



The International Criminal Court and its work in Africa

Confronting the myths

INTRODUCTION

This paper is an attempt to grapple with certain myths that have recently been propagated by a number of individuals, including government officials, political leaders and civil society members (including the media), regarding the world's first permanent international criminal tribunal – the International Criminal Court (ICC). The paper is intended as an introductory discussion document that might further stimulate debate about Africa's response to the ICC.

The ICC has sparked immense interest since it opened its doors in 2002. As one noted commentator puts it: 'Whether or not one is supportive of the International Criminal Court, any knowledgeable specialist has to admit that in the history of public international law it is a truly extraordinary phenomenon' (Schabas 2007: preface, xi). It may just be 'the most important institutional innovation since the founding of the United Nations'.¹

A measure of the Court's rise is the number of states that have joined the ICC. Since the Court's statute entered into force on 1 July 2002, it has been signed by 139 states and ratified by 108. Of those 108 States Parties, 30 are African.

Africa is thus well represented on the ICC. This siding with an institution designed to deal a blow to the perpetrators of international crimes continues a trend begun in the early 1990s. For example, Rwanda requested the UN Security Council to establish the International Criminal Tribunal for Rwanda (ICTR), although they differed on various issues, notably the death penalty and the location of the tribunal. Sierra Leone appealed to the UN to help deal with impunity in that country, and that request gave us the Special Court for Sierra Leone. Africa is therefore a continent that is no stranger to the

emerging international criminal justice initiatives that have marked the end of the cold war.

There is reason to believe that this initial support among African states for international criminal justice more generally and for the ICC in particular has begun to wane. Take the ICTR by way of example. Rwanda's President Paul Kagame has complained that the ICTR is moving too slowly and is grossly inefficient. President Kagame's views of international criminal justice have become even frostier after calls by a French judge for him to be investigated by the ICTR for the killing of his predecessor, which is widely regarded as the act that sparked the genocide (British Broadcasting Corporation News 2007; Wallis 2008). The French have been joined by the Spanish when, earlier this year, a Spanish magistrate said he also had evidence implicating President Kagame in international crimes but could not charge him because, as a sitting president, Kagame had immunity. Both cases are examples of domestic investigators probing the commission of international crimes by relying on so-called 'universal jurisdiction'. President Kagame's response, not surprisingly, has been to severely criticise the 'arrogant' assertion of universal jurisdiction by European states.

The ICC too has come under attack. Notwithstanding that it was President Kagame who called on the UN to create the ICTR to prosecute Rwandan genocidaires, his original support for international criminal justice has evaporated. His tone is bristling: he is of the view that the ICC has been created to deal only with African countries and that 'Rwanda cannot be part of that colonialism, slavery and imperialism' (Fritz 2008; Nation 2008). And, as we shall see, he is not alone in his criticism of international criminal justice, at the centre of which is the ICC.

The anti-ICC voices have reached a crescendo in response to the decision, in early July 2008, by the ICC Prosecutor to request an arrest warrant for President Omar al-Bashir of Sudan on account of his alleged involvement in genocide and crimes against humanity. But the underlying attacks on the ICC, of which President Kagame's form part, have been coming long before July 2008. They are captured in statements to the effect that the ICC is a Western, or imperialistic, initiative; that it is some form of colonial throwback or the imposition of a developed world's form of justice on an unsuspecting and servile African people; and that the Court is unhealthily preoccupied with the African continent.

IDENTIFYING THE MORE COMMON MYTHS

The founding document of the ICC is the Rome Statute, which was adopted after the UN Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court in Rome on 17 July 1998. The Rome conference was specifically aimed at attracting states and non-governmental organisations so that they might debate and adopt a statute that would form the basis for the world's first permanent international criminal tribunal.

The various allegations made against the ICC include the following principal complaints:

- First, there is the suggestion that the ICC is a creation of Western powers (Pheku 2008).
- Second, and related to the first allegation, is the argument that the ICC is a tool designed to target Africans, be they leaders or foot soldiers.

None of the myths about the ICC are substantiated by true facts

The argument finds support in the recent statement by the chairperson of the AU Commission, Jean Ping, who reportedly expressed Africa's disappointment with the ICC in noting that, rather than pursuing justice around the world, including in cases such as Columbia, Sri Lanka and Iraq, the ICC was focusing only on Africa and was undermining rather than assisting African efforts to solve its problems. The BBC has quoted Ping as complaining that it was 'unfair' that all those indicted by the ICC so far were African. While purporting to confirm that '[the AU] is not against international justice', he has apparently lamented that '[i]t seems that Africa has become a laboratory to test the new international law' (British Broadcasting Corporation News 2008).

- Third, and articulated most recently by a renowned African scholar, Mahmood Mamdani, is the more sophisticated (but also related) notion that the ICC is part of some new 'international humanitarian order' in which there is (to Mamdani) the worrying emphasis 'on big powers as enforcers of justice internationally' (Mamdani 2008).²

Part of his thesis is that the ICC is a component of this new order, an order that 'draws on the history of modern Western colonialism', and that the ICC shares an aim of 'mutual accommodation' with the world's only superpower: a fact that to Mamdani 'is clear if we take into account the four countries where the ICC has launched its investigations: Sudan, Uganda, Central African Republic and Congo', given that all of these 'are places where the United States has no major objection to the course chartered by ICC investigations' (Mamdani 2008). Mamdani concludes this line of reasoning by stating: 'Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn't oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them.'

The danger with each of these arguments is that they will find traction – not surprisingly – with dictators and their henchmen who seek reasons to delay or resist being held responsible under universally applicable standards of justice. But compounding matters is the fact that each of the arguments is not substantiated by the true facts, or, perhaps worse (even if unwittingly so), is a distortion of the true facts. As one commentator has pointed out, the danger is that 'the rhetoric of condemnation – that the ICC is an agent of neocolonialism or neo-imperialism, that is it anti-African – may so damage the institution that ... it is simply abandoned' (Fritz 2008).

The ICC is a tool for justice in a continent where impunity (the polar opposite of justice) has been emblematic. The importance of international criminal law for the African continent is starkly highlighted by a senior legal adviser (an African) in the ICC's Registry (Mochochoko 2005: 249):

No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime. This served to strengthen Africa's determination and commitment to the creation of a permanent, impartial, effective and independent judicial mechanism to try and punish the perpetrators of these types of crimes whenever they occur.

The ICC is a call to responsibility for persons guilty of 'the most serious crimes of concern to the international community as a whole' (International Criminal Court 2002: preamble). In this respect it takes seriously the words of Justice Robert Jackson, chief prosecutor at Nuremberg, who famously said that letting major war criminals live undisturbed to write their memoirs in peace 'would mock the dead and make cynics of the living' (Jackson 1947: 8).

It is only by ignoring the serious and engaged involvement of African states in the Court's creation that one can assert that the ICC is a Western court

The function of a trial in the ICC is therefore, first and foremost, a proclamation that certain conduct is unacceptable to the world community. That may sound like an obvious statement, particularly to a domestic law prosecutor, but it is not one international law has always embraced. While war crimes are committed every day and whole races have been defined by their experience of genocide or crimes against humanity, international laws designed to punish these acts have, for a variety of political reasons, only been put into practice at Nuremberg and Tokyo after the Second World War, and in the 1990s by the creation of the Hague tribunals. This very limited outpouring of indignation has for too long sent an insidious message at the international level that, to a large degree, war crimes and crimes against humanity are followed by impunity. For anyone committed to the notion of human rights, the message must change. As Kofi Annan reminded when observing the International Day of Reflection on the 1994 Genocide in Rwanda:

We have little hope of preventing genocide, or reassuring those who live in fear of its occurrence, if people who have committed this most heinous of crimes are left at large, and not held to account. It is therefore vital that we build and maintain robust judicial systems, both national and international – so that, over time, people will see there is no impunity for such crimes (United Nations 2004).

The ICC and national criminal law systems working to complement it are the means by which we can cure this defect in the international legal system. The act of

punishing particular individuals – whether the leaders, star generals or foot soldiers – becomes an instrument through which individual accountability for massive human rights violations is increasingly internalised as part of the fabric of our international society. At the same time, it is a method by which we put a stop to the culture of impunity that has taken hold at the international level, and by which we provide a public demonstration of justice.

The ICC, building on the work done by the Hague tribunals, is the means by which such a public account of justice is now possible in respect of every crime set out in the Rome Statute. In that regard, it is of singular importance to note – as the recent furore over the ICC's call for President al-Bashir's arrest highlights – that no one, not even a serving head of state, will be able to claim immunity from the jurisdiction of the Court.

It is of obvious concern, then, that the ICC has come under such vitriolic attack from within Africa and by scholars associated with Africa. What this paper proceeds to do is to consider the criticisms in turn. How valid are the attacks on the ICC? And what lessons (if any) can be learned from the fact that these attacks have been made?

AN INTERNATIONAL CRIMINAL COURT BY AND FOR AFRICANS – IF YOU TAKE THE TIME TO LOOK CLOSELY

The suggestion that the ICC is the creation of Western powers couldn't be further from the truth. It is only by ignoring the history of the Court's creation and the serious and engaged involvement of African states in that history that one can assert that the ICC is a Western court. The assertion is in any event belied by the Court's composition. While the Court is situated in The Hague, in the Netherlands, its staff is drawn from around the world and, in accordance with UN rules on regional representation, includes a number of Africans. For example, of the 18 Judges, four are from Africa,³ and the Deputy President of the Court is an African, Akua Kuenyehia. The Prosecutor is Luis Moreno-Ocampo (an Argentinean) and his deputy is Fatou Bensouda, a highly respected Gambian who was formerly attorney-general and then minister of justice in her home country.

The ICC is not a tool designed for use specifically in least-developed and developing countries in Africa and Asia. This view is demeaning to Africans more generally, but, more specifically, does no justice to the high ideals and hard work that marked African states' participation in bringing the ICC to life in Rome. Thus, '[c]ontrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding

of economic aid if they did not follow', a closer inspection of 'the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community' (Mochochoko 2005: 243).

