

Does the International Criminal Court Have a Future or Is It Just an Illusion?

Drd. Raluca Colojoară
West University Timișoara

Abstract

For international criminal law 2002 was a great year. The act that gave the International Criminal Court (hereinafter the Court or ICC), jurisdiction over several heinous crimes committed during and after an armed conflict, the so called Rome Statute, entered into force, establishing the International Criminal Court, the first permanent court in this field. By the adoption and ratification of the Statute, the Court is able to try those liable for crimes that fall under its jurisdiction committed during or after an armed conflict of an international or intern nature or an attack against the civilian population. The establishment of the Court was the result of much debate and many compromises, not only from the procedural point of view but as well from the material one, e.g. it took them five years to come up with a definition for the Crime of Aggression.

From the beginning, the ICC was confronted with some recognition problems, one of its fiercely defenders, the United States of America, decided not to ratify the founding treaty and even withdraw from the already in 1998, signed Statute.

Fourteen years later, countries started to leave the Statute and the Court as they felt it does not fulfil its purpose anymore and its more or less biased, by as they said its focus only on the African Countries. The following article will focus on the issues the Court is facing nowadays.

Keywords: *International Criminal Court, African countries, Rome Statute, international criminal law*

1. Introduction – facts and figures in international criminal law

The first time the idea to create a permanent international court that could have jurisdiction over some of the most heinous crimes faced by humanity was expressed by Vespasian Pella in his work *Towards an International Criminal Court*¹. Nineteen years later two *ad-hoc* military tribunals² were created to investigate and prosecute those responsible for crimes that fall under their statute committed during the second World War. Further on, in the early nineties two *ad-hoc* tribunals were created by the United Nations, the International Criminal Tribunal for the Former Yugoslavia³ and the

¹ Pella, V.V., *Towards an International Criminal Court*, in “American Journal of International Law”, Vol. 44, (1950).

² Nuremberg Charter “Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945” and International Military Tribunal for the Far East “Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946 Tribunal established January 19, 1946”

³ UN Resolution 827 from 25 May 1993,

International Criminal Tribunal for Rwanda⁴. These were charged to investigate and prosecute those responsible for the crimes of Genocide, Crimes Against Humanity and War Crimes⁵ committed during the Yugoslavian war and the Rwandese one⁶. Unfortunately, the international society could not come to a rest and during the next years several other tribunals and courts have been established to deal with the sort of crimes that national jurisdictions, concerned with this type of crimes, did not, did not want to or could not handle. As such, in 2002 the Residual Special Court for Sierra Leone was created "as the result of a request to the United Nations in 2000 by the Government of Sierra Leone for "a special court" to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991-2002) civil war"⁷ being the first "hybrid" international criminal tribunal. Its mandate was to try those responsible for crimes committed during the above-mentioned war having its "sit in the country where the crimes took place and the first to have an effective outreach programme on the ground".⁸ Later, the Extraordinary Chambers in the Courts of Cambodia⁹ were created by the initiative of the Cambodian government requesting in 1997 the United Nations "to assist in establishing a trial to prosecute the senior leaders of the Khmer Rouge"¹⁰ that would deal with the ordeals that have occurred during 17 April 1975 and 7 January 1979 on the Cambodian territory after the Khmer Rouge regime took power. The court was created in 2003 upon an agreement reached with the United Nations, being though independent from the government and the UN. The trials are held in Cambodia, it uses Cambodian staff and judges together with foreign personnel. From the law point of view it uses national legislation as well as international. Next to these, after the 2005 attack in Lebanon where 22 persons were killed, including the former Lebanese Prime Minister, Rafik Hariri, the United Nations Security Council decided the creation of the UN International Independent Investigation Commission (UNIIC) through Resolution 1595 from April 2005. The purpose of the commission was to gather evidence and to assist the Lebanese authorities in their investigation of the attack of 14 February 2005. The UNIIC's mandate was later expanded to include the investigation of other assassinations that took place before and after the Hariri attack. The purpose was to bring to justice "the perpetrators, organizers and sponsors of this heinous terrorist act, and noting the Lebanese government's commitments in this regard. The Council urges all states, in accordance with its

⁴ UN Resolution No. 955 from 8 November 1994,

⁵ N.b. war crimes are encompassed with the Statute of the ICTY under article 2 Grave breaches of the Geneva Conventions of 1949 and in article 3 Violations of laws and customs of war and under the ICTR Statute under article 4 Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

⁶ Sometimes referred as the Rwandese Genocide having as merit to be the first Tribunal to convict for genocide.

⁷ Special Court for Sierra Leone, Residual Special Court for Sierra Leone Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone <http://www.rscsl.org/>

⁸ <http://www.rscsl.org/index.html>, to be mentioned that there was a Trial held outside of the country's borders, respectively the former Liberian President, Charles Taylor

⁹ Extraordinary Chambers in the Courts of Cambodia, Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea Phnom Penh, 6 June 2003, <http://legal.un.org/avl/ha/abunac/abunac.html>

¹⁰ *Idem*, <https://www.eccc.gov.kh/en/about-eccc/introduction>

Resolutions 1566 (2004) and 1373 (2001), to cooperate fully in the fight against terrorism."¹¹ Further on, in 2016, the Den Haag based Tribunal for the Kosovo's war opened its doors, the Kosovo Specialist Chambers and Specialist Prosecutor's Office¹². As all the above Tribunals, Court and Chambers, this Chambers have a limited mandate as well, "namely over certain crimes against humanity, war crimes and other crimes under Kosovo law which allegedly occurred between 1 January 1998 and 31 December 2000"¹³ but in comparison with the other above mentioned institutions, these Chambers were established based on the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 ("the Marty Report")¹⁴

