

Winter 2019

## International Law and the Struggle Against Government Impunity in Africa

John Mukum Mbaku

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_international\\_comparative\\_law\\_review](https://repository.uchastings.edu/hastings_international_comparative_law_review)

 Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT'L & COMP.L. Rev. 73 (2019).

Available at: [https://repository.uchastings.edu/hastings\\_international\\_comparative\\_law\\_review/vol42/iss1/3](https://repository.uchastings.edu/hastings_international_comparative_law_review/vol42/iss1/3)

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings International and Comparative Law Review by an authorized editor of UC Hastings Scholarship Repository.

---

---

## International Law and the Struggle Against Government Impunity in Africa

BY JOHN MUKUM MBAKU\*

### ABSTRACT

*In recent years, impunity has become pervasive throughout most African countries. In some African countries, impunity is due to the inability of national governments to bring perpetrators of human rights violations to account for their crimes. In others, impunity arises from the unwillingness of government to utilize the existing legal system to bring criminals, whether they are state- or non-state actors, to justice. Effectively combatting impunity in Africa must begin with the reconstruction of African States to provide democratic institutions, which are capable of adequately constraining the government and preventing civil servants and political elites from acting with impunity; and which make possible the bringing of all perpetrators of human rights violations, whether they are members of the government or not, to account for their crimes. While making certain that all African countries have legal and judicial systems that are capable of bringing to justice all individuals who commit international crimes in their jurisdictions is the first line of the fight against impunity in Africa, it is important to acknowledge the important role that international law can play in the anti-impunity effort. The international criminal justice system, as embodied in the International Criminal Court, is seen as an important and critical tool to fight threats to international peace and security. In addition, international programs, such as the Responsibility to Protect (R2P) and the Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, add*

---

\* John Mukum Mbatia is an Attorney and Counselor at Law (licensed in the State of Utah) and Brady Presidential Distinguished Professor of Economics & John S. Hinckley Research Fellow at Weber State University (Ogden, Utah, USA). He is also a Nonresident Senior Fellow at the Brookings Institution, Washington, D.C. He received the J.D. degree and Graduate Certificate in Environmental and Natural Resources Law from the S.J. Quinney College of Law, University of Utah, where he was Managing Editor of the *Utah Environmental Law Review*, and the Ph.D. (economics) from the University of Georgia. This article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

---

---

*to the repertoire of tools available to those engaged in the fight against impunity in the African countries.*

## I. INTRODUCTION

During the decolonization period, Africans blamed policies promulgated by European colonialists for the high rates of poverty among the various ethnocultural groups that inhabited each colony.<sup>1</sup> Many Africans viewed colonialism as “an exploitative, repressive, and cruel system, established primarily to enhance the ability of Europeans to extract resources from Africa for the benefit of the metropolitan economies,”<sup>2</sup> as well as Europeans located in the colony.<sup>3</sup> Thus, the continent’s freedom fighters, that is, those who led the struggle against continued European colonialization and for independence, believed that independence would allow citizens to govern themselves and have full and effective control of their economic processes. Most importantly, it was generally believed that in the post-independence period, Africans would be able to produce their own laws and institutions and provide themselves with a governing process that minimized impunity and significantly enhanced the recognition and protection of human rights, including especially those of women, children, and religious and ethnic minorities.<sup>4</sup>

As argued by Mbaku and Ihonvbere,<sup>5</sup>

[m]any Africans, especially the historically marginalized and deprived (e.g., women, rural inhabitants, ethnic minorities, and those forced to live on the urban periphery), believed that independence was an opportunity to rid themselves of not only the Europeans, but also of their laws and institutions and then, develop and adopt, through a democratic process (i.e., a people-driven, bottom-up, participatory, and transparent institutional reform process),

---

1. John Mukum Mbaku & Julius O. Ihonvbere, *Introduction: Issues in Africa’s Political Adjustment in the “New” Global Era*, in *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE* 1–32 (John M. Mbaku & Julius O. Ihonvbere eds., 2003).

2. *Id.* at 1.

3. See JOHN M. MBAKU, *PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH* 16–18 (2018).

4. See, e.g., Mbaku & Ihonvbere, *supra* note 1, at 1–2.

5. Mbaku & Ihonvbere, *supra* note 1.

institutional arrangements based on their own values, aspirations, traditions, and customs.<sup>6</sup>

This new set of institutional arrangements, developed exclusively by Africans and designed to reflect their values and interests, would enhance the ability of the government to pursue only public policies that enhance and promote the peaceful coexistence of each country's population groups. In addition, the new governance architecture would also effectively constrain state custodians (i.e., civil servants and political elites) and prevent them from acting with impunity and engaging in such activities as corruption and the abuse of the fundamental and human rights of citizens. There was hope that in the post-independence period, the various ethnocultural groups within each African country would be granted "a significant level of autonomy so that [each one of them] could pursue its values and interests but do so within the legal and political boundaries or constraints agreed to in an earlier period and elaborated in the constitution."<sup>7</sup> Independence, then, was seen by many Africans as bringing to an end, impunity by the Europeans—the latter included, not only the civil servants and political elites who ruled the colonies, but also European settlers, traders, entrepreneurs, miners, planters, and others who exploited, degraded, and infantilized Africans with impunity.<sup>8</sup>

Unfortunately for many Africans, the decolonization process did not provide them with the opportunities to participate fully and effectively in constitutional discourse and design. The process, as argued by many scholars of decolonization in Africa,<sup>9</sup> was undertaken reluctantly and opportunistically. In addition to the fact that European colonizers only reluctantly gave up their hegemonic control of the colonial territories, the

---

6. *Id.* at 2.

7. JOHN M. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 8 (2018).

8. Consider, for example, the mistreatment of African groups by European settlers in the four British colonies that united in 1910 to form the Union of South Africa. That system of degradation, which was formalized into law in 1948 and given the name "apartheid" or "separate development," was finally abolished when South Africa gained independence in 1994 and established a non-racial democracy. *See, e.g.*, DAVID DOWNING, WITNESS TO HISTORY: APARTHEID IN SOUTH AFRICA (2004) (examining, *inter alia*, the forces contributing to the development of the system of apartheid, as well as the nature of life under the apartheid system for the country's African citizens).

9. *See, e.g.*, Robert Fatton, Jr., *Liberal Democracy in Africa*, 105 POL. SC. Q. 455 (1990). *See also* JOHN M. MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE (1997) (examining, *inter alia*, the failure of African countries to provide themselves with institutional arrangements that adequately constrain the state and minimize government impunity).

---

---

indigenous African elites were so eager to gain independence and seize control of the institutions of governance that their approach to the decolonization process was quite opportunistic. Fatton<sup>10</sup> argues that “[i]t was only in the last decade of colonialism, when independence became a certainty, that the imperialist powers gradually began to institute democratic reforms in what had hitherto been structures of exploitation, despotism, and degradation.”<sup>11</sup> Fatton<sup>12</sup> argues further that:

The transition from colonial despotism to liberal democracy was expedited in a few years without any fundamental transformation in the economic, cultural, or bureaucratic domains. The transition was in fact reluctant, repressive, and opportunistic. In addition, African leaders never fully accepted the precepts of the European political model, few were enthusiastic about it, and most tolerated it as a means to a different end. The African commitment to liberal democracy was shaky, hesitant, and ultimately short-lived.<sup>13</sup>

The desire of many African elites to attain independence without fully and effectively transforming the critical domains—that is, the political, administrative, and judicial foundations of the state, in order to render them more suitable for governance in the post-independence society, was illustrated quite well by the nature of constitutional discourse in the U.N. Trust Territory of Cameroons under French administration (“French Cameroons”). As French Cameroons prepared for independence, a group called the Constitutional Consultative Committee (“CCC”) was constituted and charged with designing the new country’s constitution. Questioned later about why the CCC chose to ignore nation-wide dialogue on constitution-making and instead, adopt de Gaulle’s constitution<sup>14</sup> as a blue print for their post-independence laws and institutions, members of the CCC stated that adopting the French constitutional model was due to the wishes of then leader of government, Ahmadou Ahidjo, whose “government was more interested in producing almost any document and having it adopted as soon as possible than in encouraging wider discussion of its basic provisions—

---

10. Fatton, *supra* note 9.

11. *Id.* at 357.

12. Fatton, *supra* note 9.

13. *Id.* at 357.

14. That is, the FRENCH CONSTITUTION OF OCTOBER 4, 1958, also referred to as the CONSTITUTION OF THE FRENCH FIFTH REPUBLIC.

thus, according to these critics, accounting largely for following the French model so closely.<sup>15</sup>

In fact, throughout Africa, many indigenous elites believed that the most important consideration was independence and that issues of constitutional discourse and design would be given a more robust hearing later, that is, in the post-independence period. Given the fact that the constitution is the basic law for every country and the foundation for all of the country's governance institutions, the failure to engage all of each country's relevant stakeholders in participatory, inclusive, and people-driven constitutional design did not augur well for effective governance in the post-independence period.<sup>16</sup>

French Cameroons gained independence on January 1, 1960, and took the name *République du Cameroun*.<sup>17</sup> In 1961, the *République du Cameroun* united with the U.N. Trust Territory of Southern Cameroons to form a federation called the Federal Republic of Cameroon. Unfortunately, the process through which the constitution of the Federal Republic of Cameroon was designed and adopted was just as opportunistic and non-participatory as that of the *République du Cameroun*. As a consequence, the resulting Federal Constitution created a governing process characterized by an imperial presidency and virtually no mechanisms for citizens to check the exercise of government power.<sup>18</sup> As a result of the failure of Cameroonians to provide themselves with institutional arrangements that adequately and effectively constrain the state, political economy in the country, since unification in 1961, has been pervaded with government impunity, including high levels of corruption, the rampant abuse of human and peoples' rights, notably those of women, children, and the country's Anglophone minority.<sup>19</sup>

15. VICTOR T. LEVINE, *THE CAMEROONS: FROM MANDATE TO INDEPENDENCE* 227 (1964).

16. *Id.* See also Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFRI. STUD. 181 (1997).

17. LEVINE, *supra* note 15.

18. See also John M. Mbaku, *Judicial Independence, Constitutionalism and Governance in Cameroon: Lessons from French Constitutional Practice*, 1 EUROPEAN J. COMP. L & GOV. 357 (2014) (examining, *inter alia*, the weaknesses of Cameroon's governance institutions and how they have failed to minimize government impunity).

19. In fact, it was the continued exploitation and abuse of the minority Anglophones by the Francophone-dominated central government that forced some Anglophones to opt for violent mobilization, which has plunged the country into its worst constitutional crisis since unification in 1961. See, e.g., S. Eban Ebai, *The Right to Self-Determination and the Anglophone Cameroon Situation*, 13 INT'L J. HUM. RTS. 631 (2009) (arguing, *inter alia*, that Anglophones in Cameroon have a right to self-determination); Piet Konings, *The Anglophone Struggle for Federalism in Cameroon*, in *FEDERALISM AND DECENTRALIZATION IN AFRICA* 289 (L. R. Basta & J. Ibrahim eds., 1999). See also *INTERNATIONAL CRISIS*

---

---

*A. The Evolution of Impunity as a Global Problem*

Shortly after independence, many African political elites soon abandoned even these poorly-designed and relatively weak constitutions and opted, instead, to rule without any legal constraints. As argued by LeVine,<sup>20</sup> “[i]n West Africa such documents were soon abrogated by the new governments, which generally preferred to rule without the constraints that they embodied.”<sup>21</sup> Throughout many of these newly-independent countries, “a constitution more often than not became simply another instrument of rule if not discarded altogether. Many a replacement was simply *octroyé*, ‘handed down from on high,’ or cobbled together by a compliant constitution-writing conference or convention, and then adopted by a ‘controlled’ plebiscite.”<sup>22</sup> Although LeVine’s article was published in 1997 and it is now 2018, constitution making in many African countries remains as dysfunctional as it was then.<sup>23</sup>

In countries, such as Kenya, Malawi, Zambia, Cameroon, and Côte d’Ivoire, the single political party soon emerged as the only legal means through which citizens could participate in the political life of their countries.<sup>24</sup> Despite the fact that the one-party state was promoted by its

---

GROUP, REPORT NO. 250: CAMEROON’S ANGLOPHONE CRISIS AT THE CROSSROADS, <https://www.crisisgroup.org/africa/central-africa/cameroon/250-camerouns-anglophone-crisis-crossroads>.

20. Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFRI. STUD. 181 (1997).

21. LeVine, *supra* note 20, at 188.

22. *Id.*

23. While there are a few exceptions, including for example, constitutional exercises in South Africa and Kenya, most African countries continue to engage in top-down, elite-driven, non-participatory and non-inclusive constitutional exercises. For example, in 2016, Côte d’Ivoire produced a new constitution for the Third Republic. In addition to the fact that the committee chosen to design the constitution was handpicked by the president and not the people (e.g., through nation-wide, fair, free, and credible elections), ratification of the constitution was undertaken through a highly controlled referendum, with the opposition virtually shut out of participation. *See, e.g.*, John M. Mbaku, *Citizenship and Political and Economic Participation in Africa*, 43 N.C. J. INT’L L. 110, 165 (2018).

24. Kenya gained independence from Great Britain on December 12, 1963 under the leadership of the Kenya African National Union (KANU) in what was essentially a de facto one-party system. In 1982, Kenya became a de jure one-party state (*see, e.g.*, CHARLES HORNSBY, *KENYA: A HISTORY SINCE INDEPENDENCE* (2013) (providing, inter alia, an overview of post-colonial developments in Kenya). Malawi gained independence from Great Britain on July 6, 1964, with the Malawi Congress Party (MCP) as the only legal political party until 1993 when the state adopted a multi-party system (*see, e.g.*, JOHN LLYOD LWANDA, *KAMUZU BANDA OF MALAWI: A STUDY IN PROMISE, POWER AND PARALYSIS (MALAWI UNDER DR. BANDA) (1961 TO 1993)* (2009) (providing, inter alia, an

proponents as a political mechanism to unite the country and enhance nation building, it actually exacerbated inter-ethnic conflicts and created many problems for governance. The domination of government by some ethnocultural groups, to the exclusion of others, caused the type of resentment that produced significant levels of sectarian violence, some of which deteriorated into civil war, as occurred in Liberia, Nigeria, Cameroon,<sup>25</sup> and most recently, South Sudan.<sup>26</sup> The single-party approach to governance significantly increased the power of the executive, and seriously

---

overview of Malawi under Banda's one-party system). Zambia gained independence from Great Britain in October 1964 under a multiparty system that was dominated by three political parties, United National Independence Party (UNIP), the ruling party; the Northern Rhodesian African National Congress (NRANC), and the United Progressive Party (UPP). However, in February 1972, Zambia became a one-party state—all political parties, except for the UNIP, were banned (THE DYNAMICS OF THE ONE-PARTY STATE IN ZAMBIA (Cherry J. Gertzel, Carolyn Louise Baylies & Morris Szeftel eds., 1984) (providing a series of essays that examines the impact of the one-party political system on political economy in post-independence Zambia). On January 1, 1960, the U.N. Trust Territory of Cameroons under French administration gained independence and took the name *République du Cameroun*. On February 11, 1961, the U.N. Trust Territory of Southern Cameroons under British administration voted in a U.N.-controlled and administered plebiscite to unite with the *République du Cameroun* to form the Federal Republic of Cameroon. At unification in 1961, the new Federal Republic was a multiparty state with several political parties. Nevertheless, in 1966, then Federal President, Ahamdou Ahidjo, cajoled all the political parties, except the *Union des Populations du Cameroun*, to join his Cameroon Union (*Union camerounaise*) to form the Cameroon National Union (CNU). From 1966 until 1990, Cameroon was a single-party state with the CNU as the only legal political party (see, e.g., RICHARD A. JOSEPH, GAULLIST AFRIA: CAMEROON UNDER AHMADU AHIDJO (1978) (examining the evolution of political economy in Cameroon under its first president, Ahmadu Ahidjo). Côte d'Ivoire gained independence from France in 1960 under the leadership of the Democratic Party of Côte d'Ivoire—African Democratic Rally (*Parti démocratique de la Côte d'Ivoire—Rassemblement démocratique Africain* (PDCI-RDA)). Côte d'Ivoire introduced multiparty politics in 1990 but the PDCI remained in power, having won elections decisively. However, the party lost its control of the government when Henri Konan Bédié, who had replaced independence president, Félix Houphouët-Boigny, who died in office in 1993, was ousted by military coup in December 1999 (see, e.g., ABOU B. BAMBA, AFRICAN MIRACLE, AFRICAN MIRAGE: TRANSNATIONAL POLITICS AND THE PARADOX OF MODERNIZATION IN IVORY COAST (2016) (examining, inter alia, political developments in Côte d'Ivoire since independence).

25. For example, the ruling Cameroon National Union, which was renamed in 1985 as the Cameroon People's Democratic Movement (CPDM), was dominated, since its emergence in 1966, by Francophones to the exclusion of Anglophones. See MARK D. DELANCEY, REBECCA N. MBUH & MARK W. DELANCEY, HISTORICAL DICTIONARY OF CAMEROON (6th ed. 2010).