African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalised.

In the period leading up to the Rome diplomatic conference, various ICC-related activities were organised throughout Africa. This approach (replicated in other regional blocs) was consistent with the idea of enhancing universal support, and was also seen as fostering a better understanding of the substantive issues raised in the draft text of the statute (Mochochoko 2005: 246). Some 90 African organisations based in, among others, Kenya, South Africa, Nigeria, Uganda, Rwanda and Ethiopia joined the NGO Coalition for an International Criminal Court. They lobbied in their respective countries for the early establishment of an independent and effective international criminal court (Mochochoko 2005: 248).

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Also forgotten by those who would label the Court 'Western', is the active and important role played by the Southern African Development Community (SADC) in its support for the ICC. In ICC-related negotiations after the International Law Commission presented a draft statute for an international criminal court to the General Assembly in 1993, experts from the group met in Pretoria, South Africa in September 1997 to discuss their negotiation strategies and to agree on a common position in order to make a meaningful impact on the outcome of negotiations. This meeting provided impetus for a continent-wide consultation process on the creation of the Court (Mochochoko 2005: 248). The participants agreed on a set of principles that were later sent to their respective ministers of justice and attorneys-general for endorsement. These principles – which no doubt today

would draw winsome criticism from African critics of the Court – included the far-reaching suggestions that:

- The Court should have automatic jurisdiction over genocide, crimes against humanity and war crimes
- The Court should have an independent prosecutor with power to initiate proceedings *proprio motu*
- There should be full cooperation of all states with the Court at all stages of the proceedings
- That stable and adequate financial resources should be provided for the Court and that states should be prohibited from making reservations to the statute

On the basis of the principles submitted to them, SADC ministers of justice and attorneys-general issued a common statement that became a primary basis for the SADC's negotiations in Rome (Maqungo 2000). These principles also appeared in the Dakar declaration on the ICC and other declarations (Mochochoko 2005: 248–9). At a meeting on 27 February 1998, the council of ministers of the Organisation of African Unity (OAU, now the African Union) took note of the Dakar declaration and called on all OAU member states to support the creation of the ICC. This resolution was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998.

During the Rome conference itself, several circumstances resulted in African states having a significant impact on the negotiations – for example, African delegates participating in the conference had two guiding documents: the SADC principles and the Dakar declarations. Both of these were in line with the principles of the 'like-minded group', the members of which were committed to a court independent from Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes (Mochochoko 2005: 250).

Most of the work of the conference was carried out in working groups and informal working sessions. It is notable that Africans took the lead in either chairing or coordinating various issues. For instance:

- The Lesotho delegate was elected one of the vice-chairpersons of the conference and also coordinated the formulation of part 9 of the Rome Statute
- South Africa was a member of the drafting committee of the conference and coordinated the formulation of part 4 of the Rome Statute. As a consequence, South Africa was frequently invited to participate in the meetings of the bureau of the conference

As Schabas reminds us, at the Rome conference '[a] relatively new force, the Southern African Development

Community ... under the dynamic influence of post-apartheid South Africa, took important positions on human rights, providing a valuable counter-weight to the Europeans in this field' (Schabas 2007: 19).

It is thus beyond doubt that African states had the opportunity to ensure that the principles enshrined in the SADC and Dakar declarations were implemented to the extent possible. Regular African group meetings also contributed towards a coordinated effort.

Then, after the statute was completed, in February 1999 Senegal became the first State Party to ratify the Rome Statute. The Court enjoys – at least on paper – significant support in the region, as evidenced by the large number of ratifications of the statute. To date, the Rome Statute has been signed by 139 states and 108 states have ratified it.⁴

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Of those 108 states a very significant number – 30 – are African:⁵ Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Congo (Brazzaville), Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia. African commitment to the ICC, and to the cause of international justice, has been demonstrated in other respects. For example, the strategic partnership agreement signed at the EU–Africa summit in Lisbon in December 2007 says that 'crimes against humanity, war crimes and genocide should not go unpunished and their prosecution should be ensured'.⁶

THE INTERNATIONAL CRIMINAL COURT IN AFRICA: INVITED YET NOT WELCOME?

The ICC is currently considering four situations. Three of those arise from so-called 'state referrals' from Democratic Republic of the Congo, Uganda, and Central African Republic, all States Parties to the Rome Statute. The fourth has come to the Court by a Security Council referral requesting the ICC to consider the serious crimes that have been committed in Sudan, which has not

ratified the Rome Statute. In addition to these, the Court is also considering violations in Côte d'Ivoire, which has also not ratified the Rome Statute but which has made a declaration in accordance with article 12(3), which allows a non-State Party to lodge a declaration with the Registrar of the Court accepting the Court's jurisdiction for specific crimes.

In what follows, a short description is provided of each of the cases currently before the ICC with a discussion thereafter of the practice of state referral. While geography tells us that these are all African situations, that fact alone cannot prove that the ICC has a discriminatory practice of choosing African violations over those from other parts of the world.

Current investigations following state referrals

The Office of the Prosecutor is currently investigating the situations in Democratic Republic of the Congo, Uganda and Central African Republic following referrals from their respective governments. It is important to consider these referrals in greater detail to appreciate their significance for Africa and the ICC respectively.

Uganda

The Ugandan government referred the situation in its country to the Prosecutor in December 2003, and an investigation was initiated in July 2004. The investigation has focused on northern Uganda where numerous atrocities have been committed against the civilian population. The crimes under investigation include crimes against humanity and war crimes. In July 2005, the Court issued warrants for the arrest of five senior commanders of the Lord's Resistance Army (one of whom is now deceased), including its leader, Joseph Kony. The Office of the Prosecutor continues to seek the cooperation of relevant members of the international community for the arrest and surrender of the remaining commanders.

Democratic Republic of the Congo

In March 2004, Democratic Republic of the Congo authorities referred the situation in the country involving crimes within the jurisdiction of the Court to the Office of the Prosecutor. An investigation was opened in June 2004 and, having analysed the crimes within the Court's jurisdiction and identified the gravest crimes, the Office of the Prosecutor has focused its initial investigations in the Ituri region.

In February 2006, the Court issued a warrant of arrest for Thomas Lubanga, president of the Union of

Congolese Patriots (an armed group operating in Ituri province) on charges of enlisting, conscripting and using child soldiers. Lubanga was arrested and surrendered to the ICC in March 2006.⁷

In July 2007, the Court issued a warrant for the arrest of Germain Katanga, former senior commander of the Patriotic Forces of Resistance in Ituri. He is charged with crimes against humanity and war crimes. Katanga has since been surrendered to the Court by the Congolese government.⁸

The third person to be surrendered to the Court was Mathieu Ngudjolo Chui, a colonel in the Congolese armed forces and alleged former leader of the National Integrationist Front. The charges against him, which are yet to be confirmed, are in respect of war crimes and crimes against humanity. Following a decision of the Pre-trial Chamber, the cases against Chui and Katanga have now been joined.

On 28 April 2008, the Pre-trial Chamber unsealed the warrant of arrest against Bosco Ntaganda, former deputy chief of general staff for military operations of the Forces patriotiques pour la libération du Congo. He is alleged to have enlisted, conscripted and used children under the age of 15 years for active participation in hostilities in Ituri between July 2002 and December 2003. Ntaganda is still at large.

Central African Republic

The Prosecutor announced the opening of an investigation into the situation in Central African Republic in May 2007, following a referral in December 2004 (International Criminal Court 2005). The Office of the Prosecutor received information from Central African Republic authorities, non-governmental organisations and international organisations regarding alleged crimes. As is the case in the other investigations, the focus has been on the most serious crimes, most of which were committed between 2002 and 2003. The situation in Central African Republic has been noteworthy for the particularly high number of crimes involving sexual violence.⁹

The first person to have been arrested (by the Belgian authorities) in relation to this investigation is Jean-Pierre Bemba Gombo, president and commander-in-chief of the Movement for the Liberation of Congo. He is alleged to be responsible for the commission of war crimes and crimes against humanity in Central African Republic, from about 25 October 2002 to 15 March 2003. Bemba was arrested by Belgian authorities on 24 May 2008 on a warrant issued by the Court, surrendered to the ICC on 3 July 2008, and transferred to its detention centre in The Hague.

The Court's screening process

It is so that the Office of the Prosecutor's current cases are but a small minority of matters that the Court has been asked to investigate. Before glib conclusions can be drawn about the African focus of the Court's docket of cases, it is necessary to consider the process by which cases are screened.

As a starting point it may be noted that the Office of the Prosecutor has adopted an impressively open and transparent approach to its work (Schabas 2007: 356). The Office of the Prosecutor has explained in public documents its strategies and policies and – within the necessary constraints of confidentiality – attempted to justify the exercise of its discretion. For example, article 15(6) of the Rome Statute requires the Prosecutor to inform those who have provided information concerning a possible prosecution when he concludes that there is no reasonable basis to proceed further. The Prosecutor has interpreted the provision generously and, as we shall see below, has issued public and detailed statements explaining his decision not to investigate crimes committed in Iraq and Venezuela, and has issued more general comments explaining why situations fall outside the jurisdiction of the Court.

Before glib conclusions can be drawn about the African focus of the Court's docket of cases, it is necessary to consider the process by which cases are screened

The Office of the Prosecutor receives numerous submissions from various sources alleging the commission of crimes within the jurisdiction of the Court. A summary of the submissions received by the Office of the Prosecutor is publicly available.¹⁰ After attracting the necessary ratifications the Rome Statute entered into force on 1 July 2002. And in just over a year of its existence, by November 2003, the Court, through the Prosecutor, received over 650 complaints. It is important to consider these complaints. They come to the Court from a variety of sources, including States Parties and non-States Parties, non-governmental organisations and individuals.¹¹ As will be seen, they reveal a disturbing lack of understanding about the Court and the Court's functioning.