As we could see much has been done after the 1990's in the field of international criminal law, but somehow it was not enough. All these tribunals and courts were created after the end of the war, conflict or attack, their jurisdiction being put into question on many occasions by the defence or even the international community. As such, the international society decided to create a permanent Court¹⁵ that would have jurisdiction over any crimes falling under the Genocide, Crimes against Humanity, War Crimes and/or Crimes of Aggression concepts. The court was established through the 1998 Statute which came into force in 2002. At that time, many wars were ongoing through the world, especially on the African continent as well as the well-known *one on terror*. We believe that this latter was the reason why for example USA, one of the Court's biggest advocate before 9/11 and Statute's signature did not ratify it in the end, deciding in the end to even fully withdraw from the Statute. Until a few months ago, there were 124 countries that signed and ratified the ICC's Statute, out of which 34 were African states, 19 Asian-Pacific States 18 East European, 28 Latin-American and Caribbean States and 25 West European and other states. Now, several countries have already declared that they would like to exit the Statute: Burundi¹⁶, South Africa, Gambia while Kenya and Namibia are planning as well. Russia, a country that has, as the USA, only signed the Statute but did not ratify it, declared in November 2016, that it would like to fully withdraw from the Statute.¹⁷

¹¹ Special Tribunal for Lebanon, Agreement between the United Nations and the Lebanese Republic (hereinafter "the Agreement") pursuant to Security Council resolution 1664 (2006) of 29 March 2006, S/RES/1757 <https://www.stl-tsl.org/en/about-the-stl/636-creation-of-the-stl>

¹² Law n.05/L-053 on the Specialist Chambers and the Specialist Prosecutor's Office approved by the Kosovo Parliament in August 2015, <http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf>,

¹³ The Kosovo Specialist Chambers and the Specialist Prosecutor's Office approved by the Kosovo Parliament in August 2015, Law n.05/L-053 <https://www.scp-ks.org/en>

¹⁴ Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights The International Convention for the Protection of all Persons from Enforced Disappearances¹, AS/Jur (2011) 45 4 November 2011 ajdoc45 2011 <http://assembly.coe.int/CommitteeDocs/2011/ajdoc45.pdf>

¹⁵ Assembly of State Parties, Statute of the International Criminal Court A/CONG.183/9 of 17 July 1997, in force since 2002

¹⁶ Burundi's *Lower house of parliament passed a draft law to exit ICC*

¹⁷ Russia pulls out from International Criminal Court, *Moscow's decision follows UN report on Russian rights abuses and discrimination in Crimea*, 16 November 2016, <http://www.aljazeera.com/news/2016/11/russia-pulls-international-criminal-court-161116132007359.html>

2. Example of cooperation issues

The International Criminal Court has the possibility to try those responsible of committing crimes that fall under its jurisdiction if, no other state is willing or able to do so. Actually, it was hoped that, the countries where the crimes were committed or who had on their territory those sought for these crimes would be willing to prosecute them there, and only in special cases, as a last resort and in conformity with the complementarity principle the Court would have to investigate and prosecute those responsible.¹⁸ Unfortunately, this was not the case and because of the ongoing conflicts or the inability or unwillingness of the states in which the crimes were committed, the ICC had to intervene. Before we make a short presentation of the current situation and discuss the court's issues, we would like to make certain clarifications.

First, the court has jurisdiction only over crimes committed after the date the Rome Statute entered force, July 2002, secondly, as already mentioned it can try an individual only if proven that a country is unwilling or unable to prosecute him or her, thirdly the Court has jurisdiction to prosecute only the nationals of member states or the resortissants of those countries who's situation was referred to it by the United Nations upon a Resolution¹⁹ and fourthly, but not lastly, according to the ICC Statute, the capacity under which the perpetrator acted is irrelevant²⁰, therefore the Court being able to try states officials and presidents.

Until now, the Court has investigated situations from Uganda, the Democratic Republic of Congo, Darfur, Sudan; Central African Republic, the Republic of Kenya, Libya, Cote d'Ivoire, Mali, Georgia and Central African Republic II and has started preliminary investigations in Afghanistan, Burundi, Columbia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine, Registered Vessels of Comoros, Greece and Cambodia and Ukraine. The prosecution decided in the case of Honduras, Venezuela and the Republic of Korea not to proceed with the investigation, closing the cases.

