

ADDRESS TO JUSTICE AND LAW SOCIETY 20 OCTOBER 2017
International Criminal Court - future challenges
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Introduction

- [1] The Rome Statute of the International Criminal Court (the Rome Statute) came into force on 17 July 1998, with the Court beginning its operations on 1 July 2002 – some 15 years ago now. In this paper I would like to examine how effective the Court has been and of recent challenges to its future.

Overview of the ICC

- [2] Firstly, I will discuss a brief overview of the International Criminal Court.
- [3] Calls for the establishment of an International Criminal Court have been made for over 100 years. Such a notion was discussed at the first international peace conference in The Hague in 1899. Despite such calls, international criminal tribunals were merely ad hoc arrangements. For example the Nuremberg and Tokyo Tribunals established after the Second World War.
- [4] Moving forward from there other ad hoc tribunals has been established dealing with war crimes including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Indeed the occurrence of many war crimes in Yugoslavia and Rwanda in the 1990s “reignited” the push for a permanent international criminal court.
- [5] In July 1998 after a five week diplomatic conference in Rome, the international community finally agreed to establish a permanent International Criminal Court (ICC). The new Court was tasked with the responsibility of ensuring criminal liability for serious violations of international humanitarian law and other such crimes. As to the exercise of jurisdiction, firstly, the Court has jurisdiction when the United Nations Security Council (UNSC) refers a situation to the Court.² Secondly, the Court can exercise jurisdiction

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² Article 13(b) of the Rome Statute and Chapter VII of the UN Charter 1948.

where a referral is made by a State party.³ Thirdly, the Court can exercise jurisdiction where the prosecutor refers a matter to the Court. The prosecutor must obtain the approval of the pre-trial chamber to proceed with the prosecution.⁴

[6] The Court's jurisdiction arises on a number of circumstances.⁵ Firstly, it has jurisdiction to deal with the crime of genocide.⁶ Secondly, it has jurisdiction to deal with crimes against humanity. Thirdly, it has jurisdiction to deal with crimes of aggression.

[7] Turning to its jurisdiction to deal with crimes against humanity, it is to be noted that Article 7 of the Rome Statute sets out a list of these crimes such as murder, extermination, enslavement, deportation, deprivation of liberty, torture, rape, persecution, apartheid or other inhumane acts. It is important to note that Article 7(1) does not make reference to any requirement that an armed conflict exist. However it must be borne in mind that Article 7(1) of the Rome Statute requires that the relevant act or acts be "committed as part of a widespread or systematic attack directly against any civilian population with knowledge of the attack."

[8] As to war crimes they are constituted by the following:

- (a) Grave breaches of the 1949 Geneva Conventions in respect of protected persons and property including wilful killing, torture, wilfully causing great suffering or serious injury, extensive destruction of property, compelling a POW to serve in armed forces, depriving a POW or protected person of a fair trial, unlawful deprivation in taking of hostages.⁷
- (b) Other serious violations of the law and customs applicable to international armed conflict.⁸

³ Article 14 of the Rome Statute.

⁴ Article 15 of the Rome Statute.

⁵ Article 5 of the Rome Statute.

⁶ Article 6 of the Rome Statute.

⁷ Article 8(2)(a) of the Rome Statute.

⁸ Article 8(2)(b) of the Rome Statute.

- [9] It is to be noted that the threshold jurisdiction is that the war crime must be committed as part of a plan or policy or as part of a large scale commission of such crimes.⁹

How has the ICC gone¹⁰?

- [10] It is firstly to be noted that the budget for the ICC is extensive – €141.6 million in 2017, employing some 800 staff. The USA is still not a party to the Rome Statute, nor is it likely to become one. Russia withdrew in 2016 after the UN General Assembly condemned its occupation of the Crimea.
- [11] Over the last 15 years – the Office of the Prosecutor has opened investigations into 10 situations:
1. Two in the Central African Republic;
 2. One in the Côte d'Ivoire;
 3. One in Darfur, Sudan;
 4. One in the Democratic Republic of the Congo;
 5. One in Georgia, Kenya;
 6. One in Libya;
 7. One in Mali; and
 8. One in Uganda.
- [12] As at 17 August 2017, 31 arrest warrants had been issued. 14 had been implemented, and three withdrawn as a result of the death of the suspects. Presently six persons are in custody, 15 suspects are at large and nine are not in custody.
- [13] 25 cases all up have been brought before the Court. Five are in the trial stages as follows:
1. *Prosecutor v Ongwen* – Uganda – trial commenced 6 December 2016
 2. *Prosecutor v Netaganda* – Congo – trial commenced 2 September 2015
 3. *Prosecutor v Nourain* – Darfur – not yet commenced

⁹ Article 8(1) of the Rome Statute.