Fifty of the complaints contained allegations of acts committed before 1 July 2002. This is problematic

because the ICC's jurisdiction is forward looking, and it does not have retrospective jurisdiction over acts committed prior to 1 July 2002. A number of communications alleged acts that fall outside the subject matter of the Court's jurisdiction, and complained about environmental damage, drug trafficking, judicial corruption, tax evasion and less serious human rights violations that do not fall within the Court's remit.

Thirty-eight complaints alleged that an act of aggression had taken place in the context of the war in Iraq in 2003. The problem here is that the US is not a party to the Statute, and, in any event, the ICC cannot exercise jurisdiction over alleged crimes of aggression until the crime is properly defined – something the drafters of the Statute expressly left until a future date, most probably some time after 2009. Two communications referred to the Israeli-Palestinian conflict. The difficulty here is that Israel is not a party to the statute, and the Palestinian authority is not yet a state and so cannot be a party. By early 2006 the Prosecutor's office recorded that it had received 1 732 communications from over 103 countries, and that a staggering 80 per cent of those communications were found to be 'manifestly outside [the Court's] jurisdiction after initial review' (International Criminal Court 2006a).

In short, the overwhelming number of communications directed at the Office of the Prosecutor is simply not actionable. That fact alone places in better perspective the actual – and significantly smaller – number of communications that have lawfully been open for consideration by the Prosecutor for possible investigation. The approach adopted by the Office of the Prosecutor in screening these submissions will be discussed in detail below, and results ultimately in a decision as to whether there is a reasonable basis to proceed with an investigation. The policy of the Office is to maintain the confidentiality of the analysis process, in accordance with the duty to protect the confidentiality of senders, the confidentiality of information submitted and the integrity of analysis or investigation.¹²

In the great majority of cases, where a decision is taken not to initiate an investigation on the basis of communications received, the Office submits reasons for its decision only to senders of communications. This policy is consistent with rule 49(1) of the Court's Rules of Procedure and Evidence, and is necessary to prevent any danger to the safety, well-being and privacy of senders and helps to protect the integrity of the analysis process. However, in the interests of transparency, the Office may make publicly available its reasons for a decision where three conditions are met:

- A situation has warranted intensive analysis
- The situation has generated public interest and the

fact of the analysis is in the public domain

- Reasons can be provided without risk to the safety, well-being and privacy of senders

Accordingly, in the interests of transparency, the Office made available its decisions in relation to Iraq and Venezuela, both of which are available on the Court's website.¹³ Five unspecified situations were reported to be subject to ongoing examination, although their identity was not publicly disclosed (International Criminal Court 2006a: 9). Among them are Central African Republic, which has since been referred to the Court, and Côte d'Ivoire, which has made a declaration under article 12(3). As Schabas points out, that 'leaves three remaining situations about which we can only speculate. Columbia and Afghanistan would be good candidates for the list' (Schabas 2007: 163).

A review of the complaints received by the ICC reveals a disturbing lack of understanding about the Court

The responses to information received regarding the alleged commission of crimes in Venezuela and Iraq illustrate how this process functions in practice.¹⁴ These examples are useful, given the complaint that the ICC is unfairly skewing its attention in favour of African states. Even if one disagrees (legally or otherwise) with the Office of the Prosecutor's approach for refusing to act on requests for investigation, a reading of those reasons reveals that there is little basis for suggesting that the ICC is a Court that unfairly, or irrationally, or arbitrarily, or without due consideration discriminates in its selection of certain situations over others.

Venezuela

Most of the information submitted to the Office of the Prosecutor related to crimes alleged to have been committed by the Venezuelan government and associated forces. One complaint related to crimes alleged to have been committed by groups opposed to the government. In his response, the Prosecutor emphasised his duty to analyse the information received on potential crimes in order to determine whether there was a reasonable basis on which to proceed with an investigation (International Criminal Court 2002: article 53(1)(a)). He also stated that the analysis of the situation in Venezuela was conducted

under article 15 of the statute since no state referral had been received.

The Prosecutor reviewed the information provided, together with additional material obtained from open sources, media reports and reports of international and non-governmental organisations. He noted that, as Venezuela had ratified the Rome Statute in July 2000, the Court had jurisdiction over crimes perpetrated on the territory or by nationals of Venezuela after 1 July 2002, when the Rome Statute entered into force. Because a significant number of the allegations referred to incidents alleged to have occurred prior to 1 July 2002, the Office of the Prosecutor focused only on those that fell within the temporal jurisdiction of the Court.

In the view of the Office, the available information did not provide a reasonable basis to believe that the crimes against humanity allegedly perpetrated against opponents of the Venezuelan government were committed as part of a widespread or systematic attack against any civilian population, as required under article 7(1) of the statute. The allegations relating to crimes against humanity committed by groups opposed to the government were found, with the exception of a few incidents, to be very generalised; they could not, furthermore, be substantiated by open-source information. Again, the Prosecutor found that the information available did not provide a reasonable basis to believe that the crimes in question would have been committed as part of a widespread and systematic attack against any civilian population.

Although critics fear a Court with unprincipled 'universal' aspirations, the Prosecutor has to date never exercised this power to initiate an investigation

There were no specific allegations of war crimes having been committed. In any event, based on the available information concerning events in Venezuela since 1 July 2002, the situation was found not to meet the threshold of an armed conflict. There was therefore no reasonable basis to believe that war crimes within the jurisdiction of the Court had been committed.

Finally, there were no allegations concerning genocide, and the available information was found not to provide a reasonable basis to believe that the crime of genocide had been committed. The Prosecutor concluded

that the statutory requirements to seek authorisation to initiate an investigation into the situation in Venezuela had not been satisfied. As stated in the response, the Prosecutor's conclusion could be reconsidered in the light of new facts or evidence, and it remained open to the information providers to submit any such information.

Iraq

The allegations regarding crimes committed in Iraq related to the launching of military operations and the resulting fatalities by US and allied forces. The Prosecutor's response to the allegations outlined the process of receiving and analysing information employed by the Office of the Prosecutor. The response noted that the events in question occurred on the territory of Iraq, which was not a State Party and which had not lodged a declaration of acceptance of jurisdiction under article 12(3). In addition, crimes committed on the territory of a non-State Party only fell within the jurisdiction of the Court when the perpetrators were State Party nationals.

A number of submissions concerned the legality of the war in Iraq in relation to which the Prosecutor advised that the Court cannot exercise jurisdiction over the crime of aggression, and that under the Rome Statute the Court has a mandate to examine conduct during the conflict and not the legality of the decision to engage in armed conflict.

Few factual allegations were submitted concerning genocide and crimes against humanity. The Prosecutor was of the view that the available information provided no reasonable indications that coalition forces had 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such', as required in the definition of genocide (International Criminal Court 2002: article 6). Similarly, the available information provided no reasonable indications of the required elements for a crime against humanity, namely, a widespread or systematic attack directed against any civilian population (International Criminal Court 2002: article 7).

The Office of the Prosecutor examined allegations relating to the targeting of civilians and to excessive attacks (namely, where the civilian damage or injury was excessive in relation to the anticipated military advantage), and found no reasonable basis to conclude that either crime had been committed.

With respect to allegations concerning the wilful killing or inhuman treatment of civilians by State Party nationals, the Prosecutor concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed. The information available indicated that there were an estimated four to 12 victims of wilful killing and a limited number of victims of inhuman treatment, totalling less

than 20 persons. The Prosecutor's decision on these crimes was that they did not meet the criteria set out in article 8(1) or the general threshold of gravity.¹⁵

No mean feat: assessing the gravity of the situation

We have already seen how the state-referral mechanism has caused the ICC, through African invitation, to exercise jurisdiction over the situations in Uganda, Democratic Republic of the Congo and Central African Republic (all States Parties) and, in future, Côte d'Ivoire (to date not a State Party) (International Criminal Court 2002: article 15(1)). Crucially, the Prosecutor also has the power to open an investigation on his or her own initiative on the basis of information indicating the commission of crimes within the Court's jurisdiction. Contrary to the expectations of those critics who fear a Court with unprincipled 'universal' aspirations,¹⁶ the Prosecutor has to date never exercised this power to initiate an investigation.

But whether it is a State Party referral or a future *proprio motu* investigation by the Prosecutor, even where all the jurisdictional requirements have been met the case in question must meet an additional threshold of gravity before the Prosecutor can intervene. This criterion is most clearly expressed in article 17(1)(d) of the Rome Statute.¹⁷ As the Iraq and Venezuela requests indicate, in determining whether a case is grave enough to justify further action by the Court, the Prosecutor will take into account a range of factors, including the nature of the crimes, the scale and manner of their commission, as well as their impact.¹⁸

A proper appreciation of the gravity criterion in the Rome Statute requires one to acknowledge the inherent differences between domestic and international prosecutions, and to simultaneously appreciate the immense challenges facing the Prosecutor.

Louis Arbour, who was then the prosecutor of the International Criminal Tribunal for the former Yugoslavia, noted in a statement to the December 1997 session of the Preparatory Committee on the Establishment of an International Criminal Court that there is a major difference between international and domestic prosecution. In a domestic context, there is an assumption that all crimes that go beyond the trivial or *de minimis* range are to be prosecuted. But before an international tribunal 'the discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex. In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for

international intervention, rather than to weed out weak or frivolous ones.¹⁹

Philippe Kirsch QC and Darryl Robinson provide further elaboration. They point out:

Since the issue of trigger mechanisms relates to the special problems of activating an international criminal justice mechanism, it is hardly surprising that there could be no relevant legal precedents in national procedural laws. ... The ICC, however, presented a novel problem as it represented the first permanent international criminal law institution empowered to deal with future and unknown situations. Thus, it was necessary to determine the procedural mechanisms to 'trigger' ICC proceedings over future situations that may arise (Kirsch and Robinson 2002: 620–621).