Looking at this list, is not hard to understand why it is being asserted that the ICC is an African court, being built for the prosecution of the African people.²¹ The first non-African country where the Prosecution has decided to investigate after its preliminary examination was in the case of Georgia, with special focus on in and around South Ossetia for "alleged crimes against humanity and war crimes committed in the context of an international armed conflict between 1 July and 10 October 2008".²²

Not to be understood that the Court has jurisdiction over states we would like to shortly present how the Court works. At first the prosecutor starts a preliminary

¹⁸ Article 17 of the Rome Statute

¹⁹ N.B.: An investigation concerning a situation that would fall under the Court's jurisdiction can start based on the country's referral, an UN referral or the prosecutor's *proprio motu*

²⁰ Article 27 "Irrelevance of official capacity" and 20 "Responsibility of commanders and other superiors" of the Rome Statute

²¹ Bensouda, F., *Africa Question, Is the International Criminal Court (ICC) targeting Africa inappropriately?* In Human Rights and International Criminal Law, ICC Forum.com <http://iccforum.com/africa>, Nyabola, N, *Does the ICC have an African Problem?* <https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/51456-does-the-icc-have-an-africa-problem.html>, South Africa to quit International Criminal Court, Government to submit a bill to exit the ICC, amid growing concerns that Hague-based court tries mostly African leaders, <http://www.aljazeera.com/news/2016/10/south-africa-formally-applies-quit-icc-media-161021044116029.html>

²² ICC, Situation in Georgia, case No. ICC-01/15, <https://www.icc-cpi.int/georgia>

examination on a situation referred to it by a state – party or not, the UN or on a *proprio motu* bases. It analysis if the Court has jurisdiction or on any other admissibility issues. If it considers that all, by the Statute expressed requirements are met, the Prosecution starts an investigation in the case, for him or her to decide if, the case could be send to trial, based on the existing and/or gathered evidence, or not. It is only after such a decision has been taken that the case goes before the Pre-Trial Chamber which decides if an arrest warrant against one or several persons shall be issued and examines the by the prosecution and defence presented evidence. But in front of the (Pre-Trial) Chambers it is not the State that it's being prosecuted but the individuals accused of having committed the respective crimes. It is only after the Pre-Trial's Chamber decides that the case should or shouldn't go to Trial, depending if the former considers that the Prosecution has or hasn't succeeded to make a case.

For the procedure before the Pre-Trial Chamber and the Trial Chamber to be conducted, the accused must be present, a trial *in absentia* not being possible. As such, the competent Pre-Trial Chamber issues an arrest warrant for the person to be broth before the Court. And here comes the catch. The accused must be arrested, based on the by the competent Pre-Trial Chamber issued arrest warrant, by the country where he or she is found and surrendered to the Court. But this is not such an easy task to fulfil, and mainly because of political reasons or, as we shall specify later on, concluded conventions for *ressortissants* of a certain state not to be arrested and surrendered to the Court. The Country that arrests the accused has though the possibility under the universality principle of the crimes concerned in this article, to, if willing and able, try the person herself. Not to enter in many details, on this matter we would like to give an example of a case of an arrest warrant not complied with.²³

In 2010, the United Nations Security Council “acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593(2005)²⁴, whereby it referred the situation in Darfur, Sudan, since 1 July 2002 to the Prosecutor of the Court and decided, inter alia, “that the Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”.²⁵ As Sudan, Darfur is not State Party to the ICC Statute, the situation entered within its competence by UN referral. Of course, Darfur, Sudan did not cooperate with the arrest warrant issued against its (still) acting president. Darfur's President Omar al-Bashir is being sought for and charged with crimes committed in Darfur Sudan, since 2003, as an indirect (co) perpetrator²⁶. His first arrest warrant was issued in March 2009²⁷ and the second in 2010²⁸. He is, *inter alia*, accused of “as the *de jure* and *de facto*

²³ N. b. This is a more peculiar case.

²⁴ USA and China for example abstained, maybe because it did not want to create a precedent, even thou the US Minister of Foreign affairs at that time “saluted” the adoption.

²⁵ UN SC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, on 31 March 2005, see as well, ICC, Situation in Darfur Sudan, in the case of *The Prosecutor v Omar Hassan Al Bashir*, case No.: ICC-02/05-01/09, *Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute* 11 July 2016,

²⁶ ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09

²⁷ ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-Trial Chamber, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, 04 March 2009 (*hereinafter Bashir, Arrest Warrant*)

²⁸ ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-Trial Chamber, *Second Decision on the Prosecution's Application for a Warrant of Arrest*, 10 July 2010

President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the common plan”²⁹ and that “Omar Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups.”³⁰ Seven years after the first arrest warrant was issued, Darfur’s president is still at large, attending international meetings in African countries. This case raised several issues concerning States cooperation with the Court’s warrants.

Several notes need to be made on this matter. As we already said, the Darfur/Sudan case concerns a non-State Party, and it would have been obliged to comply with the arrest warrant based only on the UNSC Resolution, that specifically obliges Darfur/Sudan to fulfil it.³¹ If the indicted would have been found on the territory of an ICC State parties, the latter would be, in theory, in accordance with the Statute it ratified, especially article 27³², obliged to comply with such a warrant, but in case, the if the supposed perpetrator is national of a non-State Party and/or if he or she is found on the territory of such a country, article 98 (1) of the Rome Statute establishes certain conditions. Based on this article, if the requested State would be in the position to breach its obligations under (customary) international law, concerning “State and diplomatic immunities of a person or property of a third State”³³, the Court “may not proceed with a request of surrender and assistance” except an agreement is reached³⁴. Accordingly, the Court needs to obtain first the cooperation of that third State, for the waiver of the above-mentioned immunity. The second paragraph impeaches the Court to act and “proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender”. This provision has been introduced after long negotiations carried out by the United States, country that refused to ratify the Statute in the end.³⁵ In conclusion, the Court and the member States need to act in conformity with their international public law obligations, the Court being able only to hope for cooperation.

