

THE INTERNATIONAL CRIMINAL COURT AND THE EVOLUTION OF THE IDEA OF COMBATING IMPUNITY: AN ASSESSMENT 15 YEARS AFTER THE ROME CONFERENCE

Patrícia Galvão Teles

pgalvaoteles@gmail.com

Graduate of the Faculty of Law of the University of Lisbon; Master's Degree and PhD in International Law from the Institute of International Studies of the University of Geneva, Switzerland; Researcher and Member of the Scientific Council of *Observare* and of the Editorial Board of Janus.Net; Legal Adviser of the Permanent Representation of Portugal to the European Union in Brussels (Belgium).

Abstract

This article¹ evaluates the International Criminal Court's first years of operation, taking stock of the institution's activity. It describes and analyzes the main challenges which confronts this institution, namely: a) universality, complementarity and cooperation; and b) peace and justice. In the specific case of Kenya, the President and Vice-President of the Republic are suspected of committing crimes against humanity. Considering the positions taken by the African Union, the debate is whether the introduction of immunity from criminal jurisdiction, albeit temporary, to Heads of State and Government while in Office may, or may not, come to represent a step backwards for the idea of combating impunity for the most serious international crimes.

Keywords:

International Criminal Court; International Criminal Justice; Impunity; Immunity; African Union

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Introduction

The signing of the Statute of the International Criminal Court (ICC)² took place in Rome on 17 July 1998 and it entered into force on 1 July 2002. There are now 122 States part of this Statute, which corresponds to approximately two-thirds of the members of the international community. Specifically, there are 34 States from Africa, 27 from Latin America and the Caribbean, 25 from Western Europe and Others Group, 18 from Eastern Europe and 18 from Asia.

The International Criminal Court is currently adjudicating approximately twenty cases in eight different countries: Uganda, Democratic Republic of Congo, Sudan/Darfur, Central African Republic, Kenya, Libya, Ivory Coast and Mali. The Democratic Republic of Congo, Uganda, Central African Republic and Mali situations were submitted by the respective States. The UN Security Council has submitted two: Darfur and Libya. The final two were the result of the powers of the Prosecutor to investigate *proprio motu*: Kenya and the Ivory Coast.

The ICC is the first permanent international criminal court with jurisdiction to try those responsible for the most serious principal international crimes: aggression³, genocide, crimes against humanity and war crimes. Today, it is the main forum for international criminal justice, although *ad hoc* tribunals and the universal jurisdiction remain in existence.

The Statute of the ICC is, without a doubt, one of the principal treaties of the post-cold war period. International law received popular support at the time of the Statute, which was at the center of the political discourse, particularly in response to the most serious atrocities since World War II, such as Rwanda and the Former Yugoslavia, celebrating now the 20th anniversary since these cases justified the creation of *ad hoc* tribunals.

During the genesis and early years of the ICC, fighting impunity was a constant challenge, regarding the prevention of atrocities and their repression. Yet, how has the idea of fighting impunity evolved over the last 15 years and what are the main challenges facing the ICC today?

² For detailed information on the ICC, its cases, organs, etc., see: www.icc-cpi.int

³ Despite the amendments adopted at the Review Conference in Kampala in 2010, the definition of the crime of aggression and the conditions for the exercise of jurisdiction have not yet entered into force.



If the creation of the ICC was an enormous (and for some an unexpected) success, international criminal justice is currently under pressure. Expectations were high and thus generating high expectations which may explain the frustration with the fact that the Court, disposing of a substantial budget⁴, has taken ten years for the first conviction⁵, especially at a time of global economic crisis and austerity measures.

Nevertheless, the major challenges, besides the delay of justice or the financial burden of the institution, are political in nature. The fact that the ICC focuses mainly on cases involving African states arouses criticism of selectivity. Moreover, in the absence of full international ratification there are always "*double standards*" in the struggle against impunity, even though this can be remedied – but only in part – by the UN Security Council since the "P5" will always be "safe", given their power of veto).