26. See James Verini, *How the World's Youngest Nation Descended into Bloody Civil War*, NATIONAL GEOGRAPHIC, Sept. 30, 2014, <https://news.nationalgeographic.com/news/special-features/2014/10/141001-south-sudan-dinka-nuer-ethiopia-juba-khartoum/>; Endalcachew Bayeh, *Republic of South Sudan: From North-South to Nuer-Dinka Conflict*, 1 INT'L J. RESEARCH 288 (2014).

weakened the judiciary and the legislature. Perhaps, more important is the fact that in all of these countries, governance was characterized by significant levels of impunity, including corruption and the abuse of the fundamental and human rights of citizens, especially those of historically marginalized groups, such as women, children, and ethnic and religious minorities.<sup>27</sup>

In a significant number of African countries, military elites intervened and took control over the structures of governance.<sup>28</sup> Contrary to the pronouncements of these military elites in the immediate aftermath of the coups, which included claims that they had intervened to save the country from corrupt and opportunistic civilian-led regimes, the military regimes were, more often than not, characterized by levels of corruption and other forms of impunity that were actually higher than those obtaining in the civilian regimes that the military had overthrown.<sup>29</sup> As argued by LeVine,<sup>30</sup> the intervention by military elites in African politics “epitomized the low estate to which constitutionalism had fallen during [the] 1963-89”<sup>31</sup> period in Africa. Like their civilian counterparts, Africa’s military rulers “rejected constitutions and constitutionalism as the basis for organizing their societies and resolving conflict.”<sup>32</sup> In virtually all countries that were ruled by military regimes, the governors totally rejected participation and inclusiveness and

---

27. See JOHN M. MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 99 (2018).

28. Africa’s first post-independence coup took place in Egypt on July 23, 1952, when the government of King Farouk was overthrown by members of the Free Officers Movement. Colonel Gamal Abdul Nasser was considered the brains behind the coup operation. Nevertheless, General Muhammad Naguib was chosen as the post-coup leader because of Nasser’s fear that he and his fellow soldiers might not be taken seriously because of their youth—all the young officers were under 35 years of age and hailed from peasant lower-middle-class backgrounds. Two years later, on February 27, 1954, Nasser overthrew Muhammad Naguib and took over control of the presidency of Egypt. Although military coups d’état have become less popular as a method of unconstitutional change of government in Africa, they remain a threat to each country’s constitutional order. For more on Nasser and the Free Officers Movement, see JOEL GORDON, NASSER’S BLESSED MOVEMENT: EGYPT’S FREE OFFICERS AND THE JULY REVOLUTION (1992) (examining, *inter alia*, the 1952 military coup in Egypt and the role played by Nasser’s Free Officers Movement). For a history of coups in Africa, see, e.g., A. B. ASSENSOH & YVETTE M. ALEX-ASSENSOH, AFRICAN MILITARY HISTORY AND POLITICS: COUPS AND IDEOLOGICAL INCURSIONS, 1900–PRESENT (2001) (providing a historical overview of military coups d’état in Africa).

29. See, e.g., JOHN M. MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 91–110 (1997).

30. LeVine, *supra* note 20.

31. *Id.* at 190.

32. John M. Mbaku, *What Should Africans Expect from Their Constitutions*, 41 DENV. J. INT’L L & POL’Y 149, 149 (2013).

instead opted to rely on ad hoc decrees and other forms of coercion, all of which enhanced the government's ability to act with impunity—the result was the massive abuse of the rights of citizens.<sup>33</sup>

In virtually all the African countries in which the military had taken control of the apparatus of government, supposedly to rid their fellow citizens of corrupt and opportunistic civilian leaders,<sup>34</sup> the military elites' "own vision [of governance] tended to the strictly utilitarian; that is, seeing constitutions as conditional charters to 'clean' or 'sanitize' civilian régimes."<sup>35</sup> Although most of the military elites who had intervened in the politics of their countries claimed they did so to "rid their countries of corruption and other forms of impunity and deepen and institutionalize democracy, military rulers instead immediately switched to authoritarian forms of governance, all of which were characterized by the absence of avenues for popular participation"<sup>36</sup> and significantly high levels of government impunity.

By the early-1990s, when many grassroots movements emerged to push for transition to democratic governance in Africa,<sup>37</sup> impunity had become quite pervasive throughout the continent. In many of these countries, state- and non-state actors who were perpetrators of human rights violations routinely escaped prosecution and punishment because of governments that were unwilling or unable to bring these culprits to justice. In many situations, such as the apartheid regime in South Africa, military and/or

---

33. See, e.g., SAMUEL DECALO, *COUPS & ARMY RULE IN AFRICA: MOTIVATIONS & CONSTRAINTS* 1–33 (1990) (examining, *inter alia*, the role played by the military in governance in Africa).

34. Actually, these were the same sentiments expressed by Major Chukwuma Kaduna Nzeogwu and his fellow coup plotters in Nigeria in 1966. As part of his speech delivered to the nation on January 15, 1966, Major Nzeogwu stated that they had organized the coup to rid the country of "the political profiteers, the swindlers, the men in high and low places that seek bribes and demand 10 percent; those that seek to keep the country divided permanently so that they can remain in office as ministers or VIPs at least, the tribalists, the nepotists, those that make the country look big for nothing before international circles, those that have corrupted our society and put the Nigerian political calendar back by their words and deeds." Chukwuma K. Nzeogwu, *Announcing Nigeria's First Military Coup on Radio Nigeria* (Sept. 30, 2010) (transcript available at <https://www.vanguardngr.com/2010/09/radio-broadcast-by-major-chukwuma-kaduna-nzeogwu-%E2%80%93-announcing-nigeria%E2%80%99s-first-military-coup-on-radio-nigeria-kaduna-on-january-15-1966>).

35. LeVine, *supra* note 20, at 190.

36. Mbaku, *supra* note 23, at 166.

37. Mbaku and Ihonvbere provide an overview of the transition to democracy that began in the early-1990s in Africa, See *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE* (John M. Mbaku & Julius O. Ihonvbere eds., 2003); see also *POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES* (Julius O. Ihonvbere & John M. Mbaku eds., 2003).

civilian dictatorships in countries such as Nigeria, Democratic Republic of Congo, Central African Republic, Sierra Leone, and Ethiopia, the perpetrators were actually state actors, who had no incentives to prosecute themselves for their complicity in human rights abuses.<sup>38</sup>

In some countries, impunity either directly by state actors or sponsored by them produced genocides and civil wars. In Rwanda, for example, it was members of the Hutu-dominated government, who masterminded and carried out the genocide and ethnic cleansing that killed more than 800,000 Tutsi and their Hutu sympathizers in just 100 days during the period, April 7 to mid-July 1994.<sup>39</sup> The genocide was finally brought to an end through the intervention of the Tutsi-backed Rwandan Patriotic Front (“RPF”), led by Paul Kagame, Rwanda’s present (2018) president. During the apartheid regime, which operated officially in South Africa, from 1948 to 1994, the white minority government used the law and state institutions to brutalize the African majority, including imprisoning the latter’s leaders and forcing various African groups into economically unsustainable settlements called “homelands.”<sup>40</sup>

In the Democratic Republic of Congo, the abuse of human rights by state- and non-state actors has continued unabated since the colonial period.<sup>41</sup> The Belgian colonial government, like colonialists in other parts of Africa, acted with impunity and routinely abused the fundamental rights of the Congolese people. Belgian Congo gained independence on June 30, 1960 under the leadership of prime minister, Patrice Lumumba, and took the name

---

38. For more on the abuse of human rights in Africa, especially in the period leading to the 1990s, see BRIAN BAUGHAN, *HUMAN RIGHTS IN AFRICA* (2014).

39. For more on the Rwandan genocide, *see, e.g.*, SCOTT STRAUS, *THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA* (2006) (providing an overview of the events leading to the genocide in Rwanda, as well as the genocide itself); LINDA MELVERN, *A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA’S GENOCIDE* (2009) (examining, *inter alia*, the failure of the Western countries to act to stop the mass slaughter of Rwandans in 1994); GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (1997) (examining, *inter alia*, events that contributed to the genocide in Rwanda).

40. For more on apartheid in South Africa, *see* SEAN CONNOLLY, *APARTHEID IN SOUTH AFRICA* (2003) (providing an overview of evolution and collapse of apartheid in South Africa); PATTI WALDMEIR, *ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA* (1997) (examining events leading to the demise of South African apartheid and the emergence of a democratic, non-racial, post-apartheid South African state).

41. For impunity in colonial Congo, *see, e.g.*, ADAM HOCSECHILD, *KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (detailing King Leopold, II of Belgium’s exploits in Congo); CH. DIDIER GONDOLA, *THE HISTORY OF CONGO* (2002) (providing a detailed history of Congo, including pre-colonial, colonial and post-independence periods).

Republic of Congo (*République du Congo*) but shortly afterwards, the new country was plunged into chaos—in addition to mutinies staged by soldiers, two provinces, Katanga and South Kasai, began efforts to secede and form their own sovereign and independent states. On September 5, 1960, then president of the Republic of Congo, Joseph Kasavubu, sacked prime minister Lumumba from office and created a constitutional crisis. On November 25, 1965, Joseph Mobutu, who had been appointed by Lumumba as chief of the new country's army—the *Armée Nationale Congolaise* (Congolese National Army), overthrew the government and eventually declared himself head of state. Mobutu ruled the country from 1965 until 1997 when he was forced out of office by Laurent-Désiré Kabila and his Alliance of Democratic Forces for the Liberation of Congo. Mobutu's reign was characterized by a significant level of government impunity.<sup>42</sup>

Laurent-Désiré Kabila ruled Congo from 1997 until his assassination by one of his bodyguards in 2001.<sup>43</sup> A few days after his death, he was succeeded as president of Congo by his son, Joseph Kabila, who remains the president of the country to this day (2018). The governments of both Kabilas, like those of their predecessors, have been characterized by significant levels of impunity—both by state- and non-state actors.<sup>44</sup> Of course, these are only a few examples of the situations in which African governments have engaged in impunity during the last several decades. There are, of course, many more. It is only necessary, for purposes of this article, that we list just a few situations.<sup>45</sup>

In the early-1990s, as many African countries were engaged in efforts to transition to democratic governance, the international community was becoming fully aware of the need to take action, at the global level, to deal

---

42. For impunity in Mobutu's Congo, see, e.g., MICHELA WRONG, *IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN MOBUTU'S CONGO* (2009) (examining the pauperization of the Congolese peoples during the reign of Mobutu); David J. Gould & T. B. Mukendi, *Bureaucratic Corruption in Africa: Causes, Consequences and Remedies*, 12 INT'L J. PUB. ADMIN. 427 (1989) (examining corruption and kleptocracy in Mobutu's Congo/Zaire).

43. For more on Kabila's government, see FRANÇOIS NGOLET, *CRISIS IN THE CONGO: THE RISE AND FALL OF LAURENT KABILA* (2011) (providing an overview of Laurent-Désiré Kabila's rise and fall in Congo).

44. For more on impunity in Congo under the Kabilas, see HUMAN RIGHTS WATCH, *WHAT KABILA IS HIDING: CIVILIAN KILLINGS AND IMPUNITY IN CONGO*, HUMAN RIGHTS WATCH (1997) (a report from Human Rights Watch on impunity in the senior Kabila's government); FRANK HALDEMANN & THOMAS UNGER, *THE UNITED NATIONS PRINCIPLES TO COMBAT IMPUNITY: A COMMENTARY* (2018) (indicating that the fight against impunity has become an important concern for the international community).

45. For impunity in Africa writ large, see generally PROSECUTING INTERNATIONAL CRIMES IN AFRICA (Chacha Murungu & Japhet Biegons eds., 2011) (providing an overview of efforts to deal with impunity in Africa).

with impunity and other threats to international peace and security. For example, in June 1992, Boutros Boutros-Ghali, then U.N. Secretary-General, authored a report titled *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*.<sup>46</sup> In his report, Boutros-Ghali attempted to provide a framework, which he believed could be used by intergovernmental organizations, to deal with impunity and other threats to international peace and security. The report focused on four critical areas, as requested by the U.N. Security Council: (1) preventive diplomacy; (2) peacemaking; (3) peace-keeping; and (4) post-conflict peace-building.<sup>47</sup>

Despite the U.N. Secretary-General's report, the U.N. Security Council,<sup>48</sup> remained reluctant to "issue . . . resolutions that [could be] perceived as infringing the sovereignty of Member States."<sup>49</sup> The failure of the United Nations to actively engage in dealing with threats to international peace, which included impunity by state- and non-state actors, contributed significantly to the failure of the international community to deal with violent sectarian conflict in many countries. Especially at risk during this period were citizens of many African countries, as evidenced by the extraordinary level of violence, some of it emanating from the state, in countries such as Angola,<sup>50</sup> Democratic Republic of Congo,<sup>51</sup> Liberia,<sup>52</sup> Sierra Leone,<sup>53</sup>

---

46. See U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, U.N. Co. A/47/277 (June 17, 1992). Boutros-Ghali was an Egyptian diplomat and politician who served as the 6th U.N. Secretary-General from January 1, 1992 to December 31, 1996. For more on Boutros-Ghali and his term at the United Nations, see Stephen FRANKLIN BURGESS, *THE UNITED NATIONS UNDER BOUTROS BOUTROS-GHALI, 1992-97* (2001).

47. See U.N. Secretary-General, *supra* note 46, ¶ 5.

48. This is the U.N. organ that is legally empowered, through the U.N. Charter, to maintain international peace and security. U.N. Charter art. 39–51.

49. Tim Murithi, *The African Union's Transition from Non-Intervention to Non-Indifference: An Ad Hoc Approach to the Responsibility to Protect*, INDEPENDENT PUBLISHERS GROUP (IPG), Jan. 2009, at 91.

50. For Angola, see PHIL Y. NANGOLOH, *ANGOLA: THE POLITICO-MILITARY CONFLICT AND HUMAN RIGHTS VIOLATIONS: INTERNATIONAL CONSPIRACY AND COMPLICITY* (2002) (examining, *inter alia*, the complicity of international groups in government impunity in Angola).

51. The literature on impunity in the Democratic Republic of Congo (DRC) is quite extensive. See, e.g., *THE AFRICAN STAKES OF THE CONGO WAR* (John F. Clarke ed., 2002) (presenting a series of essays that examines sectarian violence in the DRC, which has contributed significantly to the abuse of human rights in the country); G. NZONGOLA-NTALAJA, *THE CONGO: FROM LEOPOLD TO KABILA: A PEOPLE'S HISTORY* (2002) (providing a rigorous overview of the DRC's tortured history, including impunity by its various governmental regimes, from the colonial to the post-independence periods); SÉVERINE AUTESSERRE, *THE TROUBLE WITH THE CONGO: LOCAL VIOLENCE AND THE FAILURE OF*

Burundi,<sup>54</sup> South Africa,<sup>55</sup> and Rwanda.<sup>56</sup> Since 2003, the government of Sudan, aided by various non-state militias, has massacred more than 300,000 Darfuri men, women, and children in the Darfur region of western Sudan. The Darfur Genocide is often referred to as the first genocide of the 21st century. In 2009, the International Criminal Court (“ICC”) issued an arrest warrant for Sudan’s president, Omar Hassan Ahmad al-Bashir;<sup>57</sup> another warrant was issued on July 12, 2010—these warrants charged al-Bashir with “five counts of crimes against humanity: murder, extermination, forcible transfer, torture, and rape; two counts of war crimes: Intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, and pillaging; three counts of genocide: by killing, by causing serious bodily or mental harm, and by deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction, allegedly committed at least between 2003 and 2008 in Darfur, Sudan.”<sup>58</sup>

As the 21st century was being ushered in, the issue of how to deal with impunity and threats against international peace and security had gained

---

INTERNATIONAL PEACEBUILDING (2010) (providing a detailed examination of impunity by local groups).

52. For Liberia and Sierra Leone, see generally AMADU SESSAY, CHARLES UKEJE, OSMAN GBLA & OLAWALE ISMAIL, *POST-WAR REGIMES AND STATE RECONSTRUCTION IN LIBERIA AND SIERRA LEONE* (2009) (examining regime impunity in modern-day Liberia and Sierra Leone); YVES BEIGBEDER, *INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES* (2005) (providing evidence to show that the international struggle against impunity has been slow; reviews the International Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone and the Cambodia Court).

53. For Sierra Leone, see SESSAY ET AL., *supra* note 52; BEIGBEDER, *supra* note 52.

54. HUMAN RIGHTS WATCH, *MOB JUSTICE IN BURUNDI: OFFICIAL COMPLICITY AND IMPUNITY* (2010) (examining official impunity in Burundi, with particular emphasis on events that occurred in 2009). “L’Association burundaise pour la Protection des Droits Humains et des Personnes détenues” means the Burundian Association for the Protection of Human Rights and Detained Persons.

55. The literature on the apartheid system in South Africa and the atrocities that it committed against Africans and other non-white groups, is very extensive. We mention only a few: JOHN ALLEN, *APARTHEID SOUTH AFRICA: AN INSIDER’S OVERVIEW OF THE ORIGIN AND EFFECTS OF SEPARATE DEVELOPMENT* (2005) (examining apartheid in South Africa and its atrocities); NANCY L. CLARK & WILLIAM H. WORGER, *SOUTH AFRICA: THE RISE AND FALL OF APARTHEID* (2016) (examining apartheid from its imposition in 1948 to its demise in 1994 and the regime’s atrocities against Africans and other non-white groups).

56. GODFREY MWAKIKAGILE, *IDENTITY POLITICS AND ETHNIC CONFLICTS IN RWANDA AND BURUNDI: A COMPARATIVE STUDY* (2012) (examining the conflict between the Hutu and Tutsi that has been characterized by significant abuses of human rights and genocide).

57. *Prosecutor v. Al Bashir*, ICC–02/05–01/09-74, Opinion of Judge Steiner.