One of the ways in which the drafters of the Rome Statute purported to assist the ICC Prosecutor to choose from many complaints, the appropriate ones for international intervention by the Court, was by means of the gravity criterion. That the Prosecutor requires this 'trigger mechanism' is made clear by the breadth and depth of complaints that the Office of the Prosecutor has received. In its first three years of operation alone, the Office received nearly 2 000 communications from individuals or groups in more than 100 countries. One can thus appreciate the manifest difference between the Prosecutor's decisions on investigation and prosecution from those that a domestic prosecutor might have to make, the place for the gravity criterion within the Rome Statute, and the concomitant constraints placed on the Prosecutor.

The Prosecutor's decisions are subject to oversight by the Judges of the Court

The Prosecutor has said that, in determining whether to exercise his powers, he is required to consider three factors, all of them rooted in the provisions of the Rome Statute. First, he must determine whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (Schabas 2007: 163; International Criminal Court 2002: article 53(1)(a)). Second, he must assess whether the case would be admissible in accordance with article 17 of the statute – this necessitates examining the familiar standard of whether the national courts are unwilling or unable genuinely to

proceed. But it also involves assessing what one commentator described as ‘the rather enigmatic notion of “gravity”’ (Schabas 2007: 164). If these conditions are met, then the third requirement must be considered: whether it is in the ‘interests of justice’ for the matter to be investigated.²⁰ As the Prosecutor himself has explained:

While, in a general sense, any crime within the jurisdiction of the Court is ‘grave’, the Statute requires an additional threshold of gravity even where the subject-matter jurisdiction is satisfied. This assessment is necessary as *the Court is faced with multiple situations involving hundreds of thousands of crimes and must select situations in accordance with the Article 53 criteria*’ (International Criminal Court 2006c: 8, emphasis added).

Furthermore, the Prosecutor’s decisions are subject to oversight by the Judges of the Court;²¹ that is to say, much of the Prosecutor’s so-called independence is in fact significantly constrained. While the Prosecutor is not required to obtain authorisation to initiate an investigation when a State Party or the Security Council refers a situation to the Court, he is still required to determine at a preliminary stage whether there is a ‘reasonable basis’ to proceed’ (Schabas 2007: 239).

Three of the four cases currently before the ICC were self-referred by the African states in question

There is increased oversight over negative decisions to investigate. For instance, where the Prosecutor declines to investigate a case he shall inform the Pre-trial Chamber (and the relevant state, in cases of State Party referrals, and the Security Council, in cases of a Security Council referral) of his or her conclusion and the reasons for the conclusion (International Criminal Court 2002: article 53(2)). In response, the state concerned or the Security Council may demand that the Pre-trial Chamber review a decision of the Prosecutor not to proceed, and may request the Prosecutor to reconsider that decision (International Criminal Court 2002: article 53(3)(a)). So, too, where the Prosecutor, taking into account the gravity of the crime and the interests of victims, nonetheless declines to initiate an investigation because he has substantial reasons to believe that an investigation would not serve the interests of justice (International Criminal Court 2002: article 53(1)(c)), the Prosecutor must inform the Pre-trial Chamber of the Court accordingly. The Pre-trial Chamber may, on its own initiative, review this

decision, in which event it becomes final only when confirmed by the Chamber (International Criminal Court 2002: article 53(3)(b)).

The Court’s assumption of jurisdiction: not lightly, and on behalf of African states

While it is true that the Court’s first cases involve situations on the African continent, it is simplistic to argue that the ICC is therefore unfairly targeting Africa. As the short synopsis of each situation has already indicated, each of these cases is before the ICC because the state in question self-referred the situation to the Court in terms of the Rome Statute. Furthermore, the Prosecutor’s decision to investigate each of these situations has been taken within the constraints laid down by the Rome Statute, including such factors as the gravity criterion and whether a reasonable basis exists for the prosecution of the perpetrators.

As will already be clear from the brief discussion of the various referrals and requests for investigation directed at the Prosecutor, the Rome Statute strictly defines the jurisdiction of the Court. The subject-matter jurisdiction of the Court is limited to investigations of the most serious crimes of concern to the international community, and the temporal jurisdiction of the Court is limited to crimes occurring after the entry into force of the Statute, namely 1 July 2002 (International Criminal Court 2002: article 11).

For those states that become party to the statute after 1 July 2001, the ICC has jurisdiction only over crimes committed after the entry into force of the statute with respect to that state (International Criminal Court 2002: article 11(2)). In addition to these subject-matter and temporal restrictions, the Rome Statute further restricts the jurisdiction of the Court to the most clearly established bases of jurisdiction known in criminal law: the territorial principle and the active-nationality principle. The Court may act only where its jurisdiction has been accepted by the state on whose territory the crime occurred, or the state of nationality of the alleged perpetrators.

All states that become parties to the Rome Statute thereby accept the jurisdiction of the Court with respect to these crimes. That is a consequence of ratification. In order to become a party to a multilateral treaty, a state must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by the treaty. A state may express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. One of the most common ways is ratification.

A state that has ratified the Rome Statute may refer a situation to the Prosecutor where any of these crimes appears to have been committed if the alleged perpetrator is a national of a State Party, or if the crime in question was committed on the territory of a State Party, or if a state has made a declaration accepting the jurisdiction of the Court. Thus, article 12 of the Rome Statute provides that the Court may exercise jurisdiction if: (1) the state where the alleged crime was committed is a party to the Statute (*territoriality*); or, (2) the state of which the accused is a national is a party to the Statute (*nationality*).

The Uganda, Democratic Republic of the Congo and Central African Republic referrals demonstrate how, in terms of article 14 of the statute, any State Party may refer to the Court a 'situation' in which one or more crimes within the jurisdiction of the Court appear to have been committed, so long as the preconditions to the Court's exercise of jurisdiction have been met, namely, that the alleged perpetrators of the crimes are nationals of a State Party, or the crimes were committed on the territory of a State Party.²² As an illustration, it is just as well to recall the announcement by the Court after it received the first of its three African requests for investigation, from Democratic Republic of the Congo:

The Prosecutor of the International Criminal Court, Luis Moreno Ocampo, has received a letter signed by the President of the Democratic Republic of Congo (DRC) referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002. By means of this letter, the DRC asked the Prosecutor to investigate in order to determine if one or more persons should be charged with such crimes, and the authorities committed to cooperate with the International Criminal Court.²³

The referrals – particularly by Uganda and the Congo – moreover demonstrate how African states have attempted to use the ICC for political ends. It is no secret that the Ugandan and Congolese governments had their own reasons for inviting the ICC to do business in their respective countries. These appear to have been to employ the Court to prosecute rebel bands within their own territories (Schabas 2007: 36). While there has been criticism directed at the ICC Prosecutor for too tamely complying with these self-referrals, there is a double irony in suggesting that these African situations are proof of the ICC's meddling in Africa.

It is thus difficult to comprehend or take seriously suggestions that the Congo, Uganda and Central African Republic referrals stand as proof that the ICC is unhealthily preoccupied with Africa. It is not that the

ICC is transmuting into a Western court with some colonial affection for punishment of Africans guilty of crimes against humanity. Assertions about the Court's apparently over-developed appetite for African atrocities, or intimations of US behind-the-scenes machinations in the Court's choice of African investigations, are complaints that do not match the facts or the processes adopted by the Office of the Prosecutor.

The referrals – particularly by Uganda and the Congo – demonstrate how African states have attempted to use the ICC for political ends

A reflection on the Office of the Prosecutor's screening process and the self-referrals by Uganda, the Congo and Central African Republic suggest rather that Africa is in the Court's sights because African States Parties – with serious consideration, one may fairly assume, of their rights and responsibilities as States Parties to the Rome Statute, and/or because of their own strategic objectives – have chosen that outcome, and the Court has accepted that there is a reasonable basis for initiating an investigation. There is thus insincerity to the claim that the Court is acting 'unfairly' in respect of Africa. It reminds one of the host who invites guests for dinner only to feign disappointment when they arrive.

The invitations made by the independent governments of Uganda, Democratic Republic of the Congo and Central African Republic to the ICC to investigate situations in their respective states, are invitations made by States Parties to the Rome Statute. This is not insignificant. By ratifying the statute these three states showed their acceptance (morally and legally, under international law) of the Rome Statute's ideals.

Those ideals are captured in the statute's preamble, which records, among others, a recognition by States Parties that 'grave crimes threaten the peace, security and well-being of the world'; an affirmation 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'; a determination 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'; and 'to these ends and for the sake of present and future generations, to establish an independent permanent International

Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole’.

By becoming States Parties, then, the Congo, Uganda and Central African Republic ‘resolved’, along with all other states that chose or choose to become members of the Rome Statute, ‘to guarantee lasting respect for the enforcement of international justice’. Putting to one side the political mileage that these governments might have assumed was to be gained by self-referring a situation to the Court, the fact remains that their actions also show respect for the principles of international criminal justice through a request to the Court for assistance in acting against those members of rebel groups who are most responsible for international crimes.

Suggestions that these three states are unwitting pawns in some neocolonial project are not only patronising – they also devalue the international rule of law. It is worth noting the generic problems with treaty implementation that have been encountered in many countries in terms of following up the ratification of human rights instruments, for example.²⁴ It is not necessary to explore the literature on this issue, except to note that the Rome Statute is not the only instrument of great aspirational and practical utility that countries are quite prepared to ratify, but which they have failed over many years to take steps to implement or compile reports upon.

What is remarkable about the Uganda, Congo and Central African Republic referrals is that they buck this trend. By choosing to self-refer under the Rome Statute, each of the States Parties demonstrated their commitment to utilise the statute and the principles agreed on at Rome by African and other states. Sadly, critics who denounce the Court’s involvement in these states as anti-African not only miss the point – they also unwittingly contribute to what is rightly regarded as an African malaise: the failure to take seriously treaty commitments voluntarily assumed by states.