Likewise, the lack of adoption of national legislation criminalizing international crimes undermines the ICC system, which is based on the principle of complementarity. Non-cooperation and lack of Court custody of many of the defendants, particularly from Uganda and Sudan, weaken the reputation and credibility of the Court.

On the other hand, the fact that the Court is called to exercise its jurisdiction in some cases pending conflict resolution, and that Heads of State in office are the subject to criminal proceedings, invigorates the debate on "peace" and "justice", and which of these objectives should be promoted and achieved first.

Therefore, we can group two main challenges around the following themes: a) Universality, Complementarity and Cooperation; and b) Peace vs. Justice or Peace and Justice.

The Kenyan case and recent issues raised by the African Union, climaxing during the last Assembly of States Parties in the autumn of 2013, also calls for reflection. Still unresolved, these tensions may leave a mark in the fight against impunity.

Current challenges facing the ICC

a) Universality, Complementarity and Cooperation

Universality⁶

Although based on classical international law, an international treaty like the Rome Statute, whose ratification or accession is a sovereign and voluntary decision of states, is not akin to other multilateral agreements. Like the Charter of the United Nations or major treaties on human rights and international humanitarian law, the Statute aspires to universality. To this end, a campaign for universal ratification is consistently promoted (on the part of some member States, the European Union and NGOs). This is likewise echoed in resolutions adopted annually by the Assembly of States Parties (ASP) of the ICC⁷, the political body where the State Parties convene, as well as

⁴ Approximately 120 million Euros per year.

⁵ Conviction, in 2012, of Thomas Lubanga Dyilo, sentenced to 14 yrs. of prison for recruitment of child soldiers during the Democratic Republic of Congo conflict. The second sentence of the ICC relates to the same crime, in the case of Germain Katanga. The conviction of March of 2014 is still subject of appeal.

⁶ See, e.g., X. Philippe, "The principles of Universal Jurisdiction and Complementarity: How do the two principles intermesh?"

⁷ See the most recent Resolution ICC /12/Res. 8, November 27, 2013.



observer States. The ASP meets at least once annually and is responsible for ICC management and legislation.

Ideally, the ICC would have jurisdiction to try the most serious crimes committed in each country, but during the first decade, attention was directed toward conflicts in African countries. This is explained by three facts: atrocities were committed in several States that are not party to the Statute (still approximately a third of the international community), referral according to the action of the Security Council (which refereed only the cases of Sudan⁸ and Libya⁹), and that half of the cases were submitted by States themselves, by coincidence African States.

However, preliminary investigations have started in several other cases, such as Afghanistan, Colombia, Georgia, Equatorial Guinea, Honduras, North Korea, and Nigeria. Nevertheless, for the moment, such investigations have not yielded results.

On the other hand, Commissions of Inquiry, mandated by the UN Human Rights Council on atrocities committed in Syria and North Korea, recommended the submission of such cases to the ICC in 2013 and 2014.¹⁰ In the first case, Syria is not a State Party to the ICC and there was a decision against sending the case to the ICC¹¹, despite the favorable position of some of the UN Security Council members. In the case of North Korea, which is not part of the ICC either, the outcome is pending.

As Navi Navanethem Pillay, the Un High Commissioner for Human Rights stated,

"broadening the reach of the ICC is necessary so as to turn the ICC into a universal court and close the loopholes of accountability at the international level"¹².

While the ICC is not a truly universal court - and one wonders if some day it may be - its "partial" or "incomplete" jurisdiction will always be a challenge, as long as "*loopholes of accountability*" remain open.

Complementarity

The ICC was designed as a *Court of last resort*, as each State has the primary duty to protect its population from the most serious international crimes and to prevent and repress the offences defined in the Rome Statute in accordance with national criminal systems.

The Statute states clearly, in the preamble, that the ICC is intended to judge the crimes of greater severity and, in particular, Article 17 establishes the principle of complementarity, whereby the ICC only has jurisdiction to try crimes when the State

⁸ Resolution 1593 (2008).

⁹ Resolution 1970 (2011).

¹⁰ It was also the case in relation to Darfur and to Libya, whose reports of the UN Commissions of Inquiry led the Security Council to refer these cases to the ICC in 2005 and 2011.