Turning to the Bashir case, the President found himself several times on the territory of State Party to the ICC, but accordingly with article 98 a consent from Darfur, Sudan had to be sought. Such an accord has not been reached, but the ICC still condemned the Republic of Djibouti³⁶ Chad, DRC and South Africa for not complying

²⁹ *hereinafter Bashir, Arrest Warrant* p.6, https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF

³⁰ <https://www.icc-cpi.int/darfur/albashir/pages/alleged-crimes.aspx>

³¹ Paragraph 2 of the UN resolution states as follows “Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;”

³² Irrelevance of official capacity

³³ Article 98 (1)

³⁴ *idem*

³⁵ For a more detailed analysis of article 98 and the United States, see, Zapala, S., *The reaction of the US to the entry into force of the ICC Statute: Comments on the UN SC Resolution 1422 (2002) and article 98 Agreements*, Journal of International Criminal Justice, 1.1, Oxford University Press, 2003

³⁶ ICC decision *precit.*,

with the arrest warrant, when the accused was on their territory, but could practically do nothing about it. It is the State's party obligation to act in conformity with its obligations pursuant the Rome Statute and to arrest and surrender the person envisaged by the arrest warrant but the state is not obliged to do so if, the accused is national of a non-State Party, and would conclude with a breach. What the requested State is obliged to do is to receive the consent of the third State to surrender its national, although the latter could claim jurisdiction as well, under the universality principle. The Al-Bashir case gets even more complicated as according to the UN Resolution of referral, the State is obliged to cooperate with the ICC. Accordingly, it would be obliged to cooperate with the by the ICC requested State or would it not? The UN SC resolution obliges only Darfur to comply with it, and not other States on which's territory the accused is situated, as such, the States that did not act in accordance with the arrest warrant did not actually breach their obligations in conformity with the Rome Statute. As such, even if the case was referred to it by the UN SC, with who's Resolutions States, party or not, must at least in theory comply, States still have their own will and act in accordance. We have chosen to shortly present this case, to show some issues the ICC is confronted with, next to the interpretation of its Statute case-by-case.

As of why there are mostly African countries under investigation, these could be some reasons. The very disputed arrest and surrender of President Al-Bashir, and reason for much debate was a consequence of the UN SC resolution to investigate the situation in Darfur /Sudan supported by African countries like DRC, Benin and Tanzania, so not only Western Countries while South Africa, Gabon and Nigeria voted in favour of the UN Security Council referral of the Libya situation to the ICC, "Ivory Coast accepted the jurisdiction of the ICC and undertook to cooperate with the ICC. Kenya's President Kibaki and Prime Minister Odinga pledged support to the Prosecutor's independent decision to open an investigation into crimes in Kenya *proprio motu*."³⁷ On the other hand, if the events happened before 2002 or the country shows signs it would be able or willing to investigate, then the ICC would not have any jurisdiction. More, it needs to be kept in mind that the ICC has jurisdiction only over certain crimes, so it would not be able to prosecute crimes like terrorism or organized crime.

Because it is not the purpose of the paper to discuss the issue of immunities, arrest warrants or cooperation, further on we would like to shortly present what the ICC achieved and the first cases of withdrawal from the Statute.

What has the ICC achieved?

Currently, the Court has under preliminary examination ten cases and the same number of situations under investigation. There are no cases in Pre-Trial, five in Trial, one case is on appeal and three in the stadium of reparation meaning a conviction has been entered. Next to all of these, five cases have been closed, for reasons like, insufficient evidence, *the Prosecutor v. Uhuru Muigai Kenyatta, case no. ICC-01/09-02/11*, in one case charges have been vacated, the Chamber considering the evidence presented by the prosecution was weak *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, case No. ICC-01/09-01/11*, in two cases the Pre-Trial Chamber did not confirm the charges, and in one case the accused was acquitted.

³⁷ Clarke, K. M., *Africa Question, Is the International Criminal Court (ICC) targeting Africa inappropriately?* In Human Rights and International Criminal Law, ICC Forum <http://iccforum.com/africa#Clarke>

The first case before the ICC, *Prosecution v. Lubanga Dyilo*³⁸ case, was a long, exhausting one. The charges against him were confirmed in 2007 and the Verdict was given in 2012, and the appeal decision was rendered in 2014. During these 7 years, the Trial Chamber ordered two times a stay of the proceedings, first in June 2008 “because the Prosecutor would not disclose certain documents obtained through confidentiality agreements which potentially contained evidence favourable to Lubanga's defense”³⁹ and the second time in July 2010 “because the Prosecutor refused to disclose the identity of an intermediary - an outside person assisting the Prosecutor's investigation - out of a concern for the intermediary's safety. The judges found that the Prosecutor's failure to disclose compromised the possibility of a fair trial.”⁴⁰ After the, as many defence lawyers would say, fair trial fiasco in the *Lubanga* case⁴¹, the second case before the Court, where a conviction had been entered was sketchy as well. *The Prosecution v. Katanga and/or Ngudjolo Chui*. The case against Katanga started in 2007 when the arrest warrant was issued. In 2008 the Pre-Trial Chamber I joins the cases against *Germain Katanga and Mathieu Ngudjolo Chui* but then it decides in 2012 to separate the cases and sever the charges against *Ngudjolo Chui*. In the end the latter was acquitted. And, finally the last conviction before the ICC was one concerning the Mali situation, *Le Procureur c. Ahmad Al Faqi al Mahadi*⁴² where, the defendant actually admitted its guilt, and signed a plea agreement in 2016⁴³. Accordingly, the ICC, convicted 3 people out of 30plus indicted. Some might say, that not much has been achieved in its 14 years of existence, but what should be always kept in mind is that, many other cases and situations are under investigations, accused are still at large, making it impossible for the Court to prosecute them *in absentia*, and other issues the ICC is facing impeaching it from fulfilling its mandate.