THE ICC AS (PROXY) SUPERPOWER: MISUNDERSTANDING UNIVERSAL JURISDICTION

Fears of an unbridled Court

Alex de Waal recently wrote that ‘... Africa has lost confidence in the ICC and is taking rapid steps to become a zone free of universal jurisdiction.’²⁵ It is not clear whether de Waal himself believes that the ICC was the means that established the ‘zone’ of universal jurisdiction.

Domestic crimes, as is the tradition, are largely the responsibility and concern of domestic legal systems. However, certain crimes, through their seriousness, take

on a characteristic that ‘internationalises’ them. Two broad opportunities for prosecution arise from the internationalisation of the offender’s conduct.

First, the international crimes at issue may be the subject of a prosecution before an international criminal tribunal constituted especially for the investigation and prosecution of such universally despised acts. The ICC is, *par excellence*, the model for such a prosecution (and states that are party to the Rome Statute would under the terms of the statute have an opportunity to prosecute the ICC crimes through their domestic courts acting as an international surrogate).²⁶

Certain crimes, through their seriousness, take on a characteristic that ‘internationalises’ them

Quite aside from this treaty-inspired prosecution under the aegis of the Rome Statute, the internationalisation of certain crimes in turn provides the potential to all states of the world (in addition to the state on whose territory the crime was committed) to investigate and prosecute the offender under their domestic legal systems and before their domestic courts. This entitlement goes under the heading of what international lawyers understand as the principle of ‘universal jurisdiction’: the competency to act against the offender, regardless of where the crime was committed and regardless of the nationality of the criminal.

While there is ongoing debate about the scope and limits of the potential exercise of universal jurisdiction under international law, Professor Antonio Cassese, previously president of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, has convincingly explained that universal jurisdiction cannot sensibly be an absolute right of jurisdictional competence (such that any and every state is empowered to investigate and prosecute the occurrence of an international crime).²⁷ Rather, while all states are potentially empowered to act against international criminals, ‘universality may be asserted subject to the condition that the alleged offender be on the territory of the prosecuting State’ (Cassese 2003b: 589, 592).

The state concerned must of course have taken steps under its domestic law to empower its officials and courts to act upon this potential. France and Spain are examples of states that have done so, much to President Kagame’s chagrin (see the earlier discussion of his response to the

'arrogant' European calls for an investigation of his role in the Rwandan genocide). The AU has recently added its voice. In a strongly worded declaration, African presidents at the AU heads of state summit in the Egyptian port city of Sharm El Sheikh condemned the French and Spanish indictments against senior officers of the Rwanda Defence Forces. The declaration calls for a meeting between the AU and the EU to discuss lasting solutions and to ensure that the warrants are withdrawn. The declaration concludes that the '[t]he political nature and abuse of the principle of universal jurisdiction by judges from non-African States against African leaders is a clear violation of their sovereignty and territorial integrity' (Bouwknegy 2008).

These examples, and de Waal's sentiments about Africa taking steps to become a universal jurisdiction free zone, chime with the view of many (African) critics of the ICC, who believe that the ICC may – like the French and Spanish judges in respect of Kagame and other senior officers in the Rwanda Defence Forces – exercise a form of universal jurisdiction against African leaders. This belief conjures images of the ICC with unlimited interference power: that it is a superpower unto itself. Mamdani's concerns about the Court are reflected in different language, but the result is the same. His complaint is that 'the new humanitarian order' (of which the ICC is a part) has resulted 'once again [in] a bifurcated system, whereby state sovereignty obtains in large parts of the world but is suspended in more countries in Africa and the Middle East' (Mamdani 2008).

There is unquestionably merit in complaints about the unacceptably skewed nature of international politics and the abuse of international legal rules by powerful states. The US and UK's unlawful invasion of Iraq has sharpened the debate in this respect considerably. Few, let alone international lawyers, would suggest that the current system is free of serious defects. There is also a real concern – otherwise well expressed by African and allied states – that the Security Council is in urgent need of reform.²⁸

But these complaints and concerns should not too easily or speedily be pressed into service against the ICC without a proper appreciation of the Court's statute. The fear seems to be that a rogue prosecutor will assert some form of unbridled universal jurisdiction wherever he or she so chooses, to drag the unsuspecting and the unworthy to The Hague, and in the process violate the sovereignty of (weak) states under the guise of 'humanitarian' concern for the victims. This view appears to be based on a fundamental misunderstanding of the Rome Statute and the system of complementarity that is so central to the work of the ICC.

Fearing the Court's jurisdiction – a case of being uncomplimentary about complementarity

The Rome Statute of the ICC has its flaws – the nature of the drafting process and the political issues at stake ensured that – but African states, along with their counterparts at Rome, concluded a treaty in which the principle of individual criminal liability is established for those responsible for the most serious human rights violations, and whereby an institution has been established, on a permanent basis, to ensure the punishment of such individuals. This punishment would not be a result of the Court exercising universal jurisdiction.

Only by misunderstanding complementarity is it possible for critics to fear the ICC as an international equivalent of the French or Spanish domestic courts asserting jurisdiction over Kagame. Investigation and punishment take place within a carefully crafted system of complementarity between domestic actors and the ICC. Indeed, complementarity is arguably the key feature of the ICC regime. It is thus important to appreciate its significance and, in so doing, to appreciate how hollow are the fears of those who believe that the Court wields excessive and far-reaching powers of investigation (with the concomitant ability to interfere in state sovereignty).

At the heart of the complementarity principle is the ability to prosecute international criminals in one's national courts

Proposals that the principle of universal jurisdiction should apply in respect of state referrals were rejected at the Rome Conference. The preamble to the Rome Statute says that the Court's jurisdiction will be complementary to that of national jurisdiction, and article 17 of the statute embodies the complementarity principle. At the heart of the complementarity principle is the ability to prosecute international criminals in one's national courts, on behalf of the international community, or to have in place mechanisms to arrest and surrender to the ICC persons that the ICC seeks to prosecute and who happen to be in one's jurisdiction.

The general nature of national implementation obligations assumed by states that elect to become party to the Rome Statute are wide ranging (Schabas 2007; Brandon and du Plessis 2005). The Rome Statute indicates that effective prosecution is that which is ensured by

taking measures at the national level and by international cooperation. Because of its special nature, States Parties to the Rome Statute are expected to assume a level of responsibility and capability, the realisation of which will entail taking a number of important legal and practical measures.

Aside from enabling its own justice officials to prosecute international crimes before its domestic courts, a State Party is furthermore obliged to cooperate with the ICC in relation to an investigation and/or prosecution the Court may be seized with. The prosecution of a matter before the ICC (and the process leading to the decision to prosecute) will normally require very considerable investigation, information gathering, and inter-agency cooperation, often with high levels of confidentiality and information or witness protection required.

It is only if a State Party is
'unwilling or unable' to investigate
and prosecute international
crimes that the ICC is seized with
jurisdiction

Contact between the ICC (in particular the Office of the Prosecutor) and the national authorities will likely become extensive in the course of an investigation and any request for arrest and surrender or any prosecution. Indeed, in many cases there is likely to be a fairly complex and substantial process of information gathering, analysis and consideration that must be undertaken before the decision to formally investigate can even be taken. The ICC lacks many of the institutional features necessary for a comprehensive handling of a criminal matter: for ordinary policing and other functions, it will rely heavily on the assistance and cooperation of states' national mechanisms, procedures and agencies.

In order to be able to cooperate with the Office of the Prosecutor during the investigation or prosecution period²⁹ (or otherwise with the Pre-trial Chamber or the Court once a matter is properly before these, for example, in relation to witnesses), a State Party is obliged to have a range of powers, facilities and procedures in place, including by promulgation of laws and regulations. The legal framework for requests for arrest and surrender, on the one hand, and all other forms of cooperation, on the other, is mostly set out in part 9 of the Rome Statute. Article 86 describes the general duty on states to cooperate fully with the ICC in the investigation and

prosecution of crimes. Article 87 sets out general provisions for requests for cooperation, giving the ICC authority (under article 87(1)(a)) to make requests of the state for cooperation. Failure to cooperate can, among other things, lead to a referral of the state to the Security Council (article 87(7)).

Article 88 is a significant provision, obliging states to ensure that there are in place nationally the procedures and powers to enable all forms of cooperation contemplated in the statute. Unlike inter-state legal assistance and cooperation, the Rome Statute makes clear that, by ratifying, states accept that there are no grounds for refusing ICC requests for arrest and surrender.³⁰ States are therefore obliged, under the relevant arrest and surrender processes provided in their own national laws, to follow up arrest warrants or summons issued by the ICC, and to surrender persons in due course.

While the Rome Statute envisages a duty to cooperate with the Court in relation to investigation and prosecution, it should be remembered that the principle of complementarity is premised on the expectation that domestic states that are willing and able should be prosecuting these crimes themselves. The principle of 'complementarity' ensures that the ICC operates as a buttress in support of the criminal justice systems of States Parties at a national level, and as part of a broader system of international criminal justice. The principle proceeds from the belief that national courts should be the first to act. It is only if a State Party is 'unwilling or unable' to investigate and prosecute international crimes committed by its nationals or on its territory that the ICC is seized with jurisdiction (International Criminal Court 2002: article 17(1)).

To enforce this principle of complementarity and to limit further the Court's propensity for interference with sovereignty, article 18 of the Rome Statute requires that the Prosecutor must notify all States Parties and states with jurisdiction over a particular case – in other words, non-States Parties – before beginning an investigation by the Court (International Criminal Court 2002: article 18(1)), and cannot begin an investigation on his own initiative without first receiving the approval of a Chamber of three Judges (International Criminal Court 2002: article 15).

At this stage of the proceedings, it is open to both States Parties and non-States Parties to insist that they will investigate allegations against their own nationals themselves: the ICC would then be obliged to suspend its investigation (International Criminal Court 2002: article 18(2)). If the alleged perpetrator's state investigates the matter and then refuses to initiate a prosecution, the ICC may only proceed if it concludes that that decision was motivated purely by a desire to shield the individual concerned (International Criminal Court 2002: article

17(2)(a)). The thrust of the principle of complementarity is that the system effectively creates a presumption in favour of action at the level of states.