¹¹ Cf. Resolution 2118 (2013).

¹² Opening Remarks at the Side-Event at the 24th Session of the UN Human Rights Council, "The International Criminal Court 15 years after the Rome Statute: Prospects for the Future", September 10, 2012.



having jurisdiction over the same crime is "unwilling" or "unable" to exercise that jurisdiction.

To this extent, the appropriate legislation and the capacity for effective investigation and judicial procedures are necessary at the national level. This is encouraged and supported by the ICC and the ASP (cf. Resolution ICC-ASP/12/Res. 4) in order to avoid the so-called "*impunity gap*", i.e. criminal cases that are not judged at the national or international level¹³.

However, not all of the 122 States Parties to the Rome Statute have the appropriate legislation or competent judiciary to prosecute crimes within their jurisdiction. A thorough analysis of national legislation, to ensure its appropriateness, remains to be done and technical assistance can be provided to help these State Parties improve and adopt the necessary domestic legislation.

On the other hand, it is not always evident how to determine the situations in which a member State, in accordance with Article 17 (1) of the Statute, refuses or lacks the capacity to carry out the national jurisdiction over crimes. Only in the case of a negative assessment, can the Court declare the case inadmissible. As of yet, consolidated case law determining with certainty if the State "does not want" or "does not have the capacity" is lacking. Nor is it the practice of States on when to invoke such an objection of inadmissibility or of the Prosecutor for not pursuing investigations.

Are there other ways to avoid the "*impunity gap*"?

Cooperation

Non-cooperation with the Court is a phenomenon that strongly affects the credibility of the ICC. The States Parties are under an obligation to cooperate in accordance with Part IX of the Statute, specifically, in the implementation of the decisions of the Court and execution of the arrest warrants. In the event of cases referred by the Security Council under Chapter VII of the Charter, it would be fair to say that even the States not party shall be obliged to cooperate with the Court, in accordance with, at least, the aspects referred to in the resolution.

The most serious case of non-cooperation is, of course, the non-compliance with arrest warrants or requests for delivery. Arrest warrants or requests for delivery of more than half of the defendants have gone unheeded, as is outlined in the Resolution ICC-ASP/12/Res.3. Considering that all the members of the international community are under obligation to cooperate, arrest, or surrender those under warrant to the Court, it is striking that the the accused in situations submitted by the Security Council under Chapter VII (Darfur, President Bashir¹⁴, and Libya) or in the first case, initiated in 2005 by Uganda, none of the suspects are in Court custody.

Pursuant to Article 63 of the Statute, the accused shall be present during the trial. Since there is no provision for trials in *absentia*, the Court's role diminishes, as a case cannot proceed to trial by reason of non-presence of the accused.

¹³ Cf. Informal Summary by the Focal Points, "Stocktaking of international criminal justice - Taking stock of the principle of complementarity: bridging the impunity gap", Review Conference of the Rome Statute, Kampala, 31 May-11 June 2010.

¹⁴ See G. P. Barnes, "The International Criminal Court's Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir".



b) Peace vs. Justice or Peace and Justice¹⁵

The idea of peace and justice, whether conflicting or complementary, is a relatively new issue, coming to light by the creation of the ICC. Previously, instances of establishment of international criminal tribunals took place at the end of the conflict as a consequence of crimes committed. The cases of the military court in Nuremberg or the *ad hoc* tribunals for the Former Yugoslavia and Rwanda demonstrate this point.

In the ICC's case, jurisdiction can be triggered during any stage of the conflict, provided that there is suspicion that crimes, in accordance with the Statute, have been committed and that the situation will be referred by the State in whose territory the crimes are committed, by the Security Council, or in accordance with the powers *proprio motu* by the Prosecutor of the Court.

Likewise, being that the majority of current conflicts are intrastate or civil wars, their resolution will depend on a process of negotiated internal peace, where it is often necessary to gather all the conflicting parties to the negotiating table. It is frequently the case that some of these parties - government or rebels - have committed crimes, i.e., war crimes or crimes against humanity.