3. Withdrawal of States

Based on article 127 of the ICC Statute any State can withdraw from the Statute by depositing a notification addressed to the UN SC, and in accordance with para (2) “Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.”⁴⁴

³⁸ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06

³⁹ *idem*, <http://amicc.org/icc/lubanga>

⁴⁰ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 8 July 2010 <http://www.haguejusticeportal.net/Docs/Court%20Documents/ICC/lubanga-Decision%20on%20the%20Prosecution's%20Urgent%20Request%20for%20Variation%20of%20the%20Time-Limit.pdf>, <http://amicc.org/icc/lubanga>

⁴¹ The Trial's issues were enumerated even in the verdict, ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, para. 10

⁴² ICC, *Situation in Mali, The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No.: ICC-01/12-01/15 (hereinafter Al Mahdi,)

⁴³ *Al Mahdi*, ICC-01/12-01/15-78-Conf-Exp , Version publique expurgée du « Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi », 25 février 2016, ICC-01/12-01/15-78-Conf-Exp, 19 August 2016

⁴⁴ Article 127 para 2

South Africa decided this year to withdraw from the ICC because it found that its laws were conflicting with the Rome Statute, especially on head of state's immunity. The decision was taken after, while on the South African Territory the police failed to arrest Al Bashir even though next to the ICC's arrest warrant there was an interim order issued by the North Gauteng High Court preventing the Sudanese president to leave the country. Even so, the Sudanese president was allowed by the South African Government to leave the country, as it was considered that "President Bashir is protected by head of state immunity hence their alleged inability to arrest him for transfer to the ICC."⁴⁵ Interestingly enough, this action considered by the South African State's High Court as unconstitutional and invalid dismissing their application for leave to appeal, upholding the decision that the President should have been arrested and that the Government acted illegally and against the Court's ruling. Unfortunately, just before a ruling by the Country's Constitutional Court on this matter, and scheduled for November 2016, the government announced on 19 October 2016, its withdrawal from the case. The same time the withdrawal from the ICC was announced.

Next to South Africa, two other African countries decided to withdraw from the Statute, Gambia and Burundi. Their reason was the ICC is supposed to target mostly African countries.

In September 2016, the United Nations Human Rights Council decided, based on Human Rights Council Twenty-fourth special session Resolution adopted by the UN General Assembly Human Rights Council on 17 December 2015 S-24/1, Preventing the deterioration of the human rights situation in Burundi⁴⁶, that it would be necessary for a commission on inquiry into the human rights abuses committed in Burundi since April 2015. This Commission's purpose would be to identify the alleged perpetrators and to recommend what further steps could be undertaken to guarantee their accountability. This investigation commission was established because of Burundi's failure to conduct an investigation on the tortures, killings, rapes and disappearances of hundreds of people since 2015.

Observing that "the Burundian justice system, deeply corrupt and manipulated by ruling party officials, almost never conducts credible investigations or brings those responsible for these crimes to justice. Hundreds of arbitrarily arrested people have been detained on trumped-up charges."⁴⁷ As such, the ICC, as the Court of last resort, announced in April 2016 that it would open an investigation into these vicious crimes committed on the Burundian territory⁴⁸. Based on the UN's Resolution and the ICC's start of investigation, on 18th of October 2016, "President Pierre Nkurunziza signed a legislation calling for Burundi's withdrawal from the ICC. Burundi's government claimed the court is an instrument of powerful countries used to punish leaders who do not

⁴⁵Southern Africa Litigation Centre, New Release: Supreme Court of Appeal Rules on Bashir case, <http://www.southernafricalitigationcentre.org/2016/03/15/news-release-supreme-court-of-appeal-rules-on-bashir-case/>

⁴⁶ U N GA Resolution adopted by the Human Rights Council on 17 December 2015, A/HRC/RES/S-24/1, 22 December 2015; <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20619&LangID=E>

⁴⁷ <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>

⁴⁸ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, <https://www.icc-cpi.int//Pages/item.aspx?name=otp-stat-25-04-2016>

comply with the West.”⁴⁹ The notification, mad in conformity with article 127 of the ICC Statute was lodged in with the UN SC just after South Africa’s withdrawal on 21 October 2016.⁵⁰

In December 2014, in Gambia, there was an attempted *coup-etat* that led to arrests and further human rights violations.⁵¹ “The authorities continued to repress dissent and display a lack of willingness to co-operate with UN and regional human rights mechanisms or comply with their recommendations”⁵² like, the Gambian’s rejection of the Universal Periodic Report’s⁵³ recommendations that it rejected, “failed to cooperate with African regional judicial mechanisms. It has refused to implement three binding decisions by the ECOWAS Court of Justice⁵⁴ regarding the torture, murder and disappearance of journalists⁵⁵, and it has repeatedly failed to cooperate with the African Commission on Human and Peoples’ Rights”⁵⁶ No investigation was carried out by the Gambian President and Government in the aftermath of the coup. The international community proposed a joint independent investigation but was ignored and the country disregarded the African Commission on Human and Peoples’ Rights resolution from February seeking an invitation to conduct a fact-finding mission.⁵⁷⁵⁸