Complementarity is therefore an essential component of the Court's structure and a means by which national justice systems are accorded an opportunity to prosecute international crimes domestically. The ICC is one component of a regime – a network of states that have undertaken to do the ICC's work for it; to act, if you will, as domestic international criminal courts in respect of ICC crimes. Because of the ICC's system of complementarity we can therefore expect national criminal justice to play an important role of doing the ICC's work by providing exemplary punishments that will serve to restore the international legal order. In this respect, Anne-Marie Slaughter, dean of the Woodrow Wilson School of Public and International Affairs at Princeton, has pointed out that:

One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself – arresting and trying tyrants and torturers worldwide – but that it will be a backstop and trigger for domestic forces for justice and democracy (Slaughter 2003).

This is the promise of international criminal justice as exemplified by the ICC's complementarity regime. One way in which we will come to regard the ICC as effective – as having achieved its promise – will be when its very existence operates to encourage domestic institutions to comply with their responsibilities under international humanitarian and human rights law to investigate and prosecute international crimes as defined by the ICC. In this respect the Prosecutor of the Court has himself stressed the importance of what is called 'positive complementarity'. Paragraph 6 of the preamble to the Rome Statute declares that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. The Prosecutor has often invoked this principle. In his September 2006 'Prosecutorial Strategy', he stated:

With regard to complementarity, *the Office emphasises that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international*

system of justice. With this in mind, the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation' (International Criminal Court 2006a, emphasis added).

The very principle of complementarity makes it clear that by domestic prosecutors acting against international criminals, domestic courts ensure the international rule of law through a mutually reinforcing (or complementary) international system of justice (Burke-White 2008: 53). As Professor Cassese points out, there was a practical basis at Rome for this principle:

It is healthy, it was thought, *to leave the vast majority of cases concerning international crimes to national courts, which may properly exercise their jurisdiction based on a link with the case (territoriality, nationality) or even on universality. Among other things, these national courts may have more means available to collect the necessary evidence and to lay their hands on the accused* (Cassese 2003a: 351, emphasis added).

It rather seems that, instead of the ICC being an instrument of global or universal (in)justice disrespectful of particularly African states' sovereignty, the very premise of complementarity ensures appropriate respect for states by demanding that the ICC defers to their competence and right to investigate international crimes. The choice that complementarity offers and symbolises has apparently been ignored by the Court's African critics. As Slaughter expresses, the choice is for a nation to try its own or they will be tried in The Hague. Instead of weakening states and undermining sovereignty, properly understood the ICC regime does the opposite: it 'strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle' (Slaughter 2003).

The Sudan referral as (another) example of the Court's African adventurism?

We have seen that the Rome Statute does not empower the ICC to roam large as an enforcer of some new world order. That being said, under the statute the UN Security Council is empowered to refer to the Court situations in which crimes within the jurisdiction of the Court appear to have been committed (International Criminal Court 2002: article 1, 13(b)). The referral power is a mechanism by which the Court may be accorded jurisdiction over an offender, regardless of where the offence took place and

by whom it was committed, and regardless of whether the state concerned has ratified the statute or accepted the Court's jurisdiction (Kirsch and Robinson 2002: 634).

The statute provides that the Security Council may only make such a referral by acting under its well-established chapter VII powers of the UN Charter, which is to say that it must regard the events in a particular country as a threat to the peace, a breach of the peace, or an act of aggression. These same chapter VII powers were invoked by the Security Council to create the international criminal tribunals for the former Yugoslavia and Rwanda in the early 1990s. What the Rome Statute has done is to allow the Security Council to refer similar situations to a new, permanent international body – the ICC.

The view that current cases are before the Court because they occur in 'places where the United States has no major objection to the course chartered by ICC investigations' is simply incorrect

In determining whether a 'threat to the peace' exists, the Security Council will be guided by the gravity of the crimes committed, the impunity enjoyed by the crimes' perpetrators and the effectiveness or otherwise of the national jurisdiction in the prosecution of such crimes (Kirsch and Robinson 2002: 630–631). Having had regard to these factors, the Security Council, on 31 March 2005, referred the atrocities committed in the Darfur region of Sudan to the ICC for investigation.

After analysing the information available, the Prosecutor determined that there was a reasonable basis to proceed with an investigation, which was duly initiated in June 2005. In his periodic reports to the UN Security Council, the Prosecutor has stated that the evidence available shows a widespread pattern of serious crimes, including murder, rape, the displacement of civilians and the looting and burning of civilian property.³¹

In February 2007, the Prosecutor requested the Pre-trial Chamber to issue summons to appear or, alternatively, warrants of arrest in respect of Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb). Ahmad Harun is the former minister of state for the interior and the current minister of state for humanitarian affairs, while Ali Kushayb is a militia leader known to have been

operating in Darfur at the relevant time.³² The charges against Harun and Kushayb relate to war crimes and crimes against humanity. In April 2007, the Court issued warrants of arrest for these individuals and requests for their arrest and surrender have since been transmitted to the government of Sudan. At the time of writing, neither suspect has been surrendered to the Court, although Kushayb has long been in the custody of Sudanese authorities, allegedly on charges relating to Darfur (though not the same incidents charged by the Prosecutor).

Then, in early July 2008 the Prosecutor of the ICC decided to seek an arrest warrant against President Omar al-Bashir for genocide, crimes against humanity and war crimes in Darfur. The Pre-trial Chamber must confirm that warrant before it may be issued; at the time of writing the Pre-trial Chamber was still seized with the matter. The decision has drawn fierce resistance from South Africa's former Mbeki-led government, which, together with Libya, in July 2008 sought to defer any investigation or prosecution of al-Bashir for a 12-month period under article 16 of the Rome Statute of the ICC.³³ That attempt failed, but the noise continues. To demonstrate their pique with the Prosecutor's decision, the 53-member AU and the 56-member Organisation of the Islamic Conference have more recently pushed for action against the Court. As *The Economist* writes: 'Both groups have demanded that the Security Council suspend proceedings against Mr Bashir, quite a few of their members no doubt fearing that it could be their turn next' (Economist 2008).

Whether the ICC Prosecutor has acted prudently or otherwise in his call for al-Bashir's arrest is a thorny debate beyond the scope of this paper. What can be said is that his call has fomented what Alex de Waal described as Africa's 'push-back against the ICC' (De Waal 2008). But even if the Prosecutor's decision is ultimately proved unwise (for example, because it undermines the chances of peace in Sudan³⁴), that does not mean that the other criticisms already directed at the Court and examined earlier have substance. Those criticisms (that the Court is Western and is discriminating against Africans through the exercise of unbridled powers) are equally as hollow in respect of the Sudan referral, whatever the outcome of Prosecutor Moreno-Ocampo's actions against President al-Bashir.

For instance, it will be recalled that the Sudan referral is cited as further evidence of the ICC's predilection for African situations. Mamdani is firm about this. In his view it 'is clear if we take into account the four countries where the ICC has launched its investigations: Sudan, Uganda, Central African Republic and Congo', then Africans may conclude that the Court is rapidly becoming 'a Western court to try African crimes against

humanity' (Mamdani 2008). What is more, Mamdani believes that these situations are before the Court because they occur in 'places where the United States has no major objection to the course chartered by ICC investigations'.

But this is simply not correct. We have already seen that three of these situations are self-referrals, and the Darfur situation has been referred by the UN Security Council.

It will be recalled that before the referral the Security Council had adopted resolution 1564, which charged the secretary-general with establishing a commission of inquiry 'to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable'.

The Darfur Commission presented its report to the Security Council in February 2005. The Commission, under the leadership of Professor Antonio Cassese and including African members, fulfilled its mandate by visiting Sudan on two occasions. The Commission found, among others, evidence of 'violations of international human rights law and humanitarian law' and that 'clear links' existed between all these groups and the Sudanese government (Mamdani 2008: paragraphs 110–111). After an exhaustive report, the Commission's final recommendation was that the Security Council refer the situation in Darfur to the ICC 'to protect the civilians of Darfur and end the rampant impunity currently prevailing there' (Mamdani 2008: paragraph 569).

The Darfur Commission endorsed the ICC as the 'only credible way of bringing alleged perpetrators to justice'

In advocating the referral of the situation in Darfur by the Security Council, the Commission pointed out that the situation in Darfur met the requirement of chapter VII, in that it constituted a 'threat to peace and security', as was acknowledged by the Security Council in its resolutions 1556 and 1564. Furthermore, the Commission also took note of the Security Council's emphasis in these resolutions of the 'need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region' (Mamdani 2008: paragraph 590). The Commission endorsed the ICC as the 'only credible way of bringing alleged perpetrators to

justice' (Mamdani 2008: paragraph 573). It was on the strength of this recommendation that, on 31 March 2005, the Security Council passed resolution 1593, referring the situation in the Darfur region of Sudan to the Court.

Mamdani's belief that Sudan is now in the Court's sights because the US wanted it that way does not sit comfortably with the following facts. Much has been said elsewhere about the 'unhappy and extravagant' (Crawford 2003: 109) objections of the US to the Court. The US, as is well known, opposed the Court³⁵ and does not stand alone in its opposition to the ICC: it has rather unlikely allies in the form of China, Iraq and Libya, and a more predictable ally in Israel.