In the case of such peace negotiations, some argue that it is necessary to carry out the peace process first and, subsequently, commence the fight against impunity and for justice¹⁶ through a process called "*sequencing*". This is illustrated by the example of Uganda, where the case was brought to the Court by the government in an attempt to weaken the rebels of the "*Lord's Resistance Army*". However, the warring parties would only accept negotiations if the peace agreement gave them immunity from ICC indictments¹⁷.

The Rome Statute and general international law seem incompatible with granting amnesty for the most serious international crimes. Yet, the Rome Statute recognizes the importance of suspending investigations or trials in cases of the maintenance of international peace and security (Article 16), when the crimes are subject to processes at the national level (Article 17), or when the Prosecutor believes that suspension best serves the interests of justice (Article 53).

For the ICC and the ASP, these concepts are complementary: "*There can be no lasting peace without justice and (...) peace and justice are thus complementary requirements*" (Resolution ICC-ASP/12/Res. 8)¹⁸ Moreover, it is the only way to enhance the effect of deterrence¹⁹ regarding the commission of the most serious

¹⁵ For a brief interesting summary of this debate, its history and different positions, see Draft Moderator Summary, "Stocktaking of international criminal justice - Peace and Justice", Review Conference of the Rome Statute, Kampala, 31 May-11 June 2010. See also the "Nuremberg Declaration on Peace and Justice", Annex to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General (A /62/885).

¹⁶ See the opinion of the African political figure, Thabo Mbeki, co-author of an article in the New York Times, published in February 5, 2014, with the provocative title of "Courts can't end civil wars."

¹⁷ Cf. L. M. Keller, "Achieving peace without justice: the International Criminal Court and Ugandan alternative justice mechanisms", and L. M. Keller, "The false dichotomy of Peace versus Justice and the International Criminal Court".

¹⁸ See also the article of the Prosecutor of the ICC, Fatou Bensouda, the New York Times, 19 March 2013, entitled "International Justice and Diplomacy."

¹⁹ K. Cronin-Furman, "Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity".



international crimes, which was the initial rationale for the creation of the first permanent international criminal court.

The ICC, the case of Kenya, the African Union (AU) and the future of the idea of combating impunity

In the autumn of 2013, the African Union raised concerns²⁰ directed toward the ICC, especially concerning the case of Kenya, hitting its climax in the Assembly of State Parties. Still ongoing, these tensions continue to challenge the idea of combating impunity.

The African Union has taken several tough positions on the question of universal jurisdiction, the fight against impunity,²¹ and the International Criminal Court, specifically with the cases of Sudan and Kenya.

Regarding Kenya, the case was not referred to the ICC by the State directly, although it is a party to the Rome Statute, but triggered by a Prosecutor investigation *proprio motu*. The referral occurred after the discovery that crimes against humanity were committed in the wake of the 2007 national elections. Specifically, murder, rape, forms of sexual violence, deportation, forced transfer of populations, and other inhumane acts were reported. The Prosecutor's findings led to the 2010 indictment for crimes against humanity of three suspects, two of whom were elected in 2013, President Uhuru Kenyatta (trial postponed) and Vice President William Ruto (trial started in 2013) of the Kenyan Republic.

During the 21st Session of the Assembly of the African Union in May 2013, the African Union, by resolution (Assembly /AU/13 (XXI), reiterated its,

"strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts at promoting lasting peace" and the "AU's concern with the misuse of indictments against African leaders."

As a result of this decision, a letter²² was addressed on 10 September, coinciding with the start of the trial of Vice-President Ruto, to the President of the ICC referring to the need of the creation of a national mechanism to investigate and prosecute crimes

²⁰ For an evolution of the relations between the ICC and Africa see N. Waddell and P. Clark, *Courting Conflict? Justice, Peace and the ICC in Africa*; A. Arieff et al, *International Criminal Court Cases in Africa: Status and policy issues*; E. Keppler, "Managing setbacks is the International Criminal Court in Africa"; A. Warrior, *The resistance of the African States to the jurisdiction of the International Criminal Court*; F. M. Benvenuto, "La Cour Penale Internationale en juge"; and C. C. Jalloh, "Reflections on the indictment of Child Heads of State and Government and its consequences for peace and stability and reconciliation in Africa"-