58. International Criminal Court (ICC), *Al Bashir Case: The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC–02/05–01/09, <https://www.icc-cpi.int/darfur/albashir>.

currency in many global forums. For example, U.N. Secretary-General, Kofi Annan, who served the world body from January 1, 1997 to December 31, 2006, made presentations to the U.N. General Assembly asking the latter to find ways to confront impunity and other threats to international peace and security. In 1999 and again in 2000, Kofi Annan “made compelling pleas to the international community to try to find, once and for all, a new consensus on how to approach these issues, to ‘forge unity’ around the basic questions of a principle and process involved.”<sup>59</sup> Annan challenged the international community with an important question, one that implicated the failure of the international community, in general, and the United Nations, in particular, to fully and effectively respond to situations of government impunity in various countries around the world: “. . . if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?”<sup>60</sup>

In response to this challenge to the international community, the Government of Canada established the International Commission on Intervention and State Sovereignty (“ICISS”) and tasked it with dealing with a “whole range of questions”<sup>61</sup> and these included “legal, moral, operational and political”<sup>62</sup> questions and that the ICISS would consult with as many stakeholders as possible in an effort to seek solutions to these issues. The Government of Canada told the U.N. General Assembly that the completed report would be presented to the U.N. Secretary-General for further transmission to the General Assembly, with the hope that the international community could reach some common ground on how to deal with impunity and other threats to international peace and security.<sup>63</sup> The ICISS established a new approach to dealing with threats to international peace and security, which was named the Responsibility to Protect (“R2P”).

R2P incorporates and embraces three important elements or responsibilities that speak directly to impunity and other threats to international peace and security:

---

59. Int’l Comm’n on Intervention and State Sovereignty (ICISS) (Dec. 2001), *The Responsibility to Protect*, at VII, <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

60. *Id.*

61. *Id.*

62. *Id.* at 81.

63. *Id.*

- A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
- B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
- C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.<sup>64</sup>

### *B. The African Union and Impunity*

During the last several decades, many African countries have been pervaded by the gross abuse of human rights.<sup>65</sup> Violent sectarian conflict, some of which has evolved into genocide, war crimes, and crimes against humanity, have emerged in Africa during the last few decades as the most important threats to international security and peace. In the early-to-mid-1990s, it was the failure of regional, continental, and international actors to fight impunity and protect vulnerable populations against these international crimes, including especially during the Rwandan Genocide, that provided the impetus to the adoption by the United Nations, of the principle of responsibility to protect.<sup>66</sup>

The commitment by the United Nations to the R2P specifically provides that (1) States have the responsibility to protect their populations from international crimes;<sup>67</sup> and (2) States should cooperate with each other in their efforts to fulfill their obligations regarding the protection of their populations from international crimes. The U.N. went on to state that if, however, a State is either unwilling or does not have the capacity to fulfill its obligations under R2P, the international community will take action, either through peaceful means or the use of force if the former fails to resolve the

---

64. *Id.* at XI.

65. For an overview of human rights abuses in Africa, see BRIAN BAUGHAN, HUMAN RIGHTS IN AFRICA (2014) (discussing, *inter alia*, the history of human rights abuses in Africa).

66. Int'l Comm'n on Intervention and State Sovereignty, *supra* note 59.

67. These international crimes include genocide, war crimes, crimes against humanity, and ethnic cleansing. See, e.g., U.N. General Assembly, *Rome Statute of the International Criminal Court* (last amended in 2010), July 17, 1998, <http://www.refworld.org/docid/3ae6b3a84.html> (last visited Oct. 25, 2018) (providing a definition of international crimes in art. 5).

problem.<sup>68</sup> As stated in the ICISS Report, “[w]hen preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required. These coercive measures may include political, economic or judicial measures, and in extreme cases—but only extreme cases—they may also include military action.”<sup>69</sup>

Within time, Africans began to warm up to the principle of R2P. While it existed, the Organization of African Unity (“OAU”) did not have any legal power to intervene in the internal affairs of Member States to deal with impunity and other threats to international crimes. Thus, the continent remained essentially unresponsive to impunity by state and non-state actors in many countries, including, the Rwandan Genocide.<sup>70</sup> However, the African Union, the successor organization to the OAU, has been empowered to intervene in the internal affairs of Member States in respect of “war crimes, genocide and crimes against humanity.”<sup>71</sup> These provisions are contained in Article 4 of the Constitutive Act of the African Union and have been collectively referred to as Africa’s principle of “non-indifference” and the continent’s equivalent of the global R2P.

The Chairperson of the African Union Commission from September 16, 2003, to April 28, 2008, Alpha Oumar Konaré, advocated a policy that would take the AU from a culture of “non-intervention” to one of “non-indifference.”<sup>72</sup> In Africa, the responsibility for implementing the R2P principle is in the hands of the Peace and Security Council (“PSC”), which was established in 2014 through the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (“AU Protocol”).<sup>73</sup> According to Article 2(1) of the AU Protocol, “There is hereby established, pursuant to Article 5(2) of the Constitutive Act, a Peace and Security Council

---

68. Int’l Comm’n on Intervention and State Sovereignty, *supra* note 59, at 29.

69. *Id.*

70. In fact, the OAU’s Charter specifically had a policy of non-interference in the internal affairs of its Member States. See Organization for African Unity (OAU), *Charter of the Organization of African Unity*, May 23, 1963, [https://au.int/sites/default/files/treaties/7759-file-oau\\_charter\\_1963.pdf](https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf)

71. African Union (AU), *Constitutive Act of the African Union* (July 11, 2000), [http://www.achpr.org/files/instruments/au-constitutive-act/au\\_act\\_2000\\_eng.pdf](http://www.achpr.org/files/instruments/au-constitutive-act/au_act_2000_eng.pdf).

72. For an in depth discussion of the continent’s policy of “non-indifference,” see Ndubuisi C. Ani, *The African Union Non-Indifference Stance: Lessons from Sudan and Libya*, 6 AFRICAN CONFLICT & PEACEBLDG. REV. 1 (2016).

73. African Union (AU), *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (July 9, 2002), [https://au.int/sites/default/files/treaties/7781-treaty-0024\\_-\\_protocol\\_relating\\_to\\_the\\_establishment\\_of\\_the\\_peace\\_and\\_security\\_council\\_of\\_the\\_african\\_union\\_e.pdf](https://au.int/sites/default/files/treaties/7781-treaty-0024_-_protocol_relating_to_the_establishment_of_the_peace_and_security_council_of_the_african_union_e.pdf).

within the Union, as a standing decision-making organ for the prevention, management and resolution of conflicts. The Peace and Security Council shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.”<sup>74</sup>

The PSC’s objectives and responsibilities are listed in Article 3 of the African Union Protocol—the PSC was established to:

- a. promote peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development;
- b. anticipate and prevent conflicts. In circumstances where conflicts have occurred, the Peace and Security Council shall have the responsibility to undertake peace-making and peace-building functions for the resolution of these conflicts;
- c. promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence;
- d. co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects;
- e. develop a common defense policy for the Union, in accordance with article 4(d) of the Constitutive Act;
- f. promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.<sup>75</sup>

In undertaking these responsibilities, the PSC is to be assisted and supported by the AU Commission, as well as three dedicated bodies: The Panel of the Wise;<sup>76</sup> the Continental Early Warning System;<sup>77</sup> and the

---

74. *Id.* art. 2(1).

75. *Id.* art. 3(1)(a–f).

76. The Panel of the Wise is “one of the critical pillars of the Peace and Security Architecture of the African Union (APSA). Article 11 of the Protocol establishing the PSC sets up a five-person panel of ‘highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent’ with a task ‘to support the efforts of the PSC and those of the Chairperson of the Commission, particularly in the area of conflict prevention.’” *See Panel of the Wise (PoW)*, AFRICAN UNION PEACE AND SECURITY, <http://www.peaceau.org/en/page/29-panel-of-the-wise-pow>.

African Standby Force.<sup>78</sup> The PSC is also expected to be supported in its activities by the U.N.'s Military Staff Committee.<sup>79</sup> The New Partnership for Africa's Development ("NEPAD") is also expected to provide assistance to the Peace and Security Council.<sup>80</sup> In addition, the AU's various human rights institutions, including the African Commission on Human and Peoples' Rights ("ACHPR")<sup>81</sup> and the African Court on Human and Peoples' Rights ("ACHPR"),<sup>82</sup> are also expected to actively participate in the fight against impunity in the continent.

It has been argued that there may be a conflict between the right of the African Union to intervene in the internal affairs of Member States to deal

---

77. The Continental Early Warning System (CEWS) is one of the five pillars of the African Peace and Security architecture (APSA). The CEWS collects data and analyzes and provides advice to the PSC and other institutions with interest in peace and security in Africa. See *The Continental Early Warning System (CEWS)*, AFRICAN UNION PEACE AND SECURITY, <http://www.peaceau.org/en/page/28-continental-early-warning>.

78. The African Standby Force (ASF) is an important tool for dealing with impunity and other threats to international peace and security in the continent. It is a multidisciplinary peacekeeping force, consisting of military, police and civilian contingents. The ASF operates under the direction of the African Union and supports the latter's right to intervene in a member state in grave circumstances, as prescribed in Article 4h of the Constitutive Act of the African Union. For more information on the ASF, see *The African Standby Force (ASF)*, AFRICAN UNION PEACE AND SECURITY, <http://www.peaceau.org/en/page/82-african-standby-force-asf-amani-africa-1>.

79. The Military Staff Committee is a U.N. Security Council subsidiary body, whose main function is "to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament." *United Nations Security Council Subsidiary Organs, United Nations Military Staff Committee*, UNITED NATIONS (U.N.) (July 20, 2018), <https://www.un.org/sc/suborg/en/subsidiary/msc> & International Refugee Rights Initiative (IRRI), *From Non-Interference to Non-Indifference: The African Union and the Responsibility to Protect*, <https://reliefweb.int/sites/reliefweb.int/files/resources/AU%20R2P%20-%20final.pdf>.

80. For more on NEPAD, see, e.g., AFRICA & DEVELOPMENT CHALLENGES IN THE NEW MILLENNIUM: THE NEPAD DEBATE (J. O. Adésinà, Yao Gbraham & A. Olukoshi eds., 2006) (presenting a series of essays that examines the founding of the NEPAD and evaluating its performance).

81. For more on the African Commission on Human and Peoples' Rights, see RACHEL MURRAY, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INTERNATIONAL LAW (2000) (analyzing, *inter alia*, the applicability of international law to African situations).

82. For the African Court on Human and Peoples' Rights, see LUIS G. FRANCESCHI, THE AFRICAN HUMAN RIGHTS JUDICIAL SYSTEM: STREAMLINING STRUCTURES AND DOMESTICATION MECHANISMS VIEWED FROM THE FOREIGN AFFAIRS POWER PERSPECTIVE (2014) (examining the international judicial function in Africa with specific emphasis on the African Court on Human and Peoples' Rights).

with impunity and other threats to international peace and the requirement that prior authorization be obtained from the U.N. Security Council before force is used in any Member State of the African Union. This issue is clarified by the A.U. in the Ezulwini Consensus.<sup>83</sup> In the Ezulwini Consensus, the African Union argued that it was important for regional organizations to act quickly in the case of threats to international peace and then secure approval from the U.N. Security Council after the fact.<sup>84</sup>

Since 2005, the Responsibility to Protect (“R2P”) has been recognized as the unanimous commitment of the U.N. and other global actors to prevent and deal with impunity and other threats to international peace and security. The global society’s commitment to the fight against threats to international peace and security was expressed, formally, in the U.N.’s 2005 World Summit Outcome Document (“2005WSOD”).<sup>85</sup> In paragraph 138 of the 2005WSOD, the U.N. states that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>86</sup> If States do not perform their responsibilities to protect their citizens as prescribed in the 2005WSOD, the international community, through the United Nations and specifically, the U.N. Security Council, “has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>87</sup> Additionally, if the peaceful approach fails to successfully and fully resolve the situation, the international community is “prepared to take collective action, in a timely and decisive manner, through the [U.N.] Security Council, in accordance with the [U.N.] Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate.”<sup>88</sup>

---

83. The Ezulwini Consensus represents the common African position on the proper reform of the United Nations system. The Consensus was adopted at the Extraordinary Session of the Executive Council of the African Union in March 2005 in Addis Ababa, Ethiopia. See African Union (AU), *The Common African Position on the Proper Reform of the United Nations: The Ezulwini Consensus*, EXT/EX.CL/2(VII) (Mar. 4-5, 2005).

84. For more on the Ezulwini Consensus, see HANDBOOK OF AFRICA’S INTERNATIONAL RELATIONS (Tim Murithi ed., 2013) (examining, inter alia, Africa’s international relations in the post-Cold War world).

85. G.A. Res. 60/1, 2005 World Summit Outcome Document (Oct. 24, 2005).

86. *Id.* ¶ 138.

87. *Id.* ¶ 139. The international community is supposed to act in accordance with Chapters VI and VIII of the Charter of the United Nations. See U.N. Charter Chapters VI & VIII.

88. G.A. Res. 60/1, *supra* note 85, ¶ 139.

It is important to note that R2P is a political commitment and does not constitute a legally-binding obligation on the part of the U.N.'s Member States. However, some level of legal legitimacy is granted R2P given the fact that it flows directly from binding international norms (e.g., norms assumed under the Convention on the Prevention and Punishment of the Crime of Genocide and various emerging norms of customary international law).

Formal and official recognition was granted to R2P by the U.N. Security Council ("UNSC") in 2006 through Resolution 1674<sup>89</sup> and in doing so, the UNSC reaffirmed "the provisions of paragraphs 138 and 139 of the 2005 World Summit Document regarding the responsibility of each country to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."<sup>90</sup>

When Ban Ki-moon became U.N. Secretary-General on January 1, 2007, he gave his full support to R2P and, in 2008, he appointed Edward C. Luck as the U.N.'s first Special Adviser on the responsibility to protect.<sup>91</sup> In announcing the appointment of Edward C. Luck as Special Adviser on R2P, Ban Ki-moon made the following statement:

United Nations Secretary-General Ban Ki-moon is pleased to announce the appointment of Edward C. Luck as Special Adviser at the Assistant Secretary-General level. Mr. Luck's work will include the responsibility to protect, as set out by the Secretary-General in paragraphs 138 and 139 of the 2005 World Summit Outcome Document.<sup>92</sup>

Ban Ki-moon then produced several reports in which he articulated a three-pillar strategy for the implementation of R2P.<sup>93</sup> The first of Ban's pillars addresses the responsibility of each Member State with respect to the implementation of R2P.<sup>94</sup> The Secretary-General went on to argue that the State is "critical to effective and timely prevention strategies."<sup>95</sup> The second

---

89. S.C. Res. 1674, Protection of Civilians in Armed Conflicts (Apr. 28, 2006).

90. S.C. Res. 1674, *supra* note 89, ¶ 4.

91. U.N. Secretary-General, *Secretary-General Appoints Edward C. Luck of United States Special Adviser*, U.N. Press Release SG/A/1120-BIO/3963 (Feb. 21, 2008), <https://www.un.org/press/en/2008/sga1120.doc.htm>.

92. *Id.*

93. U.N. Secretary-General, *Implementing the Responsibility to Protect: Report of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009).

94. U.N. Secretary-General, Responsibility to Protect, *supra* note 93, ¶ 11(a).

95. *Id.*

pillar deals specifically with the need for the international community to help States in carrying out and meeting their obligations. Stating that prevention is “a key ingredient for a successful strategy for the responsibility to protect,”<sup>96</sup> the second pillar “seeks to draw on the cooperation of Member States, regional and subregional arrangements, civil society and the private sector, as well as the institutional strengths and comparative advantages of the United Nations system”<sup>97</sup> to prevent threats to international peace. The third pillar deals with “the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection.”<sup>98</sup>

In 2009, the U.N. General Assembly (“UNGA”) granted formal recognition to R2P through its Resolution 63/308 of October 7, 2009.<sup>99</sup> In doing so, the UNGA made reference to the World Summit Outcome Document<sup>100</sup> and made known that it would “continue its consideration of the responsibility to protect.”<sup>101</sup> The UNGA then undertook several interactive dialogues to deal with different aspects of R2P and its implementation. For example, the 2012 dialogue was dedicated exclusively to “timely and decisive responses and the 2013 dialogue was devoted to state responsibility and prevention.”<sup>102</sup>

In 2011, then U.N. Secretary-General, Ban Ki-moon, presented a report to the U.N. General Assembly and the Security Council<sup>103</sup> in which he addressed the regional and sub-regional dimensions of the responsibility to protect in anticipation of the dialogue on the topic that was scheduled for July 2011 in the General Assembly.<sup>104</sup> Ban went on to state that “[o]ver the last three years, [the U.N.] had applied responsibility to protect principles in [its] strategies for addressing threats to populations in about a dozen specific situations” and that “[i]n every case, regional and/or sub-regional

---

96. *Id.* ¶ 11(b).

97. *Id.*

98. *Id.* ¶ 11(c).

99. G.A. Res. 63/308, *The Responsibility to Protect* (Oct. 7, 2009).

100. G.A. Res. 60/1, *supra* note 85.

101. G.A. Res. 63/308, *supra* note 99, ¶ 2.

102. INTERNATIONAL REFUGEE INITIATIVE, *FROM NON-INTERFERENCE TO NON-INDIFFERENCE: THE AFRICAN UNION AND THE RESPONSIBILITY TO PROTECT* 8 (2017), <https://reliefweb.int/sites/reliefweb.int/files/resources/AU%20R2P%20-%20final.pdf>.