Together these states formed part of a group of only seven countries that voted against the Rome Statute (Scharf 2001: 64). Given the US' vehement opposition to the ICC, even before the Commission's report was released the US implemented contingency plans in the event that the Commission recommended that the situation in Darfur be referred to the ICC. One such plan was advocating the idea of a 'Sudan Tribunal', as an alternative to the ICC, to the other members of the Security Council (Human Rights Watch 2005c). However, the Commission's report dealt with the reasons why such a tribunal would not be an effective alternative to the ICC. The US even went so far as to present its 'Sudan Tribunal' as an 'African Court' and the ICC as a 'European' tribunal, fatally ignoring the strong relations that existed then between ICC and AU countries (Human Rights Watch 2005a). For these and other reasons, the US proposal was not considered as an effective alternative (Human Rights Watch undated). As momentum built up to refer the situation in Darfur to the Court, US obstinacy began to look churlish in the face of the ongoing massacres in the region. On 24 March 2005 France proposed a resolution, which would eventually become resolution 1593, referring Darfur to the ICC.

Faced with the reality that its obstinacy was doing more damage to its reputation than the referral would, and having secured 'immunity guarantees' for US personnel,³⁶ the US agreed not to veto the resolution and abstained when the Security Council voted to refer the situation in Darfur to the ICC. The US representative's reasons for this acquiescence are worth noting. She explained that 'we do not agree to a Security Council referral of the situation in Darfur to the ICC', but stated that '[w]e decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties'. Her final comment is revealing: she said that although 'the United States believes that the better

mechanism would have been a hybrid tribunal in Africa, it is important that the international community speak with one voice in order to help promote accountability.³⁷

Mamdani's views about US involvement in ensuring that Sudan is before the ICC are thus almost certainly an exaggeration. As Geoffrey Robertson has written about the US antics against the Court: 'ironically they have helped to refute the argument (made by some voices on the European left) that international criminal justice serves the interests of American hegemony' (Robertson 2006: 464).

It is also worth highlighting the reasons advanced by the Darfur Commission's recommendation that the Security Council refer the situation in Darfur to the ICC. According to the Commission there were at least six major benefits to a referral to the ICC:

- The prosecution of the crimes committed would be conducive to peace and security in Darfur
- The ICC, as the 'only truly international institution of criminal justice', would ensure justice is done regardless of the authority or prestige of the perpetrators as the ICC sits in The Hague, far from the perpetrators' spheres of influence
- The cumulative authority of the ICC and the Security Council would be required to compel those leaders responsible to acquiesce to investigation and potential prosecution
- The ICC is the 'best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor' due to its international composition and established rules of procedure
- The ICC is the only international court that can investigate and prosecute without delay
- The ICC was the most cost-effective option³⁸

All these reasons (independently and cumulatively compelling) stand in the way of assertions that the Court is biased against Africa by its involvement in investigating the Darfur situation. It might in any event be observed that the referral – under chapter VII of the UN Charter – was exacted without a veto from any of the permanent members; that is to say, not even China and Russia (long-standing defenders of the principle of non-intervention in the sovereign affairs of states) stood in the way of the ICC referral.

Whatever unfolds in respect of the al-Bashir indictment, and whether the Prosecutor may be criticised for his handling of the affair, does not detract from the fact that, in the first place, the Darfur crisis came before the ICC for the right reason (and despite – rather than because of – US involvement). That is because the human rights violations involved demanded an international

prosecutorial response in the interests of peace and justice.

LESSONS TO BE LEARNT?

Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC: more than half of all African states (30) have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions. These efforts will – if the recent anti-ICC rhetoric is to be believed – slowly be replaced by a 'push-back' against the ICC. While the recent African opposition to the ICC will have been (rightly or wrongly) aggravated by the ICC Prosecutor's decision to seek President al-Bashir's indictment, the residual reasons for that opposition remain flimsy at best.

What is worse, the reasons (or at least the motivations of some who advance them) appear to reflect an outdated and defensive view of sovereignty as a trump to human rights and justice. This is not only inconsistent with advances in international human rights worldwide, it is also today – if one takes the AU's documents at face value – ironically un-African. The provisions of the AU's Constitutive Act suggest that human rights are to play an important role in the work of the Union (Murray 2004; Lloyd & Murray 2004: 165). For instance, the preamble speaks of states being 'determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law'.

As one of its central objectives, the AU recognises the need to 'encourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights', and to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments (African Union 2000: article 3(e) and (h)). Member states are accordingly expected to promote gender equality and to have 'respect for democratic principles, human rights, the rule of law and good governance' and to respect the sanctity of life (African Union 2000: article 4(l), (m) and (o)).

Of obvious importance, given the peer-review mechanism that exists under the AU, is the principled commitment by the Union under its Constitutive Act to condemn and reject 'unconstitutional changes of governments' (African Union 2000: article 4(p)). There is thus a clear trend in the Act towards limiting the sovereignty of member states and, in appropriate circumstances, permitting the involvement of the Union in the domestic affairs of African countries, notwithstanding the principle of non-interference by any member state in the internal affairs of another (African

Union 2000: article 4(g)). There is also the very clear commitment by African states in articles 4(m), 3(h) and 4(o) of the AU's Constitutive Act to ensuring respect for the rule of law and human rights, and condemning and rejecting impunity.

The myths around the Court's anti-African nature and its discriminatory singling out of African situations for investigation are an attack on an institution that deserves support. One can hardly overestimate the importance of Africa to the Court. The ICC's first 'situations' are all on the continent. Africa is a high priority for the ICC because African states, in the case of self-referrals by Democratic Republic of the Congo, Uganda and Central African Republic, chose so, and because the international community, through the Security Council, felt compelled to do something about a situation in Darfur that has been described as the world's worst humanitarian crisis.³⁹ It is likely to remain a high priority for the foreseeable future. It is the most represented region in the ICC's Assembly of States Parties, and is a continent where international justice is in the making.

Ensuring the success of the ICC is important for peace-building efforts on the continent. However, the task of reversing the culture of impunity for international crimes and thereby strengthening the rule of law cannot simply be devolved to the ICC. As we have seen, the Court's jurisdiction and capacity are limited so that it will be able to tackle a selection of only the most serious cases.

The danger is that the Court's work in Africa and perhaps beyond Africa will be jeopardised by myths such as those confronted in this paper. If there is a lesson that might be drawn from the discussion herein it is this: there is a need in Africa for greater and more accurate public and official awareness of the work of the ICC, and a need for enhanced political support for the work of the Court and for international criminal justice more generally.

The fulfilment of the aims and objectives of the ICC on the African continent – in particular through the complementarity regime – are dependent on the support of African states and administrations, the AU and relevant regional organisations, the legal profession and civil society. Meeting this need requires commitment to a collaborative relationship between these stakeholders and the ICC.

It is also important to remember that questions of responsibility for the prosecution of core international crimes in Africa (and for raising awareness of these issues) are broader than the ICC alone. Other structures, such as the African Commission on Human and Peoples' Rights, the African Court of Justice and Human Rights and other pan-African institutions, can play a meaningful role in this regard, which should be encouraged. An

example in this respect is the work of the African Commission on Human and Peoples' Rights in its 2005 'Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC'; in which the Commission called on civil-society organisations in Africa to work collaboratively to develop partnerships to further respect for the rule of law internationally and strengthen the Rome Statute.

That these African structures and organisations should be at the forefront of awareness raising is vitally important, not least of all because of the perception present in certain African states that international criminal justice and the ICC is an 'outside' or 'Western' priority and relatively less important than other political, social and developmental goals. The need for these structures and organisations to raise awareness is all the more acute in the current climate of myth-peddling and anti-ICC rhetoric.

The reasons for recent African opposition to the ICC reflect an outdated and defensive view of sovereignty as a trump to human rights and justice

This is a time for African voices, regional organisations and civil society to speak out against inaccuracies and distortions regarding the ICC's work in Africa. Of course, that discussion must include criticism of the Court's work where criticism is due, but with an understanding that the Court's position in Africa is one that needs strengthening and nurturing.

While it is correct that all situations currently under investigation by the ICC are African, the more plausible reason for this reality is because African victims – the real beneficiaries of the Court's work – outnumber victims of serious human rights violations in other parts of the world. And the accusation of 'unfair' prosecution of African situations is an insult to the careful screening process that the Office of the Prosecutor has adopted in conformity with its obligations under the Rome Statute in order to determine whether there is a reasonable basis for initiating an investigation. These allegations ignore the objective fact that the Court's systems promote transparency, oversight and accountability, for example, by requiring that Judges of the Court sit in oversight of the decisions of the Prosecutor to investigate or not to investigate situations of alleged international criminal law violations.

It is thus unfortunate that African leaders are now choosing to balk at the Court's work on the continent, particularly on the basis of such flimsy and often politically motivated reasons. An alternative, and far more positive, interpretation of the current (largely self-driven) focus on Africa is that some African states have chosen to break the cycle of violence and impunity that has symbolised its history, even if (as the Uganda and Democratic Republic of the Congo referrals appear to show) the motivation for doing so may have been to secure short-term political gains.

It is imperative that Africa's 30 members of the ICC are encouraged to take seriously their obligations under the Rome Statute to ensure accountability for perpetrators, and that its 53 members of the AU are called to affirm rather than cheapen the organisation's commitment to stamp out impunity and ensure accountability for perpetrators of crimes against humanity, war crimes and genocide. This effort is one that African victims of international crimes deserve. The ICC is an integral means by which Africans might end impunity on their continent. Civil society and others committed to the work of the ICC in Africa thus need urgently to proclaim the varied and compelling reasons why it can be trusted. A failure to do so means risking the Court's work in Africa coming undone on the basis of myths and inaccuracies.