²¹ On this theme see "The AU-EU Expert Report on the Principal of Universal (AHJ) (Council of the European Union 8672 1/09, 16 April 2009). The theme of universal jurisdiction and the International Criminal Court has caused wide friction between the African Union and the European Union, which gave rise to the above-mentioned report. The Declaration of the most recent EU-Africa Summit, which took place in Brussels on 2 and April 3, 2014, with total absence of reference to the ICC, states in paragraph 10: "We confirm our rejection of, and reiterate our commitment to, fight impunity at the national and international level. We undertake to enhance political dialogue on international criminal justice, including the issue of universal jurisdiction, in the agreed fora between the parties."

²² Cf. Doc. BC/U/1657.10.13.



committed in the context of the post-electoral violence in Kenya in 2007. The same letter stated that the Court proceedings affect the ability of Kenyan leaders to lead, who - despite possible liability for the crisis of 2007 -, are democratically elected and must remain in the country to fulfill their constitutional responsibilities. Furthermore, the trial period requiring the physical presence of the President and the Vice-President at The Hague would not be feasible, since the Constitution of Kenya states that when the President is abroad, the Vice-President cannot be also, and vice versa.

In response, the ICC denied any procedural statute to that letter or the May decision since it fell outside the scope of the process and was not sent the request of the parties or the Security Council, and responded negatively to the pretense of suspending the process²³.

In October 2013, a Special Session of the Assembly of the AU adopted a new resolution, this time entitled: "*Decision on Africa's relationship with the International Criminal Court*" (cf. Ext /Assembly/AU/Dec .1 (Oct. 2013)). This resolution reiterated the concern with the politicization and misuse of accusations against African leaders by the ICC. Regarding the question of Kenya, the resolution stated that the indictment prompts a serious and unprecedented situation in which both the President and Vice President in Office of a country are the target of a international criminal process, affecting the sovereignty, stability and peace in that country, as well as the national reconciliation and the normal functioning of constitutional institutions. The resolution decided, *inter alia*, the following:

- For the safeguarding of constitutional order, stability, and integrity of the Member States, no prosecution can be initiated or continued by any international tribunal against any head of State or Government in Office or someone who acts or with the right to act in that capacity during his tenure;
- That the trials of the Chairman Uhuru Kenyatta and the Vice-president William Samoei Ruto, who are the current leaders in Office of the Republic of Kenya, must be suspended until their terms are completed;
- Creation of a Contact Group of the Executive Board, to be headed by the President of the Council, which shall consist of five members (one per region) to conduct consultations with the members of the UN Security Council (UNSC), specifically, the five Permanent Members, with a view to collaborate with the UNSC in all concerns of the AU on their relationship with the ICC, including the postponement of the cases against Kenya and the Sudan, in order to obtain the answer before the beginning of the trial, the 12 November 2013;
- Accelerate the extension process of the African Court on Human and Peoples' Rights (TADHP) mandate to judge international crimes, such as genocide, crimes against humanity, and war crimes;
- The African States Parties to the Rome Statute to propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute;
- Ask the African States Parties to the Rome Statute of the ICC, in particular the members of the Bureau of the Assembly of States Parties, to include in the Agenda of the next session of the ASP the question of the prosecution of a Head of State and

²³ Cf. 2013/PRES/00295-4/VPT/MH, Letter from September 13, 2013.



of Government in Africa in Office by the ICC, and its consequences for the peace, stability, and reconciliation in the Member States of the African Union.

- That any member State of the AU wishing to refer a case to the ICC should inform and obtain the approval from the African Union;
- That Kenya should send a letter to the Security Council of the United Nations, requesting postponement of the case against the President and the Vice President of Kenya, in accordance with Article 16 of the Rome Statute, which is supported by all African States Parties;
- In accordance with this Decision, ask the Court to postpone the trial of President Uhuru Kenyatta, marked for November 12, 2013 and to suspend the procedure against the Vice-president William Samoei Ruto up to the moment in which the UN Security Council considers the request of Kenya for deferral, supported by the AU.
- That the President Uhuru Kenyatta not be required to appear before the ICC until the moment that the concerns raised by the AU and its Member States have been duly considered by the Security Council of the United Nations and the ICC.

