by its fairness.

EA: The principle of complementarity is said to be the cornerstone of the Rome Statute. Dominic Ongwen is currently being tried at the ICC for international crimes committed in Northern Uganda, whilst Thomas Kwoyelo is being tried at the International Crimes Division of the High Court of Uganda (ICD) for international crimes committed in Northern Uganda. How do we reconcile the 'concurrent jurisdictional' difference between the two trials? What does this jurisdictional difference mean for the future of complementarity?

HM: This issue may come before me on appeal. It is not proper for me to address it here.

EA: At a presentation held at Keele University, you spoke of regularly hearing tales of 'horror and terror' in this field of work. How do you cope with hearing such stories on a regular basis?

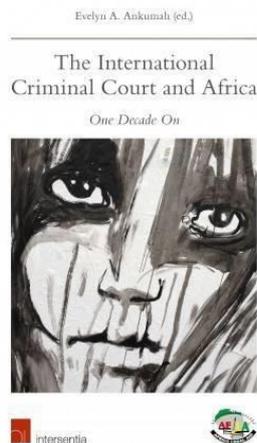
HM: All criminal lawyers and judges hear shocking evidence, sometimes over many years. It is in the nature of international cases that the evidence is sometimes more shocking and widespread than in domestic courts. As a judge you have to be able to hear and adjudicate upon such matters without letting bias or emotion cloud reasoning or judgement. It is something you accumulate through years of practice. I have been involved in the law for some 50 years and as a full and part-time judge for almost 30. It is, frankly, not easy and is not a job for everyone; but if you cannot do it you are at risk of damaging both yourself and the process.

EA: Final question. Which poses a bigger threat to the International Criminal Court at this time, the position of the current American administration or the position of the African Union?

HM: I would not single out any one administration or group or make loose comparisons. There is an obvious facet of human nature which reacts against any suggestion that your, or your friend's, individual acts or omissions make you or them culpable or even a proper case for investigation; but that is common to both domestic and international cases. The world is obviously going through a period where sovereignty and constitutionalism have come more to the fore than at times when internationalism was at its peak. The history of the world shows that that cycle is far from unique and is almost generational. The ICC cannot escape Realpolitik, but politics of any description stop at the Court door.

**The International Criminal Court and Africa: One Decade On, Evelyn A. Ankumah (ed.)
Intersentia 2016, Cambridge, Antwerp, Portland.**

September 2016 | ISBN 9781780684178 | xxxviii + 676 pages



More than ten years ago the International Criminal Court (ICC) was established as a universal court meant to achieve criminal justice worldwide. That goal still stands, but so far the Court has dedicated most of its time and resources to African conflicts in which international crimes have been committed.

While the ICC can be said to contribute to criminal justice in Africa, it cannot be denied that the relationship between the Court and the continent has been troublesome. The ICC has been accused of targeting Africa, and many African states do not seem willing to cooperate with the Court. Debates on Africa and international criminal justice are increasingly politicised.

The authors of this volume all recognise the current problems and criticism. Yet they do not side with populist pessimists who, after just over a decade of ICC experiences, conclude that the Court and international criminal justice are doomed to fail. Rather, the contributors may be regarded as cautious optimists who believe there is a future for international criminal justice, including the ICC. The contributors use their unique specific knowledge, expertise and experiences as the basis for reflections on the current problems and possible paths for improvement, both when it comes to the ICC as such, and its specific relationship with Africa.

To purchase the book, please visit Intersentia's website: <http://intersentia.be>