Even though invoking the following argument that the ICC is more concerned with African countries, as it tries mostly African leaders, and does not focus on any other conflicts, we believe that, at least the last two mentioned would like to exit the Statute because their situation might fall under the ICC’s prosecution, one, Burundi, being already under preliminary investigation, and not necessarily that they are concerned about the ICC targeting mostly African country. We believe that, their fear is actually not to end up being under investigation and later on prosecuted. Unfortunately, the African Union has issued in 2016 issued a Decision on the International Criminal Court⁵⁹ condemning the Court and its actions, stating its concerns on the African State’s still cooperation with the Court and urging the African States not to comply with the Court’s requests until certain amendments issued by the African Union on the Statute are being taken into consideration.⁶⁰ Before this, in “2011 Jean Ping, the Chairman of the AU, went so far as to declare that the AU would not cooperate with the ICC after the indictment of

⁴⁹ <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>

⁵⁰ On the Burundian Story, <http://www.irinnews.org/analysis/2016/04/26/road-ahead-icc-burundi>

⁵¹ See for example, <https://www.amnesty.org/en/latest/news/2015/04/gambia-soldiers-sentenced-to-death-in-secret-trial-must-not-be-executed/>

⁵² Gambia 2015/2016, <https://www.amnesty.org/en/countries/africa/gambia/report-gambia/>

⁵³ U N GA Human Rights Council, A/HRC/28/6/Add.1, 24 March 2015, https://www.upr-info.org/sites/default/files/document/gambia/session_20_-_october_2014/a_hrc_28_6_add.1_e.pdf

⁵⁴ Economic Community of West African States(ECOWAS) Court of Justice <http://www.courtecowas.org/site2012/index.php?lang=en>

⁵⁵ Ebrima Manneh (2010), the torture of journalist Musa Saidykhan (2010) and the unlawful killing of Deyda Hydara (2014).

⁵⁶ Gambia 2015/2016, <https://www.amnesty.org/en/countries/africa/gambia/report-gambia/>

⁵⁷ 332: Resolution on Human Rights in Conflict Situations - ACHPR/Res. 332 (EXT.OS/XIX) 2016, <http://www.achpr.org/sessions/19th-eo/resolutions/332/>

⁵⁸ Interestingly enough, ICC’s prosecutor Fatou Bensouda, is a Gambian national, former Attorney General and Minister of Justice of the Gambia

⁵⁹ Doc. EX.CL/952(XXVIII) the Assembly/AU/Dec.590(XXVI), http://www.au.int/en/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf

⁶⁰ For further information, see the Decision of AU.

Muammar Qaddafi due to the court's "discriminatory" practices for only investigating situations in Africa, decrying its failure to intervene in Afghanistan, Iraq and other places where Western powers have been implicated. As Chairman Ping remarked cuttingly, "What have we done to justify being an example to the world? Are there no worst [*sic*] countries, like Myanmar?"⁶¹

The civil society has expressed its concerns on this matter by stating that, the withdrawal from the Court's Statute "would represent a setback in the fight against impunity and the efforts towards the objective of universality of the Statute"⁶² as the "ICC remains the only path to justice for many victims of the gravest crimes when national courts are unable or unwilling to try these cases"⁶³.

Even so, there are other African countries that are still in favour of the Court, like Cote d'Ivoire or Mali. Next to this, the Court "has initiated preliminary investigations into situations in Palestine, the Ukraine, Colombia, Afghanistan, as well as the UK's involvement in the Iraq war"⁶⁴ so steps are being made towards other regions as well.

While the ICC is considering Georgia's case, by already being under investigation and Ukraine for the Crimean situation, Russia has announced its withdrawal from the not even ratified, Statute⁶⁵ considering that "The court has unfortunately failed to match the hopes one had and did not become a truly independent and respected body of international justice" as advocated by the Ministry of Foreign affairs.⁶⁶ For not being an independent or respected body is yet to be seen, as sometimes the Court cannot actually do its work because of the veto power of Russia, China or the USA. Further on, even though it took the Court 8 years to start an investigation into the Georgian situation, it still did, but in this case, nor in the Iraq/UK case did it need a UN SC Resolution to do so, as if that would have been the case most probably the situation would not have gone further than the UN *table* because of UK's (and not only) veto power.

Other powerful countries have already signed agreements with countries in order to shield their citizens, and here we are referring to the United States of America, a very big supporter of the ICC until the change of administration in 2001, when the *war against terror* began. Later on, president Bush decided that the USA will not ratify the Statute, voted against it, withdrew from the Statute and concluded agreements⁶⁷ as established in article 98 paragraph 2 of the Statute with countries to shield its citizens from any prosecution by the I.C.C..⁶⁸

⁶¹ Kamari Maxine Clarke, "Is the ICC targeting Africa inappropriately or are there sound reasons and justifications for why all of the situations currently under investigation or prosecution happen to be in Africa?", <http://iccforum.com/africa#Clarke>

⁶² Statement of the President of the Assembly of States Parties on the process of withdrawal from the Rome Statute by Burundi, ICC-CPI-20161014-PR1244, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1244>

⁶³ Daniel Bekele, Africa director at Human Rights Watch in <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>

⁶⁴ <http://qz.com/820738/the-african-leaders-leaving-the-international-criminal-court-actually-have-a-chance-to-fix-it/>

⁶⁵ <http://www.aljazeera.com/news/2016/11/russia-pulls-international-criminal-court-161116132007359.html>

⁶⁶ *idem*

⁶⁷ The United States and the International Criminal Court, <https://www.hrw.org/legacy/campaigns/icc/us.htm>

⁶⁸ See in this sense, Roht-Arriaza, N., *Just a 'Bubble'? Perspectives on the Enforcement of International Criminal Law by National Courts*, Journal of International Criminal Justice 11 (2013), Published by Oxford University Press. All; Zapala, S., *precit.*

Conclusions

Examining, investigating, prosecution and condemning those responsible for war crimes, crimes against humanity, genocide or the crime of aggression is not an easy task. States are sometimes reluctant to try those responsible for alleged crimes that fall under the Court's Statute.