On November 15, 2013 the Security Council rejected, though extremely divided (7 votes in favor and 8 abstentions) a draft Resolution (doc. S/2013/660) which sought, pursuant to Article 16 of the Rome Statute and Chapter VII of the Charter, to defer the investigation and trial of the President and Vice-President of Kenyan, for a period of one year. Voted in favor Azerbaijan, China, Morocco, Pakistan, Russia, Rwanda and Togo. Abstained Argentina, Australia, France, Guatemala, Luxembourg, the Republic of Korea, United Kingdom and USA (for individual explanations of vote see S/PV. 7060).

Nevertheless, the 12th session of the ASP included, at the request of the African Union, a special segment entitled, *"Indictment of Sitting Heads of State and Government and its consequences on peace and stability and reconciliation."*

During the November 2013 intervention on behalf of the AU in the ASP, it was stated;

"... I would like to turn now to the situation in Kenya and to highlight the inescapable link between peace and justice. We at the AU would like to see an intelligent interaction between justice and peace because it is only in this way that we can succeed in promoting democratic governance with strong institutions, the rule of law and constitutionalism. The African Union believes that if Kenya does not qualify for use of Article 16 of the Rome Statute and subsequently the principle of complementarity then no other State Party will. If this turns out to be the case, then not only Article 16 would be deemed to be redundant for the United Nations Security Council to legitimately and constructively resort to it, but the irresistible conclusion will also be that the ICC, whose establishment Africa and the Organization of African Unity strongly



supported and advocated for is no longer a Court for all but only to deal with Africans in the most rigid way”²⁴.

According to the proposal submitted by the African States - adopted by consensus - substantial amendments to the Rules of Procedure and Evidence of the ICC - namely Rule 134 – were drafted, specifically allowing the justification of absence or that of physical presence in the trial to be replaced by participation via video technology. In accordance with the Resolution ICC-ASP/12/Res. 7, the following was inserted after Rule 134 of the Rules of Procedure:

“Rule 134bis

Presence through the use of video technology

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.
2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

Rule 134ter

Excusal from presence at trial

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.
2. The Trial Chamber shall only grant the request if it is satisfied that:
 - (a) exceptional circumstances exist to justify such an absence;
 - (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
 - (c) the accused has explicitly waived his or her right to be present at the trial; and
 - (d) the rights of the accused will be fully ensured in his or her absence.
3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

Rule 134 quarter

Excusal from presence at trial due to extraordinary public duties

1. An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel

²⁴ http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-AU-Uganda-ENG.pdf.



only; the request must specify that the accused explicitly waives the right to be present at the trial.

2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time."

There will be those who question the compatibility of these amendments with Article 27 of the Rome Statute and the principle of equal treatment. The Court, in a decision from November 26 2013 on the Kenyan process, contended that the absence of the accused should only occur in exceptional circumstances and be limited to what is strictly necessary. Although the trials *in absentia* were allowed in the Nuremberg trials, they were excluded, as a general rule, in the Tribunals for the former Yugoslavia, Rwanda and by the Statute of the ICC.

Article 27 of the ICC Statute confirms, in addition, that the official capacity of a defendant is irrelevant for the purposes of a trial before this Court, providing that immunities or special procedural rules that may be inherent to the official duties of a person, according to national or international law, does not prevent the Court from exercising its jurisdiction over such a person. In addition, Article 98 of the Statute does not refer to the personal immunities of Heads of State, Government, or Ministers of Foreign Affairs in absolute terms, but rather to the diplomatic immunities between Member States and the possible need to obtain consent prior to the delivery of a suspect to Court.