103. U.N. Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, U.N. Doc. A/65/877-S/2011/393 (June 27, 2011).

104. *Id.* ¶ 1.

arrangements have made important contributions, often as full partners with the United Nations.”<sup>105</sup>

### *C. The Responsibility to Protect and Impunity*

The Responsibility to Protect is a commitment by the international community, working through the United Nations and its organs, such as the Security Council, to prevent *genocide*, *war crimes*, *ethnic cleansing* and *crimes against humanity*. But, how is R2P related to *impunity*? Impunity usually arises from the failure by relevant public authorities, either through lack of capacity or political will, to bring perpetrators of crimes to account for those crimes.<sup>106</sup> In many cases, impunity can arise when either state- or/and non-state-actors, who engage in various criminal activities are exempted from prosecution and punishment or allowed to escape the payment of fines assessed by a recognized tribunal. In international law, generally, and in international human rights law, in particular, impunity may involve the failure of responsible parties<sup>107</sup> to bring individuals engaged in the abuse of human rights to justice. The failure to fully and effectively prosecute those engaged in the violation of human rights can constitute a major infringement of the right of victims of such crimes to justice and redress of the wrongs done to them. In countries where the government or its agents or proxies are the perpetrators of human rights violations, it is often the case that those responsible for committing the various atrocities are not likely to be brought to justice. Of course, in countries, such as Somalia and the Democratic Republic of Congo, where the central government no longer has control over most of the national territory, it may be quite difficult for the forces of law and order to bring perpetrators of international crimes to justice.<sup>108</sup>

---

105. *Id.* ¶ 4.

106. *See, e.g.*, U.N. Comm'n on Human Rights, *Promotion and Protection of Human Rights, Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity of Its Sixty-First Session*, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

107. Such parties may include national governments, as well as, regional organizations, such as the African Union and the European Union. *See, e.g.* PROSECUTING INTERNATIONAL CRIMES IN AFRICA (Chacha Murungu & Japhet Biegon eds., 2011) (presenting a series of essays that examines, inter alia, the failure of some African states to deal effectively with international crimes).

108. ABDULLAH A. MOHAMOUD, *STATE COLLAPSE AND POST-CONFLICT DEVELOPMENT IN AFRICA: THE CASE OF SOMALIA, 1960-2001* (2006) (providing an overview of the collapse of the Somalia state and its impact on governance); MICHAEL DEIBERT, *THE DEMOCRATIC*

Impunity is quite common and pervasive in States that have weak institutional arrangements.<sup>109</sup> In such countries, state custodians (i.e., civil servants and political elites) are not properly constrained by the law and as a consequence, they are able to act with impunity. In a country, such as Cameroon, it is the case that security forces are protected by the government from being held accountable for human rights violations and other criminal activities. For example, security forces in Cameroon routinely arrest and torture individuals suspected of being homosexuals or engaging in same-sex intimacy but are not prosecuted for such human rights abuses.<sup>110</sup> In addition, Cameroon's security forces have been using laws against terrorism to torture and violate the human rights of journalists and other citizens. In their efforts to intimidate the media, Cameroon's security forces arrest and detain journalists without probable cause, fail to bring charges against them, and beat and torture them with impunity.<sup>111</sup>

Impunity in Cameroon can also be seen in the brutal treatment, by the country's security forces, of Anglophones who are seeking relief from oppression by the Francophone-dominated central government. When Anglophone teachers and lawyers engaged in peaceful protests in late 2016 to bring to light what they argued was oppression by the central government, the latter responded with brutal force—soldiers targeted civilians and killed many of them; other demonstrators were arrested and taken to police stations and tortured; and several villages were burned down and destroyed. Yet,

---

REPUBLIC OF CONGO: BETWEEN HOPE AND DESPAIR (2013) (describing, inter alia, the challenges of governance in the Democratic Republic of Congo).

109. Such countries usually lack democratic institutions, as well as a tradition of fidelity to the rule of law. They are pervaded by high levels of corruption, have extremely weak judiciary systems, and political systems in which the state custodians (i.e., civil servants and political elites) are not adequately constrained by the law. As a consequence, these public servants routinely act with impunity. In the case of Africa, see generally JOHN M. MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (2010) (showing that corruption is quite pervasive in countries with weak institutional arrangements).

110. Human Rights Watch, *Guilty by Association: Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law*, HUMAN RIGHTS WATCH, Mar. 21, 2003, <https://www.hrw.org/report/2013/03/21/guilty-association/human-rights-violations-enforcement-cameroons-anti>.

111. See Cameroon Using "Anti-Terror" Law to Silence Media: CPJ, ALJAZEERA (Sept. 20, 2017), <https://www.aljazeera.com/news/2017/09/cameroon-anti-terror-law-silence-media-cpj-170920112612527.html>. CPJ is Committee to Protect Journalists, a U.S.-based independent non-governmental organization that promotes press freedom throughout the world. Besides its headquarters in New York City, it has branches in many countries around the world.

none of the security forces were brought to justice for their criminal activities.<sup>112</sup>

It is not surprising that Cameroon's public sector is pervaded by impunity. The culture of impunity that has become pervasive in Cameroon starts from the top—the President of the Republic, Paul Biya, can be considered the chief priest of this insidious culture of impunity. In fact, in 2008, Biya had the constitution changed to immunize himself from all crimes committed while in office.<sup>113</sup> According to Article 53(3) of the Constitution of Cameroon, “[a]cts committed by the President of the Republic . . . shall be covered by immunity and he shall not be accountable for them after the exercise of his functions.”<sup>114</sup> The immunity granted the president of Cameroon by the constitution does not make an exemption in the case of serious offenses, such as war crimes, crimes against humanity, ethnic cleansing, and genocide. Hence, national law in Cameroon will not hold President Paul Biya accountable for the atrocities that his security forces have committed and continue to commit in the Anglophone Regions of the country.<sup>115</sup>

The Rome Statute of the International Criminal Court entered into force on July 1, 2002,<sup>116</sup> around the same time that the R2P was being debated and adopted by the international community. The Responsibility to Protect report by the Canadian-based International Commission on Intervention and State Sovereignty (“ICISS”)<sup>117</sup> was released in December 2001 and was given formal recognition by the United Nations in 2005.<sup>118</sup> In the Rome Statute's Preamble, one can find the following reference to impunity: “The States Parties to this Statute, [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such

---

112. Stephanie Busari, *Cameroon Security Forces Torturing English Speakers*, *Amnesty Says*, CNN NEWS (June 11, 2018), <https://www.cnn.com/2018/06/11/africa/cameroon-anglophone-torture-amnesty-intl/index.html>.

113. Constitution of the Republic of Cameroon, 1972; 2008 Amendments to the Constitution of the Republic of Cameroon, *Law No. 2008/1 of 14 April 2008 to Amend and Supplement some Provisions of Law No. 96/06 of 18 January 1996 to amend the Constitution of 2 June 1972*.

114. Law No. 2008/1, *supra* note 113, art. 53(3).

115. The Republic of Cameroon is currently divided into ten regions. Two of these regions, the North West and South West Regions, comprise the former U.N. Trust Territory of Southern Cameroons under British administration or Anglophone Cameroon.

116. *Rome Statute of the International Criminal Court*, A/CONF.183/9, July 17, 1998, [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

117. See *Responsibility to Protect*, *supra* note 59.

118. See *Outcome Document*, *supra* note 85.

crimes,<sup>119</sup> resolve to establish an International Criminal Court (“ICC”). The Rome Statute limited the jurisdiction of the ICC to the “most serious crimes of concern to the international community as a whole.”<sup>120</sup> Specifically, the ICC has jurisdiction over the following international crimes: crimes of genocide; crimes against humanity; war crimes; and crimes of aggression.<sup>121</sup> Impunity, especially on the part of African governments, has led to the proliferation of these crimes in the continent. This has been the case, for example, in Rwanda,<sup>122</sup> where government operatives led a genocidal and ethnic-cleansing campaign that resulted in the massacre of more than 1,000,000 citizens; South Sudan,<sup>123</sup> where thousands of people have been killed by government and opposition forces and yet, no one has been held accountable for the killings; and the Republic of Cameroon,<sup>124</sup> where government forces have killed many Anglophones who are protesting oppression at the hands of the central government.

## II. THE GLOBAL CAMPAIGN AGAINST IMPUNITY

### *A. Defining and Explaining Impunity*

Before we take a look at the global campaign against impunity, it is necessary that we provide a formal definition for the concept. In the United Nations *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*,<sup>125</sup> impunity is defined as, “[T]he

119. *Rome Statute*, *supra* note 116, preamble.

120. *Id.*

121. *Id.*

122. *See, e.g.*, SCOTT STRAUS, *THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA* (2006) (providing an overview of the events leading to the genocide in Rwanda, as well as the genocide itself).

123. *See, e.g.*, HILDE E. JOHNSON, *SOUTH SUDAN: THE UNTOLD STORY, FROM INDEPENDENCE TO CIVIL WAR* (2016) (providing an overview of sectarian violence and the mass violations of human rights in South Sudan).

124. Denis Foretia, *Cameroon Continues Its Oppression of English Speakers*, WASH. POST (Mar. 21, 2017), [https://www.washingtonpost.com/news/global-opinions/wp/2017/03/21/cameroon-continues-its-oppression-of-english-speakers/?utm\\_term=.be46db43f959](https://www.washingtonpost.com/news/global-opinions/wp/2017/03/21/cameroon-continues-its-oppression-of-english-speakers/?utm_term=.be46db43f959); Ruth Maclean, *Deaths and Detentions as Cameroon Cracks Down on Anglophone Activists—Dozens Die and Hundreds Jailed in Unrest after Calls for English to be Used in Regions’ Schools and Courtrooms*, THE GUARDIAN (Jan. 3, 2018), <https://www.theguardian.com/world/2018/jan/03/deaths-and-detentions-as-cameroon-cracks-down-on-anglophone-activists>.

125. Comm’n on Human Rights, *The Administration of Justice and the Human Rights of Detainees, Question of Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, *Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Committee*

impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”

On April 17, 1998, the U.N. Commission on Human Rights (“UNCHR”) issued its Resolution 1998/53<sup>126</sup> in which it emphasized “the importance of combating impunity to the prevention of violations of international human rights and humanitarian law” and urged “States to give necessary attention to the question of impunity for violations of international human rights and humanitarian law, including those perpetrated against women, and to take appropriate measures to address this important issue.”<sup>127</sup> The resolution also noted that it is “the expectation of impunity for violations of international human rights or humanitarian law”<sup>128</sup> that encourages state- and non-state actors to engage in such violations and this is a major obstacle to the ability of the international community to protect the fundamental and human rights of individuals and minimize threats to international peace and security.

In its resolution, the U.N. Commission on Human Rights also recognized the fact that “public knowledge” of the atrocities committed against victims of human rights violations and the nature of their suffering, as well as information about the perpetrators, represent “essential steps towards rehabilitation and reconciliation” and went on to urge “States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public and to encourage victims to participate in such a process.”<sup>129</sup> These comments by the UNCHR speak directly to some of the principles enunciated by the United Nations for combating impunity.<sup>130</sup> As will be discussed later, these principles speak to the importance of making certain that knowledge of violations of human rights, information about perpetrators of these violations, as well as the nature and the extent of the suffering endured by victims, is made fully available to citizens. Perhaps, more

---

*Decision 1996/119*, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1, at 17 (Oct. 2, 1997) (“Revised Final Report”).

126. Comm’n on Human Rights, *Commission on Human Rights Resolution 1998/53: Impunity*, U.N. Doc. E/CN.4/RES/1998/53 (Apr. 17, 1998).

127. *Id.* ¶ 1.

128. *Id.* preamble.

129. *Id.* ¶ 2.

130. See *Revised Final Report*, *supra* note 125, at 5.

important, is that victims must be allowed to participate fully and effectively in the design and implementation of public policies to deal with impunity.<sup>131</sup>

Major threats to international security and peace, such as serious crimes under international law, which include war crimes, crimes against humanity, including genocide, and grave breaches of international humanitarian law, can be directly linked to impunity. Individuals and groups are likely to engage in the commission of these international crimes if they are confident that they can do so with impunity. That is, they can participate in these criminal activities with virtually no risk that they would be held accountable for them. Such an enabling institutional environment for impunity may exist in a State if, (1) as in the case of the Republic of Cameroon, the president is constitutionally immune from prosecution for all crimes committed while in office;<sup>132</sup> (2) the government lacks the capacity to fully bring to justice violators of human rights; and (3) there does not exist the political will within the State to hold accountable perpetrators of violations of international human rights and humanitarian law within their territories. Of course, as has been examined by several scholars, political will can be lacking where governance institutions are pervaded by corruption and civil servants and political elites are major beneficiaries of the various forms of corruption.<sup>133</sup> Before we proceed, it is important that we take a look at the evolution of the global campaign against impunity.

### *B. Origins of the Global Campaign Against Impunity*

During its 43rd session in August 1991, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights, requested that Mr. Louis Joinet, then Special Rapporteur on Impunity, carry out “a study on the impunity of perpetrators of human rights violations”<sup>134</sup> globally. As argued by Joinet, the process through which the international community has gained awareness of the “imperative need to combat impunity” has actually metamorphosed through four stages.<sup>135</sup>

131. *Id.*

132. *See* Const. of the Republic of Cameroon, *supra* note 113, art. 53 §3.

133. *See, e.g.*, JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (2010) (detailing the pervasiveness of corruption in many countries in Africa and how many political elites lack the will to deal with it).

134. Comm’n on Human Rights, *The Administration of Justice and the Human Rights of Detainees, Question of Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Final Report Prepared by Mr. Joinet Pursuant to Sub-Committee Decision 1996/119, U.N. Doc. E/CN.4/Sub.2/1997/20, at 3 (June 26, 1997).

135. *Id.*

The first stage came in the 1970s, when various civil society organizations and legal experts, particularly in many of the dictatorships that pervaded Latin America, “mobilized to argue for an amnesty for political prisoners.”<sup>136</sup> According to then U.N. Special Rapporteur on Impunity, Louis Joinet, “[a]mnesty, as a symbol of freedom, would prove to be a topic that could mobilize large sectors of public opinion, thus gradually making it easier to amalgamate the many moves made during the period to offer peaceful resistance to or resist dictatorial regimes.”<sup>137</sup>

The second stage occurred in the 1980s, when there was a proliferation of “‘self-amnesty’ laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time.”<sup>138</sup> Victims reacted to the perverse laws—that is, those that were promulgated by opportunistic dictators—by organizing to develop the capacity to fight government impunity in their communities. In Latin America, this rise in anti-impunity organizations was evidenced by the “increasing prominence of the Mothers of the Plaza de Mayo and the Latin American Federation of Relatives of Disappeared Detainees (FEDEFAM).”<sup>139</sup>

The third stage coincided with the end of the Cold War, which in Africa, was marked by the end of apartheid in South Africa and the collapse of many military dictatorships.<sup>140</sup> It was at this time, specifically in the early-

---

136. *Id.* at ¶ 2.

137. *Id.*

138. *Id.* at ¶ 3.

139. *Id.* ¶ 3.

140. The Cold War lasted from 1947 to 1991, with the collapse of the Union of Soviet Socialist Republics (USSR) and the end of socialism in Eastern Europe. In Africa, these changes in the geopolitical system resulted in the collapse of many dictatorships that had been supported with regular financial subventions and other types of support from the Cold War protagonists—the Western bloc under the leadership of the United States and the Eastern bloc under the leadership of the USSR. One of the most important post-Cold War changes in Africa was the collapse of the racially-based apartheid system in South Africa, which was officially inaugurated in 1948. Negotiations to officially end the policy of apartheid took place in South Africa during the period May 4, 1990 to April 27, 1994. On May 31, 1910, four British colonies in southern Africa gained independence by coming together to form the Union of South Africa. Although independent, the Union was a Dominion of the British Empire, governed as a constitutional monarchy, with the British monarch represented by a Governor-General. The Union Government was exclusively in the hands of the white minority—Afrikaners and English. The African majority was completely excluded from participating fully and effectively in governance. On October 5, 1960, through referendum, whose participation was limited to whites, a majority of the latter voted in favor of unilateral withdrawal from the British Commonwealth in order to establish the Republic of South Africa. In 1948, the Nationalist Party formally introduced the system of apartheid—a system of institutionalized racial segregation and discrimination—as the legal

1990s, that many African countries began their transition to democratic governance.<sup>141</sup> Of great importance during this period was the conflict between the desire by former perpetrators of international crimes to be forgiven for all their crimes and the quest by victims for justice. This conflict was fully in play in the struggle by South Africans to bring to justice those people who had committed various atrocities during the apartheid regime (1948-1994) and the desire by the perpetrators of apartheid-era crimes for the past to be buried.<sup>142</sup>

Eventually, the international community began to recognize and appreciate the fact that in many countries around the world, the expectation of impunity for international crimes was enhancing engagement by both state- and non-state actors in violations of international human rights or international humanitarian law. Hence, there was urgent need to find ways to confront and combat impunity. For example, on March 14, 2001, the Inter-American Court of Human Rights (“IACtHR”) made a ground-breaking ruling in which it found that granting “amnesty for perpetrators of serious human rights violations was incompatible with the right of every individual to a fair hearing before an impartial and independent court.”<sup>143</sup> For example,

---

basis for the country’s governance institutions. Apartheid legislation was repealed in South Africa on June 17, 1991, and fully democratic, multiracial elections were held in 1994, with Nelson Mandela and the African National Congress winning the elections and taking control of the apparatus of government. Despite the fact that South Africa gained its independence from Great Britain on May 31, 1910, April 27, 1994, when the first democratic, non-racial elections were held in the country, is recognized as the country’s true independence day. *See, e.g.*, GWYNETH WILLIAMS AND BRIAN HACKLAND, *THE DICTIONARY OF CONTEMPORARY POLITICS OF SOUTHERN AFRICA* (2013) (providing an overview of important historical events in South Africa).