NOTES

- 1 Schabas 2007, citing Robert C Johansen 1997, A turning point in international relations? Establishing a permanent international criminal court, 13 Report No. 1, 1, Joan B Kroc Institute for International Peace Studies.
- 2 Mamdani's thesis is set out in a recent article appearing in *The Nation* (Nation 2008). References hereafter are to the article as it appears on the Web and without page citations.
- 3 Navanethem Pillay (South Africa), who has recently resigned to take up the position of UN High Commissioner for Human Rights; Akua Kuenyehia (Ghana), Fatoumata Dembele Diarra (Mali) and Daniel Nsereko (Uganda).
- 4 For latest ratification status, see www.iccnw.org.
- 5 For status of African ratification, see www.iccnw.org/countryinfo/RATIFICATIONSbyUNGroups.pdf.
- 6 See <http://hrw.org/english/docs/2007/12/04/africa17466.htm>.
- 7 His trial was due to begin on 23 June 2008 but was halted on 13 June 2008 when the Court's Pre-trial Chamber ruled that the Prosecutor's refusal to disclose potentially exculpatory material had breached Lubanga's right to a fair trial. The Prosecutor had obtained the evidence from the UN and other sources on the condition of confidentiality, but the Judges ruled that the Prosecutor had incorrectly applied the relevant provision of the Rome Statute and, as a consequence, 'the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial'. On 2 July 2008 the Court ordered Lubanga's release; however, at the time of writing he remains in custody pending the outcome of an appeal by the prosecution. The Court's vigorous and independent oversight role in respect of the Prosecutor is well evidenced by this development. See below for further discussion of the constraints placed upon the Prosecutor by the Rome Statute, more particularly the oversight role of the Pre-trial Chamber of the Court.
- 8 The ICC's factsheet on the case against Germain Katanga is available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-BckInfo-ENG.pdf>.
- 9 A factsheet on developments in the Central African Republic investigation is available at http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_A_EN.pdf.
- 10 For example, see http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf.
- 11 Aside from obvious sources such as States Parties (in the case of State Party referrals) or the Security Council (in the case of Security Council referrals), the Rome Statute allows the Prosecutor to take action *proprio motu* on the basis of information he has gathered from 'States, United Nations organs, intergovernmental or non-governmental organisations ... and other reliable sources that he or she deems appropriate' (International Criminal Court 2002: article 15(2)).
- 12 See, among others, International Criminal Court (2000), rules 46 and 49(1).
- 13 See http://www.icc-cpi.int/organs/otp/otp_com.html; see also Gentile (2008).
- 14 Copies of the Prosecutor's decisions are available at http://www.icc-cpi.int/organs/otp/otp_com.html.
- 15 Since, as required under article 8(1), the Court has jurisdiction over war crimes, 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. In addition, although the Prosecutor found that it was unnecessary, in light of this conclusion, to reach a conclusion on complementarity, the response notes that the Office of the Prosecutor also collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents.
- 16 On the myth that the Court has inclinations towards exercising a (politically or discriminatory) motivated form of universal jurisdiction, see further below.
- 17 According to this provision, the Court is bound to find a case inadmissible where it is 'not of sufficient gravity to justify further action by the Court'. In addition, articles 53(1)(b) and 53(2)(b) of the Rome Statute refer to the admissibility test set out in article 17, indicating that in his or her determination as to whether there is a reasonable basis to initiate an investigation or a sufficient basis for a prosecution, the Prosecutor must have regard to the article 17 criterion of gravity, among others.
- 18 The prosecutorial strategy of the OTP has been published and is available at http://www.icc-cpi.int/otp/otp_events.html.
- 19 'Statement by Justice Louis Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, December 8, 1998', pp 7-8 (emphasis added), quoted in Schabas (2007: 159-160).
- 20 See International Criminal Court 2007: article 53(1)(c). Naturally the twin criteria of 'gravity' and 'interests of justice'

- will interact, and together they ‘provide enormous space for highly discretionary determinations’ by the ICC Prosecutor (see Schabas 2007: 164). But that is as an unavoidable consequence of creating a permanent international criminal court, and this ‘space’ is imperative in relation to the ICC Prosecutor’s difficult task described by Arbour, of choosing ‘from many meritorious complaints the appropriate ones for international intervention’. Whatever the largesse of the Prosecutor’s discretion in theory, in practice it is a discretion that is subject to review by the Judges of the Court – see further below.
- 21 A powerful example of this is the decision of the Pre-trial Chamber in relation to the Lubanga matter. See the discussion earlier at endnote 7.
 - 22 See International Criminal Court 2003. See also Kirsch & Robinson 2002: 623-625. Not relevant here, but discussed further below, is the ICC Prosecutor’s power under the Rome Statute in article 15 to initiate independent investigations on the basis of information received from any reliable source. The granting to the Prosecutor of a *proprio motu* power to initiate investigations was one of the most debated issues during the negotiations of the Rome Statute. In the end, the drafters of the statute determined that in order for the Prosecutor to exercise this power, the alleged crimes must have been committed by nationals of a State Party or have taken place in the territory of a State Party – the preconditions set out in terms of article 12 (see International Criminal Court 2003; Kirsch & Robinson 2002: 661–663).
 - 23 Available at http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html. In respect of the Ugandan referral: ‘In December 2003 the President Yoweri Museveni took the decision to refer the situation concerning the Lord’s Resistance Army to the Prosecutor of the International Criminal Court. ... President Museveni met with the Prosecutor in London to establish the basis for future co-operation between Uganda and the International Criminal Court.’ Available at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html). In respect of the Central Africa Republic referral: ‘The Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has received a letter sent on behalf of the government of the Central African Republic. The letter refers the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002, the date of entry into force of the Rome Statute.’ Available at http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html).
 - 24 An African example relates to the African Charter on Human and Peoples’ Rights. Parties are obliged to recognise the rights, duties and freedoms enshrined in this charter and should undertake to adopt legislative or other measures to give effect to them (see article 1 of the charter and the decisions of the African Commission on Human and Peoples’ Rights in *Commission Nationale des Droits de l’Homme et des Libertes v Chad* 55/91, paragraph 20, and *Amnesty International and Others v Sudan* 48/90, 50/91, 52/91, 89/93, paragraph 40). The African Charter was drafted and acceded to voluntarily by African states wishing to ensure the respect of human rights on this continent. Once ratified, states parties to the charter are legally bound to its provisions. As the African Commission has noted, a state not wishing to abide by the African Charter might have refrained from ratification (see *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* 137/94, 139/94, 154/96 and 161/97, paragraph 116).
 - 25 See de Waal (2008), writing in reference to a decision by the AU Peace and Security Council to criticise the ICC Prosecutor’s decision to issue an arrest warrant for President el-Bashir. De Waal continues: ‘The positions taken at the PSC do not provide much solace to the supporters of the ICC and the advocates of universal jurisdiction.’
 - 26 Another possibility of prosecution before an international criminal tribunal is exemplified in the ad hoc tribunals that were created for Yugoslavia (the International Criminal Tribunal for the Former Yugoslavia), Rwanda (the International Criminal Tribunal for Rwanda), East Timor, Kosovo, Cambodia and Sierra Leone. A discussion of these tribunals is beyond the scope of this paper.
 - 27 The danger of countenancing such an absolute notion of universal jurisdiction has recently been highlighted by the International Court of Justice in the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Rep 14 Feb. 2002 case (*the Arrest Warrant case*). President Guillaume held, for instance, that such a system ‘would risk creating total judicial chaos’, and would ‘encourage the arbitrary for the benefit of the powerful, purportedly acting as an agent for an ill-defined “international community”’ (paragraph 15).
 - 28 What this reform entails is beyond the scope of this paper but encompasses a variety of proposals, including procedural reforms, such as eliminating the veto held by the five permanent members, and expansion of the Security Council (to include, among others, an African member). For further information, see Thakur (2004).
 - 29 The extent of cooperation required of States Parties is evident from the fact that the Office of the Prosecutor has a very wide mandate to ‘extend the investigation to cover all facts’ and investigate circumstances generally ‘in order to discover the truth’ (International Criminal Court 2002: article 54(1)(a)).
 - 30 See International Criminal Court (2002: article 89), although article 97 provides for consultation where there are certain practical difficulties.
 - 31 Detailed summaries of the crimes on which the Office of the Prosecutor has gathered information and evidence can be found in the Prosecutor’s periodic reports to the Security Council on the investigation. They are available on the Court’s website (http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html). For an analysis of the referral, see, among others, du Plessis & Gevers (2005: 23–24).
 - 32 Copies of the warrants of arrest are available on the Court’s website (<http://www.icc-cpi.int/cases/Darfur.html>).
 - 33 Article 16 provides as follows: ‘No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.’
 - 34 An outcome that is not possible to predict, although it seems that the accusations that Bashir’s indictment will endanger the Sudan peace process are exaggerated. What the indictment appears so far to have achieved is movement (finally) on the part of a recalcitrant and defiant regime as it begins to run out of options. See, for example, Musila (2008) and Fritz (2008).
 - 35 For a discussion of US opposition to the ICC, see du Plessis (2002: 301–320).

- 36 Paragraph 6 of resolution 1593 states that ‘nationals, current or former officials or personnel from a contributing State outside Sudan which is not 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 of omissions arising out of or related to operations in Sudan established or authorised by the Council of the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State’.
- 37 Quoted in Schabas (2007: 31).
- 38 In this regard, Human Rights Watch (2005b) has noted: ‘The “Sudan Tribunal” is estimated to cost some \$30 million in the first 6–8 months and then rise up to \$100 million annually, while the ICC’s 2005 overall budget is approximately \$88 million.’
- 39 At the time of the Sudan referral, the UN labelled the Darfur situation the worst humanitarian disaster in the world today, and the World Health Organisation stated that the death rate in the region was three times the emergency threshold (Time 2004:

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ABOUT THIS PAPER

A number of critics have proclaimed the world's first permanent International Criminal Court (ICC) to be a Western imperialistic initiative that is unhealthily preoccupied with the African continent. This paper confronts certain myths that have recently been propagated by several individuals, including government officials, political leaders and civil society members (including the media), about the ICC. The author argues that this is a time for African voices, regional organisations and civil society to speak out against inaccuracies and distortions regarding the ICC's work in Africa. While that discussion must include criticism of the Court's work where criticism is due, it is imperative that the discussion should proceed from an understanding that the Court's position in Africa is one that needs strengthening and nurturing. The paper is intended as an introductory discussion that might further stimulate debate about Africa's response to the Court.

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