The proposals made during the ASP for amendment to the Rules of Procedure, its acceptance policy and strategy of containment, did not prevent, however, the Government of Kenya from notifying, on November 22, 2013, the Secretary-General of the United Nations,²⁵ as depositary of the Rome Statute, the following proposed changes to the Statute in accordance with Article 121 (1), in particular with regard to Articles 63 (Trial in the Presence of the accused), 27 (Irrelevance of official capacity) and to the paragraph of the Preamble on complementarity:

Article 63 (2) - the Presence of the accused at trial

"Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel.

- (2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.
- (3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured

²⁵ Officially circulated on March 14, 2014 (C.N.1026.2013.TREATIES-XVIII.10 - Depositary Notification).



in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial."

Article 27 (3)- Irrelevance of official capacity

"Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions"

Introductory Paragraph on Complementarity

"Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions."

If the proposed amendment to Article 63 - the new rules introduced in ASP 2013 are to some extent already accepted - represents a 60 year step backwards to the trials in *absentia* of the Nuremberg Tribunal, the proposed amendment to Article 27 goes against a fundamental "sacrosanct" principle upheld since Nuremberg and incorporated in the Statute of all criminal courts: international criminal law applies to everyone, regardless of official capacity. Article 7 of the Charter of the International Military Tribunal stated *"the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."*

The proposal for the amendment of Article 27, supported by the African States and proposed for discussion in an extraordinary ASP, would alter a fundamental principle of the Statute and customary international criminal law, recognized by ICJ in the Case Arrest Warrant of 2000. It would be *"a shameful retreat in the global fight against immunity"*.²⁶ Additionally, according to the same author, this Amendment to Art. 27 could even be a stronger incentive for taking power (by democratic means or not) in order to avoid a trial in The Hague. The proposal, likewise, contradicts the principle of speedy justice for the victims, because the Court would be prevented from exercising jurisdiction with regard to persons that occupy high political positions.

In our view, and as mentioned above, the appropriate safeguards for complex cases, such as the case of Kenya are already incorporated in the Rome Statute, therefore, no change to the aforementioned articles is required. However, the safeguards in Articles 17 (Complementarity and Admissibility), 53 (Powers of the Prosecutor) and 61 and 63r (Presence of the accused at trial), could be readdressed to improved consistent and continuity. In any case, in extreme circumstances, the power to appeal will remain, and in cases in which peace is seriously threatened, the Security Council, pursuant to Article 16 of the Statute, may suspend, for periods of 12 months, the proceedings before the ICC. The fact that that body has not accepted the use of this prerogative in Sudan´s

²⁶ C. C. Jalloh, "Reflections on the indictment of sitting Heads of State and Government and its consequences for peace and stability and reconciliation in Africa", p.15.



case, where it did not formally take a decision, or Kenya, where the request was denied by a narrow margin, does not mean that this safeguard is ineffectual.²⁷

Conclusions

Due to the challenges of the current cases, some perceive the idea of combating impunity and international criminal justice as declining. Others view this as a process of stabilization developing in the ICC; which after a revolutionary achievement, despite maturing over many decades, materialized in a relatively short period.

However, the African attempt to introduce immunity from criminal jurisdiction for current Heads of State for the most serious international crimes - even if temporarily - is a severe setback to the idea of fighting impunity.

The future credibility of the ICC's role, pursuant on how and when these challenges and ideas are approached, awaits judgment. The proposal for a separate International Criminal Court for Africa (suggested by the African Union and the proposed amendment to the Statute of Rome from Kenya) and the possible withdrawal from the ICC Statute (authorized but with limited effects on current cases) by Article 127 (2) by some African states has yet to materialize.

Kofi Annan succinctly clarified the issue when he stated,

*"it is the culture of impunity and individuals who are on trial at the ICC, not Africa"*²⁸.

It is our hope that the entire international community will understand these words of wisdom and that the struggle against "impunity" will not lose its "p" and become, in fact, for some, "immunity" from crimes against humanity.