141. For more information on Africa’s transition to democratic governance, *see generally* *THE TRANSITION TO DEMOCRATIC GOVERNANCE: THE CONTINUING STRUGGLE* (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) (providing a series of essays that examines the transition to democratic governance in Africa); *POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES* (Julius O. Ihonvbere & John M. Mbaku eds., 2003) (examining the transition to democratic governance in selected countries in Africa).

142. *See, e.g.*, RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001) (arguing that South Africa’s Truth and Reconciliation Commission (“TRC”), which was set up to deal with the human rights violations of apartheid, may not have met the needs of communities at the local level); *TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?* (Audrey R. Chapman & Hugo van der Merwe eds., 2008) (arguing that the TRC was quite effective in offering victims of apartheid-era human rights violations the opportunity to tell their own stories and to provide policymakers with suggestions on how to prevent future human rights violations).

143. *See also Final Report on Impunity, supra* note 134, at 3-4.

in the case of *Barrios Altos v. Peru*,<sup>144</sup> the IACtHR found that amnesty laws were incompatible with the American Convention on Human Rights (“Pact of San José”).<sup>145</sup> The IACtHR ruled as follows, “This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”<sup>146</sup>

At the June 14-25, 1993 World Conference on Human Rights, representatives of 171 States adopted by consensus what was referred to as the *Vienna Declaration and Program of Action* (“Vienna Declaration”),<sup>147</sup> in which these States agreed on a common plan to strengthen the work to fight human rights violations around the world.<sup>148</sup> In the Declaration, the States supported, albeit implicitly, the thinking of the Inter-American Court of Human Rights in *Barrios Altos v. Peru*<sup>149</sup> and other cases.<sup>150</sup> Specifically, the States stated that “[t]he World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue.”<sup>151</sup>

The Vienna Declaration also made several recommendations regarding impunity. For example, it recommended that “States should abrogate legislation leading to impunity for those responsible for grave violations of

---

144. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser C) No. 83, p. 17 (Mar. 14, 2001).

145. Inter-American Specialized Conference on Human Rights (San José, Costa Rica), *American Convention on Human Rights*, Inter-Am. Comm. H.R. (Nov. 22, 1969).

146. *Barrios Altos v. Peru*, *supra* note 144, ¶ 41.

147. World Conference on Human Rights (Vienna), *Vienna Declaration and Program of Action*, Comm. H.R., U.N. Doc. A/CONF.157/23 (June 25, 1993).

148. Press Release, Office of the U.N. High Commissioner for Human Rights, *World Conference on Human Rights* (June 14–15, 1993, Vienna, Austria), <https://www.ohchr.org/en/aboutus/pages/viennawc.aspx>.

149. *Barrios Altos v. Peru*, *supra* note 144, at 14.

150. *See also: Human Rights and the Fight Against Impunity and Corruption*, Inter-Am. Comm’n H.R., Res. 1/7 (Sept. 12, 2017) (linking the fight against corruption to the exercise and enjoyment of human rights and arguing that impunity fosters and perpetuates acts of corruption).

151. Vienna Declaration, *supra* note 147, ¶ 91.

human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.”<sup>152</sup>

In August 1992, the U.N. Commission on Human Rights’ Sub-Commission on Prevention of Discrimination and Protection of Minorities (“Sub-Committee”) asked Mr. El Hadji Guissé<sup>153</sup> and Mr. Louis Joinet<sup>154</sup> to study the impunity of perpetrators of violations of human rights and present their report to the Sub-Committee. The preliminary report prepared by Mr. Guissé and Mr. Joinet was presented to the Sub-Committee in August 1993. The Sub-Committee then decided to split the work into two main categories and entrusted Mr. Joinet with the study of the impunity of perpetrators of the violations of civil and political rights and Mr. Guissé with the study of the impunity of perpetrators of violations of economic, social and cultural rights.<sup>155</sup>

Mr. Joinet presented his final report, which is dated June 26, 1997,<sup>156</sup> to the Sub-Committee at the latter’s 49th session in August 1997. A revised final report is dated October 2, 1997.<sup>157</sup> Mr. Guissé presented his own report to the Sub-Committee at the 49th session of the Sub-Committee in August 1997 and it is dated June 27, 1997.<sup>158</sup> The final principles appear in Annex II of E/CH.4/Sub.2/1997/20/Rev.1 and are titled “Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity” (“The Principles”).<sup>159</sup>

---

152. Vienna Declaration, *supra* note 147, ¶ 60.

153. Mr. El Hadji Guissé is a Senegalese judge who was elected as a Judge of the African Court on Human and Peoples’ Rights in January 2006 and served until 2012. He also served the United Nations in several capacities, including as Special Rapporteur on the Right to Drinking Water in 1998. He was also a U.N. Special Rapporteur on the question of perpetrators of human rights violations (economic, social and cultural rights). See U.N. Comm’n on Human Rights, Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities, *The Realization of Economic, Social and Cultural Rights: Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights)*, Prepared by Mr. El Hadji Guissé, Special Rapporteur, Pursuant to Sub-Commission Resolution 1996/24, U.N. Doc. E/CN.4/Sub.2/1997/8 (June 27, 1997).

154. Mr. Louis Joinet was a U.N. Special Rapporteur on Impunity.

155. *Question of Impunity*, *supra* note 153, ¶¶ 10–12.

156. See *Final Report on Impunity*, *supra* note 134, at 1.

157. *Revised Final Report*, *supra* note 125, at 1.

158. *Question of Impunity*, *supra* note 153, at 1.

159. See *Final Report on Impunity*, *supra* note 134, at 15.

*C. Overview of The Principles for the Protection of Human Rights Through Action to Combat Impunity*

In the Preamble to the Principles, the U.N. General Assembly recalls the Preamble of the Universal Declaration of Human Rights, “which states that disregard and contempt of human rights have resulted in barbarous acts which have outraged the conscience of mankind,”<sup>160</sup> considers that “the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to control impunity,”<sup>161</sup> recalls the recommendation contained in paragraph 91 of Part II of the *Vienna Declaration and Program of Action*,<sup>162</sup> and “[d]ecides, . . . solemnly to proclaim the following principles for the guidance of States having to combat impunity.”<sup>163</sup>

The Principles begin with a definition of impunity, which is centered around the existence, in each country, of the impossibility, *de jure* or *de facto*, of bringing to justice those who are complicit in human rights violations.<sup>164</sup> In addition, a definition is given to “serious crimes under international law”—the expression “covers war crimes, crimes against humanity, including genocide, and grave breaches of and crimes against international humanitarian law.”<sup>165</sup> Principles 1-4 come under the category named the “Right to Know”—every person has “the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to perpetration of aberrant crimes.”<sup>166</sup> This right is important and critical to the minimization of future recurrence. Principles 2-4 impose a duty on the State to remember and to preserve the collective memory and to guard against the development of “revisionist and negationist arguments”;<sup>167</sup> guarantees victims, their families and their loved ones, the right to know the truth about the “circumstances in which violations took place and, in the

---

160. *Id.*

161. *Id.*

162. Paragraph 91 of the Vienna Declaration and Program of Action states as follows: “The World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue.”

163. See *Final Report on Impunity*, *supra* note 134, at 15.

164. *Id.* Annex II(A).

165. *Id.* Annex II(B).

166. *Id.* at 16.

167. *Id.*

event of death or disappearance, the victim's fate";<sup>168</sup> and demands that States take appropriate action to give effect to the right to know, including establishing extrajudicial commissions of inquiry and making certain that information gathered is preserved for posterity, through, for example, the establishment and maintenance of archives.<sup>169</sup>

Principles 5-12 fall under the category "Extrajudicial Commissions of Inquiry" and provide information on the role of the extrajudicial commissions of inquiry; how to guarantee their independence and impartiality; their terms of reference; guarantees for persons implicated in the crimes being investigated, as well as for victims and witnesses; operating procedures for the commissions; and procedures for disseminating the information collected by the commissions.<sup>170</sup>

Preservation of and access to archives is covered under Principles 13-18. Generally, Principles 1-18 deal with the right to know, while Principles 19-35 deal with the right to justice. This part of the Principles starts by reminding States that "[t]here can be no just and lasting reconciliation without an effective response to the need for justice" and that "an important element in reconciliation is forgiveness, a private act which implies that the victim knows the perpetrator of the violations and that the latter has been able to show repentance."<sup>171</sup>

Principle 20 deals specifically with the duties of States with regard to the administration of justice. Noting that "impunity is a failure of States to meet their obligations to investigate violations, take appropriate measures in respect of perpetrators, particularly in the area of justice, to ensure that they are prosecuted, tried and duly punished," as well as to "provide the victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations,"<sup>172</sup> this principle argues further that each State must make available to victims "supplementary procedural rules," which can enable a victim to "institute proceedings on his or her own behalf where the authorities fail to do so, or become an associated party."<sup>173</sup> This provision is especially important in Africa, where the State and its agents/proxies are often the source of the threat to international peace—that is, they are the perpetrators of human rights violations.

Principles 21-25 deal with the distribution of jurisdiction for impunity and serious crimes under international law between national, foreign and

---

168. *Id.*

169. *Id.*

170. *Id.* at 16–19.

171. *Id.* at 20.

172. *Id.* at 21.

173. *Id.*

international courts. These principles state that in order to avoid the need to refer situations to ad hoc international criminal courts, it is necessary for the global community to establish a standing international criminal court with jurisdiction binding on all Member States.<sup>174</sup> Principles 22-25 deal with rules of procedure applicable in international courts, jurisdiction of foreign courts, measures to strengthen the effectiveness of treaty provisions on universal jurisdiction, and measures to determine extraterritorial jurisdiction in internal law.<sup>175</sup> States are granted authority through Principle 25 “to establish extraterritorial jurisdiction over serious crimes under international law committed outside their territory which by their nature are within the purview not only of internal criminal law but also of an international punitive system to which the concept of frontiers is alien” and this power can be exercised only in the case where it is not possible “to apply a universal jurisdiction clause to the country where the crime was committed.”<sup>176</sup>

Articles 26-35 deal with restrictive measures justified by action to combat impunity. Emphasis is placed on safeguards against the “misuse to further impunity of prescriptions, amnesty, right to asylum, refusal to extradite, absence of *in absentia* procedure, due obedience, legislation on repentance, the jurisdiction of military courts and the irremovability of judges.”<sup>177</sup> The overall objective of these principles is to minimize any attempts by perpetrators and their supporters, who may include national governments, from avoiding prosecution and punishment, if found guilty.

The rest of the principles (36-50) deal with the right to reparation. It is noted that any violation of human rights—whether by state- or non-state actors—“gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”<sup>178</sup> The State has an obligation under these principles to make certain that the victim’s right to reparation is upheld and the victim allowed to exercise it and if, necessary, with the help of the State. Where necessary, the State must provide the victim protection from intimidation and reprisals, as well as access to applicable international procedures, should he choose to exercise his right to reparation.<sup>179</sup>

---

174. The Rome Statute created such a court in 2002 called the International Criminal Court (ICC). See *Rome Statute*, *supra* note 116, at 8.

175. See *Final Report on Impunity*, *supra* note 134, at 21.

176. *Id.* at 22.

177. *Id.*

178. *Id.* at 24.

179. *Id.* at 25.

These principles also impose a duty on the Member States to take appropriate measures to make certain that there is no repeat of the violations—that is, victims must not be victimized again. Thus, States must take measures to (1) disband parastatal armed groups; (2) repeal emergency provisions, which have enhanced or made possible violations; and (3) administrative or other measures vis-à-vis State officials implicated in serious human rights violations.<sup>180</sup>

Since the Principles were submitted to the U.N. Commission for Human Rights in 1997, they have played “an influential role in strengthening domestic efforts to combat impunity.”<sup>181</sup> In addition, the Principles have become very important references for the decision-making processes of, and have been affirmed by, various international criminal tribunals and human rights treaty bodies. For example, the Inter-American Commission on Human Rights (“IACHR”) held, in its review of the Supreme Court of Justice of Chile’s decision in *Carmelo Soria Espinoza v. Chile*,<sup>182</sup> that although the Commission for Truth and Reconciliation, established by Chile’s democratic government to investigate past violations of human rights, as well as look into “the situation of the disappeared detainees,”<sup>183</sup> had covered a large number of cases and situations, it had, nevertheless, failed to investigate “criminal acts committed by State agents,”<sup>184</sup> nor had it identified and punished those responsible and this was due to the Amnesty law. The IACHR concluded that “the State did not comply with its obligation to investigate and punish those responsible for violating the human rights of Carmelo Soria Espinoza and that the dismissal resulting from the application of amnesty, despite the incriminating evidence existing against them, demonstrates that the State also failed to comply with its obligation to punish.”<sup>185</sup>

The first eighteen Principles deal with the right to know the truth—this right has garnered strong support and affirmation by many international human rights bodies. For example, the various institutions and organizations

180. *Id.* at 26–27.

181. Comm’n on Human Rights, *Promotion and Protection of Human Rights: Impunity: Independent Study of Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat all Aspects of Impunity*, by Professor Diane Orentlicher, U.N. Doc. E/CN.4/2004/88 (Feb. 27, 2004), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/113/55/PDF/G0411355.pdf?OpenElement> (“Independent Study”).

182. *Carmelo Soria Espinoza v. Chile*, Case 11.725, Inter-Am. Comm’n H.R., Report No. 133/99 (Nov. 19, 1999), <http://www.cidh.oas.org/annualrep/99eng/Merits/Chile11.725.htm>.

183. *Id.* ¶ 102.

184. *Id.*

185. *Id.* ¶ 106.

established under the American Convention on Human Rights, for example, have “recognized that the anguish that individuals experience as a result of uncertainty about the fate of close relatives who are direct victims of enforced disappearance in itself constitutes cruel, inhuman or degrading treatment and thus is a distinct violation of the relevant treaty.”<sup>186</sup> States, then, are under obligation to investigate all situations involving violations of human rights, including the disappearance of detainees, and inform their relatives of their fate.<sup>187</sup>

In addition, the jurisprudence of the Inter-American Commission on Human Rights<sup>188</sup> has recognized, consistent with Principle 36,<sup>189</sup> the right “to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them” as “part of the right to reparation for human rights violations.”<sup>190</sup>

Since the Principles were submitted to the U.N. Commission on Human Rights in 1997, there have been significant advances in efforts by domestic, regional and international actors to combat impunity through the arrest and prosecution of those alleged to have committed serious international crimes. For example, in 2002, the Rome Statute established the International Criminal Court (“ICC”) with jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>191</sup> In addition, there have been trials of senior Rwandan/Yugoslav officials before the International Criminal Tribunal for Rwanda (“ICTR”)<sup>192</sup> and the International Criminal Tribunal for Yugoslavia (“ICTY”),<sup>193</sup> respectively.<sup>194</sup>

---

186. Independent Study, *supra* note 181, ¶ 14.

187. *Id.* The Inter-American Court of Human Rights’ accumulated jurisprudence on this subject is presented and affirmed in *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000), ¶¶ 159–66, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_70\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf). *See, specifically.*

188. *See, e.g.,* *Monsignor Oscar Arnulfo Romero y Galdáamez v. El Salvador*, Case 11.481, Inter-Am. Comm’n H.R., Report No. 37/00 (Apr. 3, 2000).

189. Principle 36 deals with the rights and duties arising out of the obligation to make reparations. *See Final Report on Impunity, supra* note 134, at 25.

190. *Monsignor Oscar Arnulfo Romero y Galdáamez v. El Salvador, supra* note 188, ¶ 148. *See also id.* ¶ 147.

191. *Rome Statute of the International Criminal Court, supra* note 116, at 8.

192. For more on the ICTR and its work, *see generally* USTA KAITESI, GENOCIDAL GENDER AND SEXUAL VIOLENCE: THE LEGACY OF THE ICTR, RWANDA’S ORDINARY COURTS AND GACACA COURTS (2014) (examining, *inter alia*, the experiences of victims of genocidal and sexual violence have been addressed on a theoretical and practical level).

193. For more on the ICTY, *see generally* INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY (Gideon Boas & William A. Schabas eds.,

*D. Update and Revision of the Principles*

On April 21, 2004, through its Resolution 2004/72,<sup>195</sup> the U.N. Commission on Human Rights requested the U.N. Secretary-General “to appoint an independent expert, from within existing resources and for a period of one year, to update the Set of Principles<sup>196</sup> to reflect recent developments in international law and practice, including international jurisprudence and State practice.”<sup>197</sup> The expert hired to update the Principles was also required to take into consideration an independent study on impunity that had been undertaken earlier at the request of the U.N. Secretary-General (“Independent Study”).<sup>198</sup>

In updating the Principles, the expert, Professor Orentlicher, noted that a central premise of the Principles is the need for the international community to develop and adopt a comprehensive approach towards fighting or combating impunity and in doing so, States have a very important and critical role to play.<sup>199</sup> In line with that premise, Principle 18(1) of the original revised Principles,<sup>200</sup> which recognizes various measures that States are required to take in order to meet their obligations to fight impunity, was made Principle 1. The new Principle 1 states as follows:

---

2003) (examining, inter alia, the experiences of the ICTY in prosecuting perpetrators of war crimes and gross or systematic violations of human rights).

194. For more discussion of the Principles and how their existence has affected the struggle against impunity, see generally Independent Study, *supra* note 181; THE UNITED NATIONS PRINCIPLES TO COMBAT IMPUNITY: A COMMENTARY (Frank Haldemann & Thomas Unger eds., 2018).