¹⁰ The Court Today 17 August 2017 ICC-PIDS-TCT-01-084/17

4. *Prosecutor v Gbagbo & Goude* - Côte d'Ivoire – trial commenced 28 January 2016
- [14] There have only been four convictions in 15 years:
1. *Prosecutor v Lubanga Dyilo*¹¹ – Congo – convicted on 14 March 2012 of committing war crimes by enlisting children under 15 to participate in hostilities. Sentenced to 14 years imprisonment.
 2. *Prosecutor v Germain Katanga*¹² – Congo – on 17 March 2014 found guilty of one crime against humanity and four war crimes. Sentenced to 12 years imprisonment.
 3. *Prosecutor v Bemba Gombo*¹³ – Central African Republic – convicted on 21 March 2016 of two crimes against humanity and three war crimes. He was sentenced to 18 years imprisonment. This case is the subject of an appeal.
 4. *Prosecutor v Ahmad al-Mahdi*¹⁴ – Mali – convicted on 27 September 2016 of one count of war crimes. He was sentenced to 9 years imprisonment.
- [15] It may be seen there have been four convictions in 15 years. 11 other cases are in the pre-trial stage. One man has been acquitted and four have had jurisdiction declined or charges withdrawn.
- [16] The trials have tended to take a long time to finalise. The *Lubanga Dyilo* trial resulted in the accused spending 6 years in custody before finalisation. It was 3 years and 2 months between opening statements and finalisation. In the *Katanga* matter it was 4 years and 3 months between opening statements and finalisation; 3 years and 1 month in *Ngudjolo*,¹⁵ and 5 years and 4 months in the *Bemba Gombo* case.
- [17] Over and beyond the lack of cases and finalisation time, there has been criticism that the ICC is unfairly targeting African countries in its prosecution. In its first 10 years, the ICC investigations and prosecutions have all concerned situations in Africa. Indeed the Court issued warrants for two

¹¹ *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06.

¹² *Prosecutor v Germain Katanga* ICC-01/04-01/07.

¹³ *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

¹⁴ *Prosecutor v Ahmad Al Mahdi* ICC-01/12-01/15

¹⁵ *Prosecutor v Mathieu Ngudjolo Chiu* ICC-01/04-02/12. He was acquitted.

heads of state – Al Bashir and Kenyata.¹⁶ This has attracted criticism from some African countries that head of state immunity has been undermined. Additionally, the ICC has declined to exercise jurisdiction in Venezuela and in respect of British troops in Iraq.

[18] In 2016 South Africa, Burundi and Gambia announced their decision to withdraw from the ICC. Indeed, sections of the media have asked whether this might be the end for the ICC.¹⁷ At the African Union Summit held in February 2017, African leaders backed a “strategy of collective withdrawal”.

[19] But the withdrawal process has been full of uncertainty.

[20] In March 2016 the Supreme Court of South Africa¹⁸ considered the situation where ICC had issued 2 warrants for the arrest of President Al Bashir arising out of events in Darfur and elsewhere in Sudan which were alleged to be war crimes. In 2015 Al Bashir was in South Africa for an African Union meeting. South Africa refused to act on the arrest warrants on the basis the Al Bashir enjoyed head of state immunity. The court held that South Africa had acted unlawfully.

[21] By late 2016 South Africa announced that it had withdrawn from the ICC.

[22] However In February 2017 the High Court in Pretoria decided that the withdrawal was unconstitutional and invalid without the approval of the Parliament¹⁹.

[23] In March 2017, South Africa reversed its decision to withdraw as a result of the court ruling.

[24] It is still highly possible South Africa will withdraw after parliamentary approval. Gambia has also rescinded its decision to withdraw.

[25] The ICC held in July 2017 that South Africa had thereby acted contrary to the Rome Statute. South Africa continued to argue that Al Bashir was

¹⁶ The charges were terminated by the trial chamber on 13 March 2015.

¹⁷ Karen Allen, BBC, 24 October 2016.

¹⁸ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016)

¹⁹ *Democratic Alliance v Minister of International relations and Co-operation* High Court of South Africa CASE NO: 83145/2016

immune from proceedings under customary international law²⁰. However the court did not refer South Africa's conduct to the UN assembly or to the UNSC.

- [26] However, it is further to be noted that in August 2017, the Chief Justices of South Africa, Rwanda and Sierra Leone in a joint statement suggested that Africa was capable of having its own International Criminal Court.

Conclusion

- [27] In conclusion, in more recent years it has been a turbulent time for the ICC. The budget is high, there have been limited prosecutions. Those prosecutions that have taken place and have been very lengthy.
- [28] One would have grave concerns for the future of the ICC if South Africa ultimately does withdraw with other African states as State parties.
- [29] Any such withdrawal would leave Africa not the subject of the ICC's jurisdiction which would be disastrous particularly when one bears in mind the fact that many of the more recent war crimes alleged are alleged to have occurred on the African continent.
- [30] The withdrawal of South African from the ICC could give rise to questions as to the legitimacy and ongoing future of the ICC.
- [31] It would be a great shame if this occurred because the ICC provides an important protection for many in the modern world.

²⁰ *Prosecutor v Al Bashir* ICC-02/05-01/09-302 6 July 2017.