References

- Arieff, A et al. (2010). *International Criminal Court Cases in Africa: Status and policy issues*. Diane Publishing.
- Barnes, G.P. (2011). "The International Criminal Court's Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir." *Fordham International Law Journal*, Vol. 34, No. 6:1584-1619.
- Beauvallet, O. (ed.) (2012). "10e anniversaire de la Cour Pénale Internationale", *La Semaine Juridique*, Vol. 86, No. 52:1-24.
- Bellelli, R. (ed.). (2010). *International Criminal Justice: law and practice from the Rome Statute to its review*. Ashgate.

²⁷ On the relationship between the ICC and the UN Security Council see H. Mistry and D. Ruiz Verduzco (Rapporteurs), "The UN Security Council and the International Criminal Court, International Law Meeting Summary"; D. Kaye *et al*, "The Council and the Court: Improving Security Council Support for the International Criminal Court"; e J. Trahan. "The relationship between the International Criminal Court and the UN Security Council: Parameters and best practices".

²⁸ Speech of K. Annan in " 3rd Annual Desmond Tutu International Peace Lecture", October 7, 2013.



- Benvenuto, F.M. (2013). "La Cour Pénale Internationale en accusation." *Le Monde Diplomatique*, Vol. 60, No. 716:11.
- Blaise, N. (2012). "Les interactions entre la Cour Pénale Internationale et le Conseil de Sécurité : justice versus politique?" *Revue de la Faculté de Droit de L'Université de Liège*, Vol. 57,no. 1-2:61-98
- Boas, G., W. Schabas and M. Scharf (eds.) (2012). *International Criminal Justice: legitimacy and coherence*, Elgar.
- Cronin-Furman, K. (2013). "Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity", *The International Journal of Transitional Justice*, 1-21.
- Guerreiro, A. (2012). *A resistência dos Estados Africanos à jurisdição do Tribunal Penal Internacional*, Almedina.
- Jalloh, C. C. (2014). "Reflections on the indictment of sitting Heads of State and Government and its consequences for peace and stability and reconciliation in Africa", *Legal Studies Research Paper Studies*, University of Pittsburgh, Working Paper.
- Kaye, D. et al, (2013) "The Council and the Court: Improving Security Council Support for the International Criminal Court." School of Law, University of California.
- Keller, L.M. (2008). "Achieving peace without justice: the International Criminal Court and Ugandan alternative justice mechanisms", *Connecticut Journal of International Law*, Vol. 23: 209-279.
- Keller, L.M. (2008). "The false dichotomy of Peace versus Justice and the International Criminal Court", *Hague Justice Journal*, Vol 3, No. 1:12-47.
- Keppler, E (2012). "Managing setbacks for the International Criminal Court in Africa." *Journal of African Law*, Vol. 56, No. 1:1-14.
- Mendes, E. (2010). *Peace and Justice at the International Criminal Court: A Court of last resort*. Elgar.
- Mistry, H. and D. Ruiz Verduzco (Rapporteurs). (16 Março 2012). "The UN Security Council and the International Criminal Court, International Law Meeting Summary", London: Chatham House.
- Philippe, X. (2006). "The principles of Universal Jurisdiction and Complementarity: how do the two principles intermesh?" *International Review of the Red Cross*, Vol. 88, No. 862:375-398.
- Piranio, C. et al. (2011). "Reflections on the Rome Statute." *Cambridge Review of International Affairs*, Vol. 24, No. 3:307-447.
- Roach, S. C. (2013). "Legitimising negotiated justice: the International Criminal Court and flexible governance." *International Journal of Human Rights*, Vol. 7, No. 5-6:619-632.
- Schabas, W. (2012). "The International Criminal Court: struggling to find its way." A. Cassese (ed.), *Realizing Utopia: the future of International Law*, OUP.
- Sidiki, A. (2012). "La Cour Pénale Internationale: une justice a double vitesse?" *Revue du Droit Public et de la Science Politique*, Vol. 128, no. 4:1013-1030.



Trahan, J (2013). "The relationship between the International Criminal Court and the UN Security Council: Parameters and best practices." *Criminal Law Forum*, Vol. 24:417-473.

Waddell, N. and P. Clark. (2008). *Courting Conflict? Justice, Peace and the ICC in Africa*. The Royal African Society