195. Office of the [U.N.] High Commissioner for Human Rights, *Impunity: Commission on Human Rights Resolution: 2004/72*, U.N. Doc. E/CN.4/2004/127 (Apr. 21, 2004), <http://www.refworld.org/docid/43f313869.html>.

196. That is, the Set of Principles for the protection and promotion of human rights through action to combat impunity. See *Revised Final Report*, *supra* note 125, Annex II.

197. *Id.* ¶ 20.

198. Independent Study, *supra* note 181, at 1 (stating that the expert hired was Professor Diane Orentlicher, Professor of International Law at American University, Washington, D.C., who is also one of the world’s leading authorities on international human rights law, war crimes tribunals, and transitional justice).

199. The updated principles are presented in: *Promotion and Protection of Human Rights: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (“Report of the Independent Expert”), Comm’n on Human Rights, U.N. Doc. E/CN.4/2005/102/Add. 1 (Feb. 8, 2005), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.

200. See *Revised Final Report*, *supra* note 125, at 22–23.

---

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.<sup>201</sup>

Another set of revisions targeted and reflected developments in State practice that inform effective approaches to and strategies for combating impunity. The updated Principles noted an important finding of the Independent Study,<sup>202</sup> which affirmed the critical importance of the “broad participation of victims and other citizens”<sup>203</sup> in the design and implementation of policies to combat impunity. Note was made of the extent to which South Africa’s post-apartheid government went in making certain that victims of apartheid crimes were granted the facilities and wherewithal to participate fully and effectively in promulgating the law establishing the country’s truth and reconciliation commission. But, why is the participation of victims in the design and implementation of anti-impunity policies critical?

First, as the Independent Study<sup>204</sup> determined, participation enhances public support for the policy and ensures its likely success. Second, allowing victims to participate in the design and implementation of policies to combat impunity helps make certain that any such programs reflect and respond to “victims’ actual needs.”<sup>205</sup> Third, giving victims the power to participate can provide them with a new sense of belonging—since victims are most likely to be individuals who had previously been denied the protection of the law, participation in the design and implementation of policies to combat impunity can serve as a mechanism to finally bring them into the community of citizens that are fully protected by the law.<sup>206</sup> Fourth, participation in public dialogue about how to fight impunity can provide the wherewithal for victims to “reclaim control over their lives and may help restore their

---

201. See Updated Set of Principles, *supra* note 199, at 7.

202. Independent Study, *supra* note 181 at 2.

203. *Id.* ¶ 11.

204. *Id.*

205. *Id.*

206. *Id.*

confidence in government.”<sup>207</sup> Fifth, public policies to fight impunity that emerge from broad-based national consultation are more likely “to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations”<sup>208</sup> than those that are developed through a top-down, elite-driven and non-participatory process. Finally, public engagement, for example, through truth and reconciliation commission, can allow victims “to engage in a cathartic denunciation” of those who had committed mass atrocities against them.<sup>209</sup>

To enhance the effectiveness of public policies to fight impunity, it is also important that the participation of women, especially in countries where women have traditionally been excluded from public discourse, be guaranteed—women must be allowed to participate at levels that are equal to those of their fellow male citizens. For example, in constituting commissions of enquiry, including truth and reconciliation commissions, concerted efforts must be made to ensure that women are adequately represented. Of course, given the history of discrimination against and marginalization of certain groups (e.g., religious and ethnic minorities) in the African countries, it is important that they be granted the opportunity to participate fully and effectively in the design and implementation of public policies, particularly those to combat impunity.

Effective policies to combat impunity are those which are not based on a “one-size-fits-all” approach. Instead, programs to fight impunity should take into consideration the needs of victims, their desire for justice, as well as local realities. That is why broad-based public consultation is very important. Of course, these Principles, it is noted, “are not legal standards in the strict sense, but guiding principles.”<sup>210</sup> Nevertheless, while these Principles are not legal standards, they “reflect and comport with pertinent legal standards.”<sup>211</sup>

The updated Principles introduced the phrase “truth commission”—the latter is a special type of commission of inquiry, which since the early-1990s, has increasingly become a major tool for dealing with the right to know. In the aftermath of the demise of apartheid in South Africa, the truth and reconciliation commission emerged as a major tool that was used to help the people, particularly the victims, deal with the atrocities committed by the

---

207. *Id.*

208. *Rep. of the S.C., The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

209. John M. Mbaku, *Transition to Democratic Governance in Africa: Learning from Past Failures*, in *POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES* 17, 39 (Julius O. Ihonvbere & John M. Mbaku eds., 2003).

210. *Revised Final Report*, *supra* note 125, ¶ 49.

211. *Independent Study*, *supra* note 181, ¶ 11.

apartheid regime.<sup>212</sup> In addition, records about truth commissions, how they are established and how they function, can help other countries that find themselves in need of such commissions. For example, in establishing its own truth commission in 2002, Timor-Leste was inspired by South Africa's Truth and Reconciliation Commission ("TRC") but made modifications to deal with what they argued were the TRC's deficiencies. Accordingly, Timor-Leste's Commission for Reception, Truth and Reconciliation ("CAVR"), unlike South Africa's TRC, did not permit immunity for serious crimes, such as murder or rape, and grants immunity for other crimes only on condition that the perpetrator agrees to and actually performs community service or makes a symbolic financial payment in addition to the confession.<sup>213</sup>

Professor Orentlicher concludes her report by stating that since the Principles were submitted to the U.N. Commission on Human Rights in 1997, "seemingly impregnable barriers to prosecution have been dismantled in countries that endured the depredations of dictatorship."<sup>214</sup> In addition, many States have "cooperated to ensure prosecution of officials at the highest levels of Government before international tribunals and national courts; a new breed of court, combining national and international elements, has entered the lexicon of institutions designed to render justice for atrocious crimes; and Governments and civil society have benefited from an expanding repertoire of tools for combating impunity and from a deepening reservoir of expertise and insight concerning the design and implementation of effective anti-impunity programs."<sup>215</sup>

It is clear that since the Principles were submitted to the U.N. Commission on Human Rights in 1997, there have been significant advances, at both the international and national levels, in efforts to battle impunity. Nevertheless, there is need for States, particularly those in Africa, to engage in comprehensive institutional reforms in order to provide themselves with strong democratic institutions—specifically, an independent judiciary, a robust independent press, and a legislature that has enough

---

212. For more on South Africa's Truth and Reconciliation Commission, see generally TRUTH & RECONCILIATION IN SOUTH AFRICA: 10 YEARS ON (Charles Villa-Vicencio & Fanie du Toit eds., 2007).

213. For more on Timor-Leste's truth and reconciliation work, see generally Post-CAVR Technical Secretariat, CHEGAL: THE FINAL REPORT OF THE TIMOR-LESTE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION (CAVR): A PLAIN GUIDE (2013); RECONCILIATION IN CONFLICT-AFFECTED COMMUNITIES: PRACTICES AND INSIGHTS FROM THE ASIA-PACIFIC (Bert Jenkins, D. B. Subedi & Kathy Jenkins eds., 2018).

214. See Updated Set of Principles, *supra* note 199.

215. *Id.*

independence to fully check on the exercise of government power. In addition, and perhaps more important, is that each African country should seek to enhance the development of a strong and politically active civil society that can serve as an important check on the government. All these democratic institutions can ensure that those who commit international crimes are brought to justice. Often, impunity arises from the decision, by political elites, not to prosecute certain individuals, many of whom are members or agents of the incumbent government, for their involvement in international crimes. Hence, as part of the effort to fight impunity, States should provide themselves with governing processes that adequately constrain the state and prevent civil servants and political elites from granting themselves immunity from or amnesty for their criminal acts.

### III. IMPUNITY IN AFRICA

#### *A. Introduction*

Africa has had a long tradition of impunity—from the colonialists who brutalized defenseless villagers in as part of the effort to maximize the flow, from the continent, of scarce resources to the European economies, to modern-day dictators who continue to brutalize their fellow citizens in order to maintain a monopoly on power. While there are many examples from Africa’s history to illustrate the level of colonial brutality, we will mention only two. First, is King Leopold II’s brutal treatment of the peoples of Congo. During the colonial period in what was then the Congo Free State,<sup>216</sup> the colonialists used significant levels of brutality to force Congolese people to collect rubber. For example, an eyewitness account of this brutality from a junior officer of the *Force publique*,<sup>217</sup> is as follows:

---

216. The Congo Free State (*l’État indépendant du Congo*) was a large territory in central Africa that was ruled personally by Belgian’s King Leopold II from 1885 to 1908. It was operated separately from Belgium. In 1908, Belgium annexed the territory and converted it into a colony, which was renamed Belgian Congo. For more on the Congo Free State, see, e.g., MARTIN EWANS, EUROPEAN ATROCITY, AFRICAN CATASTROPHE: LEOPOLD II, THE CONGO FREE STATE AND ITS AFTERMATH (2002); ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1999); HENRY WELLINGTON WACK, THE STORY OF THE CONGO FREE STATE: SOCIAL, POLITICAL, AND ECONOMIC ASPECTS OF THE BELGIAN SYSTEM OF GOVERNMENT IN CENTRAL AFRICA (G. P. Putnam’s Sons 1905).

217. The *Force publique* was a military force in the Congo Free State, as well as in Belgian Congo. At independence in 1960 the *Force publique* was converted into the Congolese National Army (*l’Armée nationale congolaise*). For more on the *Force publique*, see, e.g., BRYANT P. SHAW, FORCE PUBLIQUE, FORCE UNIQUE: THE MILITARY IN BELGIAN CONGO, 1914–1939 (1984); LOUIS-FRANÇOIS VANDERSTRAETEN, DE LA FORCE PUBLIQUE À

We were a party of thirty [which was sent] to a village to ascertain if the natives were collecting rubber, and, if not, to murder all, men, women, and children. We found the natives sitting peacefully. We asked what they were doing. They were unable to reply, thereupon we fell upon them and killed them all without mercy.<sup>218</sup>

Regardless of who the colonial power of record was, colonialism “was an extremely brutal, inhuman, and heartless system designed to maximize benefits accruing to Europeans in the colonies and the métropole.”<sup>219</sup> Michael Crowder, an expert on European colonialism in Africa, argues that during the colonial period, any efforts by Africans to resist their exploitation and domination by the Europeans was “visited by punitive expeditions that were often quite unrestrained by any of the norms of warfare in Europe.”<sup>220</sup> Crowder then cites as an example of the extent to which brutality was critical in the colonial enterprise, “the bloody suppression of the Maji Maji and Herero uprisings in German East Africa and South West Africa,” as well as various atrocities committed during the British-sponsored “suppression of the Satiru revolt in [the colony of] Northern Nigeria.”<sup>221</sup> Additional evidence is found in the correspondences of Edward Lugard, brother of Lord Lugard—the latter was, at the time, the British High Commissioner in the colony of Northern Nigeria and the architect of the British policy of indirect rule in West Africa. Edward Lugard, on a visit to the colony of Northern Nigeria was taken aback by the level and nature of brutality visited upon defenseless women by colonial forces. In a letter to his brother (Lord Lugard), which was dated May 21, 1908, Edward Lugard wrote that “they [colonial soldiers, military police, and regular police units] killed every living thing before them”<sup>222</sup> and that “[w]omen’s breasts had been cut off and the leader spitted on a stake.”<sup>223</sup>

There is no evidence that any of the perpetrators of these atrocities against defenseless Africans was ever held accountable for their deeds. In fact, in many cases, as illustrated by the activities of the *Force publique* in

---

L'ARMÉE NATIONALE CONGOLAISE: HISTOIRE D'UNE MUTINERIE, JUILLET 1960 (Académie Royale de Belgique 1993).

218. HENRY RICHARD FOX BOURNE, CIVILIZATION IN CONGOLAND: A STORY OF INTERNATIONAL WRONG-DOING 253 (P. S. King & Son 1903).

219. MBAKU, *supra* note 7, at 21.

220. Michael Crowder, *Whose Dream Was It Anyway? Twenty-Five Years of African Independence*, 86 AFRICAN AFFAIRS 7 (1987).

221. *Id.* at 12.

222. *Id.*

223. *Id.*

the Congo Free State, as well as in Belgian Congo, such brutality was actually a requirement of the job for soldiers and other paramilitary forces. Perhaps, more importantly, is the fact that those who engaged in such inhuman treatment of Africans were rewarded for their actions.<sup>224</sup>

Of course, there was South Africa's system of institutionalized racial segregation called apartheid.<sup>225</sup> Officially established in 1948, apartheid was based on white supremacy and permanent black (or African) inferiority. To make it work, the white minority government enacted an extraordinary number of laws, which ranged from the prohibition of marriages between blacks and whites to those that forcefully removed Africans from their homes and placed them in economically unsustainable "homelands."<sup>226</sup> That apartheid was characterized by extremely high levels of impunity is not in doubt. One need only read narratives provided through the post-apartheid truth and reconciliation process to gauge the extent to which apartheid's security forces had killed, maimed, and generally brutalized Africans, with impunity<sup>227</sup>

Despite the significant improvements in governance that have taken place in the continent since many countries began to transition their political systems to democracy in the early 1990s, impunity still remains a major concern. The genocidal massacre of Tutsi and their Hutu sympathizers by the Hutu-majority government during a 100-day period in the summer of 1994, is just one example of the atrocities that continue to pervade African societies even into the 21st century and without the perpetrators being brought to justice.<sup>228</sup> Below, we take a brief look at how some African countries have attempted to deal with impunity. Nevertheless, before we do so, we will first

---

224. See BOURNE, *supra* note 218. See also CAROLINE ELKINS, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA* (2006) (providing an overview of the brutal treatment of Kenya's Kikuyu people in the aftermath of World War II).

225. For an overview of apartheid, its origins and its impact on South Africa and its peoples, see JOHN ALLEN, *APARTHEID SOUTH AFRICA: AN INSIDER'S VIEW OF THE ORIGIN AND EFFECTS OF SEPARATE DEVELOPMENT* (2005); SEAN CONNOLLY, *APARTHEID IN SOUTH AFRICA* (2003).

226. For an insight into the homelands of apartheid South Africa, see JEFFREY BUTLER, ROBERT I. ROTBERG & JOHN ADAMS, *THE BLACK HOMELANDS OF SOUTH AFRICA: THE POLITICAL AND ECONOMIC DEVELOPMENT OF BOPHUTHATHSWANA AND KWAZULU* (1978); *NEW HISTORIES OF SOUTH AFRICA'S APARTHEID-ERA BANTUSTANS* (Shireen Ally & Arianna Lissoni eds., 2017).

227. See, e.g., RITA KESSELING, *BODIES OF TRUTH: LAW, MEMORY, AND EMANCIPATION IN POST-APARTHEID SOUTH AFRICA* (2016); *ATROCITIES, MASSACRES, AND WAR CRIMES: AN ENCYCLOPEDIA*, VOL. A-L 20 (Alexander Mikaberidze ed., 2013); HELENA COBBAN, *AMNESTY AFTER ATROCITY? HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES* 8 (2007).

228. For more on the Rwandan Genocide, see, e.g., LINDA MELVERN, *CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE* (2004).

---

---

take a look at truth commissions, which have emerged as the most important instrument for addressing the causes of conflict and providing recommendations on how affected societies can deal with impunity.

*B. The Truth Commission and Impunity in Africa*

A truth commission is a mechanism that can be used to administer justice, address the root causes of conflict, and provide policymakers with recommendations on how to deal with impunity. The first truth commission in post-independence Africa was one that was established in 1974 by then president of Uganda, Idi Amin, to investigate “enforced disappearances” under his regime.<sup>229</sup> Since that time, the truth commission has emerged as “a means to investigate past human rights violations, uncover the repressive machinery of authoritarian regimes, and identify systemic socioeconomic injustices.”<sup>230</sup>

Since the early 1990s, at least twenty-five truth commissions have been established in Africa. The ability of each of these truth commissions to uncover the truth has been affected significantly by their “institutional design.”<sup>231</sup> For example, if the truth commission is granted subpoena power, as well as significant operating resources (e.g., money, skilled manpower), it is more likely than not, to access information on the committed atrocities. In addition, those commissions that are granted the power to publicly name perpetrators are more likely to force accountability (even if only symbolically) and in doing so, secure some level of justice for the victims. But, what if the commission is empowered to grant amnesty to perpetrators? It has been suggested that giving it the power to grant amnesty can actually transform the commission, at least in the eyes of victims, into a supporter of impunity.<sup>232</sup> Although South Africa’s post-apartheid Truth and Reconciliation Commission (“TRC”) was empowered to grant “conditional amnesty in exchange for full disclosure of crimes,”<sup>233</sup> most of the continent’s truth commissions have usually not been granted such power.

Unfortunately, truth commissions, as they currently operate in Africa, have many limitations. For one thing, in order for them to function

---

229. Intl’ Peace Institute [IPI], African Union Panel of the Wise, *Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity* (February 2013), [https://www.ipinst.org/2013/01/peace-justice-and-reconciliation-in-africa\\_](https://www.ipinst.org/2013/01/peace-justice-and-reconciliation-in-africa_)

230. *Id.* at 21.