Despite all the above mentioned set-backs, the International Criminal Law as well as its jurisdiction has come a long way since it was set up. The fact that countries do not want to cooperate with a permanent Court, is not of a legal matter but more of a political and diplomatic one.

The court was not established just to prosecute and convict, the court was established so that it would end impunity and bring justice to victims of some of the most heinous crimes. The situations it is dealing with are difficult to investigate and examine. Most of the time, the court encounters reluctance on the ground and refusal to cooperate. Non-compliance with the arrest warrants is another issue the Court is confronted with. As we showed above, the countries wanting to exit the Statute fear prosecution of their own, not being willing to investigate the crimes committed on its territory, even though international help was offered.

On the other hand, on the question that keeps rising, on why the ICC is, almost at all investigating other countries or situations then African ones, some pertinent answers could be given. First, the African continent is mostly affected by crimes that fall under the Court's jurisdiction, second, even though heinous crimes are committed in other countries as well they do not fall under the Court's scope, as they do not reach the requested degree of gravity or are of a different nature, like organised crime or terrorism. Thirdly, the Court has jurisdiction only if it is proven that there is unwillingness or inability to examine, investigate and prosecute those individually criminal responsible for the crimes. Fourthly, the court might not even have jurisdiction because the country/countries involved are not part of the Statute, being able to circumvent even a Security Council referral to the Court by invoking their veto powers, some of them making sure that its citizens will not be prosecuted by the permanent Court, signing agreements on this matter with different countries. On the arrest warrants issues, the Court does not have its own police as such depending on other enforcement organs, which as we saw, sometimes due to politics fail to fulfil their duties.

But somehow, at the end of the day, what needs to be understood is, that it is irrelevant which judicial corpus will try those responsible for such crimes, as long as a trial, a fair trial, fulfilling all the necessary legal requirements is being conducted and the perpetrators are being brought to justice. What was and still is hoped is that, the Court should have learned from its *ad-hoc* predecessors which faced similar problems. Of course, the cases it handles are very complex and hard to establish but, it is certainly being expected from this specific Court to deal with its cases in a more expedite manner, while respecting the accused's rights to a fair trial. Similar to the ICC, throughout international criminal law's history it has been shown that the Courts and Tribunals dealing with these types of crimes have always faced criticism, and their legality and jurisdiction was put into question. The only difference is that, the latter is a permanent one, out of which, State Parties could opt out.

As a conclusion, we believe the International Criminal Court has come a long way since its establishment, and even though not many verdicts were handed down until now, some sort of justice has been done for the victims. Because the Court does not have

a dead-line to fulfil its mandate, like other specialised Tribunals, Chambers and Courts, we believe there is still a future for it.

Bibliography

Articles

1. Pella, V.V., *Towards an International Criminal Court*, in "American Journal of International Law", Vol. 44, (1950)
2. Zapala, S., *The reaction of the US to the entry into force of the ICC Statute: Comments on the UN SC Resolution 1422 (2002) and article 98 Agreements.*, Journal of International Criminal Justice, 1.1, Oxford University Press, 2003
3. Roht-Arriaza, N., *Just a 'Bubble'? Perspectives on the Enforcement of International Criminal Law by National Courts*, Journal of International Criminal Justice 11 (2013), Published by Oxford University Press. All;

Legal Documents

1. Nuremberg Charter "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945"
2. International Military Tribunal for the Far East "Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946 Tribunal established January 19, 1946"
3. Statute for the International Tribunal for the Former Yugoslavia, UN Resolution 827 from 25 May 1993
4. Statute for the International Tribunal for Rwanda, UN Resolution No. 955 from 8 November 1994
5. Statute of the International Criminal Court A/CONG.183/9 of 17 July 1997, in force since 2002
6. Extraordinary Chambers in the Courts of Cambodia, Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea Phnom Penh, 6 June 2003 General Assembly approved the draft Agreement by its resolution 57/228(B) of 13 May 2003, <http://legal.un.org/avl/ha/abunac/abunac.html>
7. ICC Preliminary Examinations, <https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx>,
8. Special Court for Sierra Leone, Residual Special Court for Sierra Leone Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone <http://www.rscsl.org/index.html>,
9. Extraordinary Chambers in the Courts of Cambodia, <https://www.eccc.gov.kh/en/about-eccc/introduction>
10. Special Tribunal for Lebanon, Agreement between the United Nations and the Lebanese Republic (hereinafter "the Agreement") pursuant to Security Council resolution 1664 (2006) of 29 March 2006, S/RES/1757 <https://www.stl-tsl.org/en/about-the-stl/636-creation-of-the-stl>