231. *Id.*

232. *Id.*

233. *Id.*

effectively as tools to unearth the truth about past atrocities, as well as deliver some justice to victims, there must be political will—the government must not only be willing to support the commission’s activities, but it must also provide the necessary human and financial resources for the commission to carry out its duties, as well as provide an environment in the country within which truth-telling can easily be accomplished.<sup>234</sup> As argued by the African Union Panel of the Wise,<sup>235</sup> “there is a real danger that [truth commissions] are increasingly seen as a panacea, inserted into peace agreements in order to provide options for leaders seeking to avoid criminal accountability.”<sup>236</sup> Nevertheless, truth commissions remain a powerful tool to fight impunity. However, they can do so only if they are provided enough resources to do their jobs and there is necessary political support. At the very least, truth commissions can provide the necessary forum for societies afflicted by rampant human rights violations to investigate and uncover the truth about past and on-going atrocities, as well as provide victims with some level of justice, even if only symbolic.<sup>237</sup> Of course, truth commissions can play an important role in national peacebuilding efforts, help build a culture of respect for human rights, and provide policymakers with important recommendations on how to create institutions that generally improve governance. As stated by the A.U. Panel of the Wise, “when properly executed, truth commissions can be one among a host of mechanisms for restoring the rule of law.”<sup>238</sup>

Principle 31<sup>239</sup> represents an important tenet of international human rights law, which is “the right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”<sup>240</sup> This principle is given practical effect by Article 75 of the Rome Statute “in

---

234. *Id.*

235. The A.U. Panel of the Wise is a critical pillar of the Peace and Security Architecture of the African Union. The Panel of the Wise was set up by Article 11 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC) as a five-person panel of “highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent” with the duty “to support the efforts of the PSC and those of the Chairperson of the Commission, particularly in the area of conflict prevention.” African Union, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (Dec. 26, 2003), <https://au.int/en/treaties/protocol-relating-establish-ment-peace-and-security-council-african-union>.

236. *Id.* at 21.

237. *Id.*

238. *Id.* at 22.

239. See Updated Set of Principles, *supra* note 199.

240. *Id.* art. 31.

the context of international criminal proceedings.”<sup>241</sup> Reparations are considered very important because they place emphasis on victims and, in addition, represent “a critical transitional justice mechanism for repairing relations between national actors and victims.”<sup>242</sup> In addition to the fact that the right to reparations can be found in many multilateral treaties, it is now accepted as part of customary international law.<sup>243</sup> In a resolution adopted on December 16, 2005, the U.N. General Assembly outlined principles on the right to remedy and reparations.<sup>244</sup> In its resolution, the U.N. General Assembly identified five components of the right to reparation: restitution (the victim should be restored to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred), compensation (payment should be made for any economically assessable damage), rehabilitation (which include medical and psychological care, as well as legal and social services), satisfaction (various measures, including cessation of continuing violations, public apology, and judicial and administrative sanctions against persons liable for the violations), and guarantees of non-repetition (these include effective civilian control of military and security forces, strengthening the independence of the judiciary, and promoting mechanisms for preventing and monitoring social conflicts and their resolution).<sup>245</sup>

During the last several years, truth commissions or truth-seeking bodies have risen to play an important role in reparation regimes. For example, truth-seeking commissions in South Africa, Sierra Leone, and Liberia have all made recommendations on reparations. Morocco and Malawi have created dedicated institutions for reparations and Morocco granted its truth commission the power to grant reparations directly to victims.<sup>246</sup>

---

241. See Independent Study, *supra* note 181, ¶ 57. Article 75 of the Rome Statute is titled “Reparations to victims.” Article 75(1) states as follows: “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its motion in exceptional circumstances, determine the scope and extent of any damage, loss and inquiry to, or in respect of, victims and will state the principles on which it is acting.” See *Rome Statute*, *supra* note 116.

242. A.U. Panel of the Wise, *supra* note 229, at 22.

243. Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, New York and Geneva (2006), 5–6, <https://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

244. G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Law (Dec. 16, 2005).

245. *Id.* ¶ 18.

246. A.U. Panel of the Wise, *supra* note 229, at 23.

i. South Africa's Truth and Reconciliation Commission

Since the early-1990s, many African countries have become “a vast testing ground for new policies to address impunity, seek truth and justice, and enable reconciliation in fractured societies.”<sup>247</sup> One of the most instructive and informative transitions from a governmental regime pervaded by impunity to a democratic one is South Africa's post-apartheid political system. In 1995, as South Africa was in the process of transitioning from the apartheid system, the government enacted the Promotion of National Unity and Reconciliation Act (“PNURA”).<sup>248</sup> Chapter 2 of the PNURA creates a Truth and Reconciliation Commission (“TRC”) as “a juristic person,” whose objectives would be “to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past.”<sup>249</sup> Specifically, the TRC was tasked with “establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date.”<sup>250</sup>

South Africans were eager to uncover the truth about the crimes and atrocities committed during the apartheid era and hold the perpetrators accountable for their actions.<sup>251</sup> To ensure full disclosure, the TRC offered amnesty to perpetrators so that they could come forward on their own and testify.<sup>252</sup> South Africa's TRC released the report of its investigation in 1998, with two important conclusions: (1) the apartheid government had committed the majority of human rights abuses during the period 1960-1994; and (2) the African National Congress and other anti-apartheid groups also committed human rights violations.<sup>253</sup>

---

247. *Id.*

248. Government of South Africa, Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.), <http://www.justice.gov.za/legislation/acts/1995-034.pdf>.

249. *Id.* art. 2(1).

250. *Id.* art. 3(1)(a). The cut-off date was 1994; that is, the TRC was to investigate human rights violations committed during the period 1960–1994.

251. Perpetrators included, not just the people who actually committed the crimes, but also those who ordered the crimes. *See, e.g.*, ALETTE SMEULERS & FRED GRÜNFELD, INTERNATIONAL CRIMES AND OTHER GROSS HUMAN RIGHTS VIOLATIONS: A MULTI- AND INTERDISCIPLINARY TEXTBOOK 319 (2011) (arguing, *inter alia*, that during the apartheid period in South Africa, some of the perpetrators of crimes were “lawyers and policymakers drafting or implementing the discriminatory laws,” as well as “bureaucrats implementing the rules or the legal profession and judiciary prosecuting people by implementing and ruling on unfair and illegitimate legislation”).

252. Promotion of National Unity and Reconciliation, *supra* note 248, preamble.

253. *See* Truth and Reconciliation Comm'n (of South Africa), *The TRC Report, Vol. One*, <http://www.justice.gov.za/trc/report/> (last visited July 27, 2018).

---

---

Besides offering victims an opportunity to seek and secure justice, South Africa's truth and reconciliation process also involved more broader objectives, which included, inter alia, the construction of a solid foundation for democratic governance. It was critical for South Africans that there be reconciliation and accountability at the national level and the TRC provided the medium through which these important goals could be achieved or actualized. Of course, there was fear, especially among vulnerable groups, primarily those which had been abused and exploited during the apartheid regime, that these atrocities could be visited upon them again. Hence, TRC was expected to make recommendations on how post-apartheid society could make certain that such crimes and atrocities were never committed again. With respect to post-apartheid South Africa, the key to making certain that apartheid-era crimes would never be repeated, lies in the country's strong democratic institutions—an independent judiciary, a strong, robust, and politically-informed and active civil society, and an independent press. These institutions provide a check on the exercise of government power and ensure that anyone, including even high-ranking officials of the state, who engages in behaviors that violate human rights, is brought to justice.

Despite the fact that the TRC succeeded in laying the foundation for a strong and robust democracy in South Africa, it was criticized by many citizens, especially those who had been severely impoverished by apartheid, for not dealing fully and effectively with the socioeconomics impacts of apartheid. Specifically, critics of the TRC argued that it had totally failed to hold the beneficiaries of the apartheid system—who included individuals and business enterprises—accountable for their complicity in this regime that had committed numerous atrocities against millions of people.<sup>254</sup> The TRC was designed specifically to foster national and political reconciliation and not individual reconciliation. Hence, victims took the TRC to task for “raising expectations about its ability to foster individual reconciliation.”<sup>255</sup> Critics have argued that there were other problems that rendered the TRC less effective as a tool for administering transitional justice. First, the TRC lacked “comprehensive reparations and redress,”<sup>256</sup> and as a consequence, many victims of apartheid continue to wait for justice. Second, the threat to prosecute those perpetrators who did not come forward to testify was limited and ineffective. In 2005 and 2007, the ANC Government of South Africa

---

254. *Id.* at 31.

255. *Id.*

256. *Id.*

implemented two policies,<sup>257</sup> which paved the way for perpetrators of crimes under apartheid to have a second chance at amnesty. However, local and international civil society groups, working together, and in cooperation with various victims' groups in South Africa, "secured a legal victory that ruled that the state should be compelled to fulfill its constitutional obligation to investigate cases from the apartheid era, including compliance with the TRC principle of victims' participation in the granting of pardons."<sup>258</sup>

ii. The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda ("ICTR") was established in November 1994 by the United Nations Security Council and empowered to prosecute the perpetrators of the Rwandan Genocide and other serious violations of international humanitarian law.<sup>259</sup> According to Article 1 of the U.N. Security Council's Resolution 995, which established the ICTR,

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.<sup>260</sup>

In December 2015, the ICTR delivered its 45th and final judgment and then made preparations to formally close.<sup>261</sup> Although the ICTR was not the only institution set up to judge those who were responsible for killing over 800,000 Tutsi and their Hutu sympathizers, it was the first international court

---

257. In 2005 and 2007 ANC Government implemented a set of amendments to the National Prosecuting Authority's policy and the Pardons Reference Group, respectively. *See Id.*

258. The TRC Report, *supra* note 253, at 32.

259. For more on the ICTR, *see* INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR), INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR) SPECIAL BIBLIOGRAPHY 2015 (2015); YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE AD HOC TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT (2004). *See also* U.N. Security Council, S.C. Res. 955 (Nov. 8, 1994).

260. S.C. Res. 955 (Nov. 8 1994), *id.* art. 1.

261. Alastair Leithead, *Rwanda Genocide: International Criminal Tribunal Closes*, BBC NEWS (December 15, 2015) <https://www.bbc.com/news/world-africa-35070220>.

to render judgment on the crime of genocide.<sup>262</sup> Nearly four years after the gruesome massacre took place, Jean-Paul Akayesu, a former teacher, school inspector, and mayor of Taba, was convicted of nine counts of genocide and crimes against humanity.<sup>263</sup> The ICTR went on to convict many more perpetrators of the Rwandan Genocide, including Jean Kambanda, who became the first head of a government to be convicted of genocide by an international court.<sup>264</sup>

Among the people who were indicted by the ICTR, were political elites, businessmen, and high-ranking military leaders and civil servants. About two-thirds of them were convicted and sentenced and, as much as, 3,000 witnesses appeared before the tribunal to give their personal testimony of crimes against humanity. According to information provided on the official ICTR website,<sup>265</sup> by April 2018, the ICTR had indicted 93 individuals; concluded proceedings for 80 accused individuals; transferred 30 convicted individuals to a State<sup>266</sup> to serve their sentence; 2 were awaiting transfer to a State to serve their sentence; 22 had completed serving their sentence; 6 had died while serving their sentence; 1 had died before being transferred to a State to serve their sentence; 3 had died before judgment was passed; 14 were acquitted; and 2 had their indictments withdrawn.<sup>267</sup>

The ICTR's work was a major tool against impunity in Africa. In addition to the fact that the ICTR was the first international court to recognize rape as "a means of perpetuating genocide,"<sup>268</sup> it also made history in Africa by convicting a head of government, former Rwandan prime minister, Jean Kambanda, for crimes against humanity.<sup>269</sup> Thus, the ICTR can be viewed as an international legal institution that sent a powerful message to African government officials and other actors that they would no

---

262. Leithead, *supra* note 261.

263. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (June 1, 2001), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/appeals-chamber-judgements/en/010601.pdf>.

264. *Kambanda v. Prosecutor*, Case No. ICTR-97-23-A, Judgment (October 2000), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-97-23/appeals-chamber-judgements/en/001019.pdf>.

265. See *Key Figures of ICTR Cases*, UNICTR, <http://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en-1804.pdf> (last modified in April 2018).

266. The States to which convicted individuals were sent to serve their sentence include Mali, Benin, and Senegal. See Margaret M. Penrose, *Creating an International Prison*, RESEARCH HANDBOOK ON THE INTERNATIONAL PENAL SYSTEM 423, 431 (Róisín Mulgrew & Denis Abels eds., 2016).

267. Key Figures of ICTR Cases, *supra* note 265.

268. Leithead, *supra* note 261.

269. *Id.*

long be able to commit serious international crimes or commit serious human rights violations with impunity. Viewed positively then, one can argue that the ICTR's judgments sent a message to anyone who "commit[s] genocide or other atrocities" that, regardless of their political, economic, or social standing, they will no longer go unpunished; they will be brought to justice, even if the national government is either unwilling or unable to do so.

However, the ICTR's critics argue that this was a very expensive experiment in transitional justice that provided only marginal benefits. For example, they argue that the ICTR spent \$2 billion and only managed to produce a small number of convictions, especially given the scale of the massacres—nearly one million Rwandans were brutally massacred in just 100 days. Perhaps, more important is the fact that many critics argue that the ICTR delivered nothing to each victim's family or the survivors of the genocide.<sup>270</sup> In addition, many ordinary Rwandans argue that as important as the process was, there was a disconnect between them and what was taking place in Arusha—they were not provided the opportunity to fully participate in and witness the proceedings. Also, many of them believed that the sentences handed out by the ICTR were not harsh enough, especially given the brutal nature of the atrocities committed.<sup>271</sup>

Some critics have argued that the ICTR's concentration on genocide crimes committed against the Tutsi population by the Hutu-dominated government forced it to neglect investigating atrocities committed by Tutsi-backed groups throughout the country during the civil war. These critics argue that the failure of the ICTR to investigate and prosecute crimes committed by the Tutsi-dominated Rwanda Patriotic Front ("RPF") during the civil war was a major failing of the international tribunal.<sup>272</sup> Despite these alleged shortcomings, it is important to recognize the fact that the legal precedents set by this international court will become important tools for fighting impunity. These precedents have now become part of the international community's and Africa's human rights jurisprudence.

---

270. Some critics have argued that the decision to locate the ICTR outside Rwanda (i.e., in Arusha, Tanzania) and undertake proceedings in three languages—English, French, Kinyarwanda) made the process very expensive. As argued by Jalloh and Morgan, "the decision to locate the Tribunal [ICTR] in Arusha created geographic distance between the *locus commisi delicti* and the seat of the court. It is clear that this ultimately made the process of gathering evidence and security witness testimony much more expensive as it required arrangements, safe houses, and dedicated aircraft for witness travel." See Charles Jalloh & Andrew Morgan, *International Criminal Justice Processes and Sierra Leone: Lessons for Liberia*, in SHIELDING HUMANITY: ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE ABDUL G. KOROMA 447, 476 (Charles Chernor Jalloh & Olufemi Elias eds., 2015).

271. Leithead, *supra* note 261.

272. *Id.*

---

---

#### IV. RECENT DEVELOPMENT IN THE FIGHT AGAINST IMPUNITY IN AFRICA

##### *A. The International Criminal Court and Impunity in Africa*

When the International Criminal Court (“ICC”)<sup>273</sup> began criminal proceedings against Congolese militia leader, Thomas Lubanga Dyilo, in 2009,<sup>274</sup> it appeared that the international community had finally taken concrete steps to fight impunity in Africa and other parts of the world. Unlike the International Criminal Tribunal for Rwanda (“ICTR”) and other temporary and specially-created international courts, the ICC is the world’s first permanent international criminal court. It is empowered to bring to justice individuals who are alleged to have committed serious international crimes, which include the violation of human rights.<sup>275</sup>

The ICC’s efforts to fight impunity have been praised by human rights advocates, especially in Africa.<sup>276</sup> Since it came into being in 2002, the ICC has focused disproportionately on African situations and that has drawn criticisms from many Africans, who see the international tribunal as an instrument of modern imperialism.<sup>277</sup> When the ICC attempted to prosecute two sitting African heads of state—Sudan’s Omar Hassan al-Bashir and then Libyan strong-man, Muammar al-Qaddafi—the African Union declined to enforce arrest warrants against the two leaders. Since both countries were not

---

273. The International Criminal Court (ICC) was established by the Rome Statute of the International Court. The Rome Statute was adopted at a diplomatic conference in Rome (Italy) on July 17, 1998 and entered into force on July 1, 2002. In addition to establishing the court and its functions, jurisdiction, and structure, the Rome Statute also established four core international crimes—genocide, crimes against humanity, war crimes, and the crime of aggression—and granted jurisdiction over them to the ICC. *Rome Statute of the International Criminal Court*, *supra* note 116.

274. Prosecutor v. Dyilo, ICC-01/04-01/06, <https://www.icc-cpi.int/drc/lubanga/Documents/lubangaEng.pdf>.

275. Crimes within the jurisdiction of the ICC are listed in Article 5 of the Rome Statute. *See* Rome Statute, *supra* note 116, art. 5.

276. *See, e.g.,* Sarah Rayzl Lansky, *Africans Speak Out Against ICC Withdrawal: Governments Signal Continued Support for Court*, HUMAN RIGHTS WATCH (Nov. 2, 2016), <https://www.hrw.org/news/2016/11/02/africans-speak-out-against-icc-withdrawal>.