11. The Kosovo Specialist Chambers and Specialist Prosecutor's Office, <https://www.scp-ks.org/en>
12. Specialist Chambers and the Specialist Prosecutor's Office approved by the Kosovo Parliament in August 2015, Law n.05/L-053 <http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf>
13. UN SC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, on 31 March 2005
14. Economic Community of West African States(ECOWAS) Court of Justice
15. U N GA Human Rights Council, A/HRC/28/6/Add.1, 24 March 2015, https://www.upr-info.org/sites/default/files/document/gambia/session_20_-_october_2014/a_hrc_28_6_add.1_e.pdf
16. Resolution adopted by the Human Rights Council on 17 December 2015 A/HRC/RES/S-24/1, 22 December 2015;
17. African Commission on Human Rights and Peoples' Rights 332: Resolution on Human Rights in Conflict Situations - ACHPR/Res. 332 (EXT.OS/XIX) 2016, <http://www.achpr.org/sessions/19th-eo/resolutions/332/>
18. African Union Doc. EX.CL/952(XXVIII) the Assembly/AU/Dec.590(XXVI), http://www.au.int/en/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf
19. Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights The International Convention for the Protection of all Persons from Enforced Disappearances1, AS/Jur (2011) 45 4 November 2011 ajdoc45 2011 <http://assembly.coe.int/CommitteeDocs/2011/ajdoc45.pdf>

Case law

1. ICC, Situation in Georgia, case No. ICC-01/15, <https://www.icc-cpi.int/georgia>
2. ICC, *Situation in Mali, The Prosecutor v. Ahmad Al Faqi Al Mahdi*, case No. ICC-01/15
3. ICC, *Situation in Darfur Sudan, in the case of The Prosecutor v Omar Hassan Al Bashir*, case No.: ICC-02/05-01/09, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016,
4. ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09
5. ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-Trial Chamber, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, 04 March 2009
6. ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-Trial Chamber, *Second Decision on the Prosecution's Application for a Warrant of Arrest*, 10 July 2010
7. ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06,
8. <http://amicc.org/icc/lubanga>
9. ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute 14 March 2012,
10. ICC, *Situation in Mali, The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Version publique expurgée du « Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi », 25 février 2016, ICC-01/12-01/15-78-Conf-Exp, 19 August 2016

Other documents

1. Special Court for Sierra Leone, Introduction, <http://www.rscsl.org/index.html>,
2. Russia pulls out from International Criminal Court, *Moscow's decision follows UN report on Russian rights abuses and discrimination in Crimea*, 16 November 2016, <http://www.aljazeera.com/news/2016/11/russia-pulls-international-criminal-court-161116132007359.html>
3. Bensouda, F., *Africa Question, Is the International Criminal Court (ICC) targeting Africa inappropriately?* In Human Rights and International Criminal Law, ICC Forum.com <http://iccforum.com/africa>,
4. Nyabola, N, *Does the ICC have an African Problem?* <https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/51456-does-the-icc-have-an-africa-problem.html>
5. South Africa to quit International Criminal Court, Government to submit a bill to exit the ICC, amid growing concerns that Hague-based court tries mostly African leaders, <http://www.aljazeera.com/news/2016/10/south-africa-formally-applies-quit-icc-media-161021044116029.html>
6. Clarke, K. M., *Africa Question, Is the International Criminal Court (ICC) targeting Africa inappropriately?* In Human Rights and International Criminal Law, ICC Forum.com <http://iccforum.com/africa#Clarke>
7. Southern Africa Litigation Centre, New Release: Supreme Court of Appeal Rules on Bashir case, <http://www.southernafricalitigationcentre.org/2016/03/15/news-release-supreme-court-of-appeal-rules-on-bashir-case/>
8. Human Rights Council adopts four resolutions, creates commission of inquiry on Burundi - See more at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20619&LangID=E#sthash.jZilq1t2.dpuf>
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20619&LangID=E>
9. <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>
10. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016>
11. Burundi: ICC Withdrawal Major Loss to Victims, Latest Move Shows Government's Disregard for Victims 27 October 2016, <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>
12. The road ahead for the ICC in Burundi, <http://www.irinnews.org/analysis/2016/04/26/road-ahead-icc-burundi>
13. Gambia: Soldiers sentenced to death in secret trial must not be executed, 1 April 2015, <https://www.amnesty.org/en/latest/news/2015/04/gambia-soldiers-sentenced-to-death-in-secret-trial-must-not-be-executed/>
14. GAMBIA 2015/2016, <https://www.amnesty.org/en/countries/africa/gambia/report-gambia/>
15. Clarke, K.M. *"Is the ICC targeting Africa inappropriately or are there sound reasons and justifications for why all of the situations currently under investigation or prosecution happen to be in Africa?"*, <http://iccforum.com/africa#Clarke>

16. Statement of the President of the Assembly of States Parties on the process of withdrawal from the Rome Statute by Burundi, ICC-CPI-20161014-PR1244, <https://www.icc-cpi.int//Pages/item.aspx?name=pr1244>

17. Daniel Bekele, Africa director at Human Rights Watch in <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>

18. Chutel, L., *The African leaders leaving the International Criminal Court actually have a chance to fix it*, October 28, 2016 <http://qz.com/820738/the-african-leaders-leaving-the-international-criminal-court-actually-have-a-chance-to-fix-it/>

19. The United States and the International Criminal Court <https://www.hrw.org/legacy/campaigns/icc/us.htm>