277. *See, e.g.,* Motsoko Pheko, *The ICC is Now an Instrument of Imperialism*, PAMBAZUKA NEWS (June 25, 2015), <https://www.pambazuka.org/governance/icc-now-instrument-imperialism>; Mwangi S. Kimenyi, *Can the International Criminal Court Play Fair in Africa*, THE BROOKINGS INSTITUTION (Oct. 17, 2013), <https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa/>; Oumar Ba, *International Justice and the Postcolonial Condition*, 63 AFRICA TODAY 44, 46 (2017) (arguing that the ICC is essentially a tool of the West to fight impunity in Africa).

signatories to the Rome Statute, jurisdiction was obtained through a resolution from the U.N. Security Council.<sup>278</sup> Within Africa, controversy also arose over the ICC's attempts to prosecute top Kenyan officials in connection with the gross human rights abuses that occurred in the country in the aftermath of the 2007 presidential elections. Although Kenya is a State Party to the Rome Statute, Kenyan officials argued that dragging their leaders to trial in The Hague could create a serious constitutional crisis and seriously damage the country's already fragile peace and security.<sup>279</sup>

In 2016, former U.N. Secretary-General, Kofi Annan, who was also a former Ghanaian diplomat, granted an interview to the *Financial Times*<sup>280</sup> in which he rejected accusations by several Africans that the ICC is an anti-African international institution.<sup>281</sup> He went on to say that he believed strongly that most ordinary Africans want their leaders held accountable for their actions. Specifically, he said that Africans "want justice" and "if they can get it from their own courts," that is good. Nevertheless, if they cannot get justice from their own courts, then "an international court," such as the ICC, is, for them, a court of last resort.<sup>282</sup>

The truth of the matter is that, as long as African countries remain unable to fully and effectively deal with impunity—that is, hold fully accountable anyone who commits international crimes—the ICC will remain relevant to the continent. Although both the ICC and the African Union are interested in fighting impunity on the continent, the two institutions have, nevertheless, "gradually developed a significant rift."<sup>283</sup> The AU has accused the ICC of practicing or pursuing "selective justice" as it has, until recently, only concentrated on African cases.<sup>284</sup> Mbaku<sup>285</sup> argues that "[w]hile the ICC's previous prosecutions are based on solid legal grounds, it would be

278. See S.C. Res. 1593 (Mar. 31, 2005), <https://www.un.org/press/en/2005/sc8351.doc.htm>.

279. See, e.g., Congressional Research Service (U.S.), *International Criminal Court Cases in Africa: Status and Policy Issues* (July 22, 2011), [https://www.everycrsreport.com/files/20110722\\_RL34665\\_adc91e5a4311fd813418c0457a57a83308357981.pdf](https://www.everycrsreport.com/files/20110722_RL34665_adc91e5a4311fd813418c0457a57a83308357981.pdf).

280. David Pilling, *Kofi Annan Defends International Criminal Court Despite Africa Row*, FINANCIAL TIMES (June 16, 2016) <https://www.ft.com/content/204df924-32cd-11e6-bda0-04585c31b153>.

281. *Id.*

282. *Id.*

283. John M. Mbaku, *Africa and the International Criminal Court: Is There Room for Cooperation?* GEORGETOWN J. INT'L AFF., April 26, 2017, <https://www.georgetownjournalofinternationalaffairs.org/online-edition/africa-and-the-international-criminal-court-is-there-room-for-cooperation>.

284. *Id.*

285. *Id.*

---

---

unwise for the Court to ignore the voices of those who argue that the ICC is a tool of Western imperialism.”<sup>286</sup>

Given the fact that it is likely to take many years for African countries to develop both the legal capacity and the political will to deal fully with impunity, cooperation with the ICC and other international institutions, including especially those which are dedicated to promoting the recognition and protection of human rights, is critical to ensuring that victims of serious and gross human rights violations receive justice.<sup>287</sup> Regardless of its shortcomings, the ICC remains an important part of Africa’s legal architecture for combating impunity in the continent.

The ICC, of course, is not the only institution dedicated to fighting impunity. There are others, working at both the international, regional, and national levels, to make certain that any individual who engages in the gross violation of human rights is brought to justice. In other words, there are other institutions, besides the ICC, that are fighting or have fought impunity in Africa. Below, we take a look at some of them.

### *B. Charles Taylor and The Special Court for Sierra Leone*

In 2000, the Government of Sierra Leone made a request to the United Nations to provide the country with a “special court” to address serious crimes that had been committed against civilians and U.N. peacekeepers during the country’s civil war, which took place from 1991 to 2002.<sup>288</sup> After negotiations between the Government of Sierra Leone and the United Nations, the world’s first “hybrid” international criminal tribunal<sup>289</sup> was created and granted power to hold accountable those individuals “bearing the greatest responsibility” for serious crimes committed in Sierra Leone “after 30 November 1996, the date of the failed Abidjan Peace Accord.”<sup>290</sup> The

---

286. *Id.*

287. *Id.*

288. See, e.g., Special Court for Sierra Leone/Residual Special Court for Sierra Leone, Freetown (Sierra Leone) and The Hague (The Netherlands), *The Special Court for Sierra Leone: Its History and Jurisprudence*, <http://www.rscsl.org/> (last visited Oct. 9, 2018).

289. This court was officially known as “The Special Court for Sierra Leone.” After the Special Court for Sierra Leone was closed in 2013, the U.N. established the Residual Special Court for Sierra Leone through an agreement between the U.N. and the Government of Sierra Leone “to oversee the continuing legal obligations of the Special Court for Sierra Leone.” See *The Special Court for Sierra Leone*, *supra* note 288. The obligations that the Residual Special Court was expected to oversee included the protection of witnesses, supervision of prison sentences, and the management of the archives of the Special Court for Sierra Leone.

290. *The Special Court for Sierra Leone*, *supra* note 288.

Special Court for Sierra Leone (“SCSL”) was “the first modern international tribunal to sit in the country where the crimes took place, and the first to have an effective outreach program on the ground.”<sup>291</sup>

The Statute of the Special Court for Sierra Leone<sup>292</sup> specifically empowered the Prosecutor to bring charges for war crimes,<sup>293</sup> crimes against humanity, other serious violations of international humanitarian law, and certain serious violations of Sierra Leonean law.<sup>294</sup> In March 2003, the Prosecutor brought 13 indictments against leaders of the Revolutionary United Front (“RUF”),<sup>295</sup> the Armed Forces Revolutionary Council (“AFRC”), the Civil Defense Forces (“CDF”), and then-President of Liberia, Charles Taylor.<sup>296</sup>

In June 2003, the Prosecutor to the Special Court for Sierra Leone, unsealed the indictment against Charles Taylor, which charged the latter with war crimes. Initially, the Prosecutor had indicted Taylor on 17 counts of war crimes and crimes against humanity, which were committed during the conflict in Sierra Leone. However, the indictment was later amended and Taylor would stand trial for 11 counts of war crimes and crimes against humanity. Taylor’s Indictment and Warrant of Arrest was formally unsealed on June 12, 2003.<sup>297</sup> On August 11, 2003, Taylor stepped down as President of Liberia and went into exile in Nigeria and remained there until he was arrested by Nigerian authorities on March 29, 2006 and subsequently transferred to the Special Court for Sierra Leone that same day.<sup>298</sup>

291. *Id.*

292. U.N., Statute for the Special Court for Sierra Leone (Jan. 2002), <http://legal.un.org/avl/ha/scsl/scsl.html>.

293. Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

294. Specifically, the Malicious Damage Act (1861) and the Prevention of Cruelty to Children Act (1926).

295. The Revolutionary United Front (RUF) was a rebel army that wedged a failed 11-year war against the government of Sierra Leone. The RUF’s brutal war against the government of Sierra Leone lasted from 1991 to 2002. Three of the RUF’s most senior surviving leaders—Issa Sesay, Morris Kallon, and Augustine Gbao, were convicted of war crimes and crimes against humanity in 2009. *See* MARINA AKSENOVA, *COMPLICITY IN INTERNATIONAL LAW* 217 (2016); CHARLES CHERNOR JALLOH & SIMON MEISENBERG, *THE LAW REPORTS OF THE SPECIAL COURT FOR SIERRA LEONE: VOLUME III: PROSECUTOR V. CHARLES TAYLOR (THE TAYLOR CASE)* xxxv (2015).

296. *See* JALLOH and MEISENBERG, *supra* note 295.

297. *Prosecutor v. Taylor* (Case No. SCSL-03-01-A), Judgment (Sept. 26, 2013), <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>.

298. Nigeria’s decision to arrest and handover Taylor to the SCSL was significant since such cooperation, at the national level, is important for combating impunity in the continent. This was a powerful message for other fleeing senior government officials accused of complicity in human rights violations that they cannot hide in other African countries as a

In Taylor's indictment, five counts dealt with crimes against humanity (murder, rape, sexual slavery, other inhumane acts, and enslavement); five other counts charged violations of Common Article 3 and Additional Protocol II (acts of terrorism; violence to life, health and physical or mental well-being of persons, in particular murder; outrages upon personal dignity; violence to life, health and physical or mental well-being of persons, in particular cruel treatment; and pillage). One count charged other serious violations of international humanitarian law (conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities).<sup>299</sup>

The Trial Chamber convicted Charles Taylor on all eleven counts of the Indictment and "found him individually criminally liable under Article 6(1) of the Statute for aiding and abetting the commission of crimes, charged in all eleven counts, between 3 November 1996 and 18 January 2002 in the Districts of Bombali, Kailahun, Kenema, Kono, Port Loko and Freetown and the Western Area."<sup>300</sup> The verdict in Taylor's trial was announced on April 26, 2012—the SCSL unanimously ruled that he was guilty of 11 counts of "aiding and abetting" war crimes and crimes against humanity.<sup>301</sup> Taylor, thus, became the first, albeit former, head of state to be convicted by an international tribunal since Karl Döenitz<sup>302</sup> was convicted at the Nuremberg Trials.<sup>303</sup>

Charles Taylor was subsequently sentenced to 50 years in prison. He appealed his sentence to the Appeals Chamber and the latter upheld the verdict of the Trial Chamber.<sup>304</sup> Reacting to the verdict, the Government of Sierra Leone stated that "[i]t [i.e., the verdict] is a step forward as justice has

---

way to escape prosecution. See YVES BEIGBEDER, *INTERNATIONAL CRIMINAL TRIBUNALS: JUSTICE AND POLITICS* 137 (2011) (stating, inter alia, that Charles Taylor was arrested by Nigerian authorities on March 29, 2005 and transferred to Liberia where he was handed over to the U.N. peacekeeping mission, who flew him to Sierra Leone).

299. Prosecutor v. Taylor, *supra* note 297.

300. *Id.* ¶ 13.

301. *Id.*

302. Karl Döenitz (1891–1980) was a German admiral who succeeded Adolf Hitler, although only briefly, as the head of state of Germany. The name is also spelled "Dönitz." For more on Döenitz, see, e.g., BARRY TURNER, *KARL DÖENITZ AND THE LAST DAYS OF THE THIRD REICH* (2015); PETER PADFIELD, *DONITZ: THE LAST FUHRER* (2013).

303. For more on the Nuremberg Trials, see *generally* HAROLD KEITH THOMPSON & HENRY STRUTZ, *DOENITZ AT NUREMBERG, A REAPPRAISAL: WAR CRIMES AND THE MILITARY PROFESSIONAL* (1976).

304. See Thomas Escritt, *Liberia's Charles Taylor Loses Appeal Against War Crimes Conviction*, REUTERS (Sep. 26, 2013), <https://www.reuters.com/article/us-warcrimes-taylor-appeal-idUSBRE98P0DP20130926>.

been done, though the magnitude of the sentence is not commensurate with the atrocities committed.”<sup>305</sup>

When Charles Taylor was captured in Nigeria and handed over to the SCSL, many Africans argued that this was a positive development for the fight against impunity in the continent. Then U.N. Secretary-General, Kofi Annan, stated that “the capture and trial of Mr. Taylor will send a powerful message to the region and beyond that impunity will not be allowed to stand and that the rule of law must prevail.”<sup>306</sup> Dr. Alex Vines, Head of the Africa Program at Chatham House (U.K.)<sup>307</sup> and a former U.N. sanctions inspector in West Africa during the 2001-2003 period, stated in 2012 that “[a] key reason for almost a decade of peace in both countries [i.e., Liberia and Sierra Leone] was the containment of Charles Taylor through U.N. sanctions, military action, and the indictment by the Special Court.”<sup>308</sup> The indictment by the SCSL forced Taylor to resign as President of Liberia and seek refuge in Nigeria, giving Liberia the opportunity to begin the rebuilding process. His resignation and departure also significantly reduced his illegal activities, not only in Liberia, but also in Sierra Leone. Of course, Nigeria later arrested him and extradited him to the SCSL.

Among the non-governmental organizations that closely followed the Taylor trial is Human Rights Watch (“HRW”).<sup>309</sup> In July 2012, HRW released its study of the Taylor trial titled “Even a ‘Big Man’ Must Face Justice: Lessons from the Trial of Charles Taylor”<sup>310</sup> in which it stated that the Taylor trial sent a strong signal “that the world has become a less

---

305. Quoted in *Liberia Ex-leader Charles Taylor get[s] 50 Years in Jail*, BBC NEWS (May 30, 2012), <https://www.bbc.co.uk/news/world-africa-18259596>.

306. Michael Fleshman, *Africa Ending Impunity for Rights Abuses*, AFRICA RENEWAL (January 2007), <https://www.un.org/africarenewal/magazine/january-2007/africa-ending-impunity-rights-abuses>.

307. Chatham House is the common name for the Royal Institute of International Affairs. It is a non-profit and non-governmental organization based in London. Chatham House is one of the world’s top think tanks in the area of international affairs. In the Global Go To Think Tanks Report, it is ranked only second to The Brookings Institution. For more on the Chatham House’s founding and its purposes, see *generally* SIR STEPHEN KING-HALL, CHATHAM HOUSE: A BRIEF ACCOUNT OF THE ORIGINS, PURPOSES, AND METHODS OF THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS (1937).

308. Alex Vines, *The Importance of the Charles Taylor Verdict for Africa*, CHATHAM HOUSE—THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS (Apr. 26, 2012), <https://www.chathamhouse.org/media/comment/view/182995>.

309. Human Rights Watch is an international non-governmental organization that conducts research on human rights and advocates for the recognition and protection of human rights throughout the world.

310. *Even a ‘Big Man’ Must Face Justice: Lessons from the Trial of Charles Taylor*, HUMAN RIGHTS WATCH (July 2012), <https://www.hrw.org/report/2012/07/25/even-big-man-must-face-justice/lessons-trial-charles-taylor> (last visited Oct. 25, 2018).

hospitable place for the highest-level leaders accused of committing the most serious crimes.”<sup>311</sup> The report went on to say that “the Taylor trial reflects a major departure from the impunity that heads of state traditionally enjoyed when implicated in genocide, war crimes, and crimes against humanity.”<sup>312</sup>

The Taylor trial was important for West Africa, a region in which, for many years, a group of “powerful individuals who either [led] armed groups or [wielded] significant political power,” had been able to commit various atrocities without fear of being held accountable.<sup>313</sup> When the SCSL brought Taylor to trial, this represented the first time that a “big man” has “been taken into custody and forced to answer for alleged international crimes at trial.”<sup>314</sup>

As determined by HRW, despite the trial’s limitations, it did provide some notable benefits for Sierra Leone and Liberia. First, outreach programs conducted by the SCSL in affected areas, including the creation of audio and video summaries of the trial in local languages, helped communities in Liberia and Sierra Leone participate in and learn from the trial proceedings. In addition, the SCSL made it possible for civil society members from several affected communities to visit the SCSL in The Hague and then return home to share their experiences with their fellow citizens.<sup>315</sup>

Second, the trial significantly enhanced the ability of the affected and other communities in West Africa to understand and appreciate the importance of accountability. In Sierra Leone and Liberia, HRW was told by many people that Taylor’s trial helped them appreciate the “value of justice.”<sup>316</sup> While the trial has improved the people’s perception of accountability, particularly by those in government, these countries have a long way to go to provide themselves with institutions that force all civil servants and political elites to be accountable to both the constitution and the people. This is a problem that is not unique to Liberia and Sierra Leone. Most countries in the continent are still burdened with laws and institutions that do not adequately constrain the State and hence, impunity remains a major governance problem.<sup>317</sup>

Finally, many human rights activists have argued that the Taylor trial has contributed significantly to “promoting long-term respect for human

---

311. Human Rights Watch, *supra* note 310, at 1.

312. *Id.*

313. *Id.* at 2.

314. *Id.*

315. *Id.* at 5.

316. *Id.* at 6.

317. *Id.* at 5–6.

rights and the rule of law in the sub-region.”<sup>318</sup> Specifically, according to one human rights advocate, “[The trial has] helped . . . change the historical concept that leaders are above the law and [challenge] the acceptance that leaders and elected officials can use war and violence as way[s] to carry out their personal agendas.”<sup>319</sup> If there is one lesson that Africans should learn from the trial, conviction and sentencing of Charles Taylor, it is that “[t]he supremacy of law is the heart and foundation for a democracy; it is the mark of a free society; it is the most important characteristic of a governance system.”<sup>320</sup>

### C. *The Case of Hissène Habré Before the Extraordinary African Chambers*

#### i. The Case Against Hissène Habré

Hissène Habré is a Chadian politician who served as President of the Republic of Chad from 1982 until he was ousted in 1990. Habré seized power in 1982 with help from the United States and France—the two Western countries saw Habré as important partner in their efforts to contain the ambitions of Muammar al-Qaddafi in the sub-region. On May 30, 2016, Habré was found guilty of crimes against humanity, summary execution, torture and rape by the Extraordinary African Chambers.<sup>321</sup>

Habré served as President of the Republic of Chad from June 7, 1982 to December 1, 1990, when he was ousted by the country’s current president, Idriss Déby Itno. After he was deposed, Habré fled to Senegal where he was granted asylum and lived there until he was brought to trial in 2015 for international crimes he was alleged to have committed during his tenure as President of Chad. The effort to bring Habré to justice for his crimes began in 1990 after he was ousted from power. During his tenure as president, it was

---

318. *Id.* at 6.

319. *Id.*

320. John M. Mbaku, *Foresight Africa Viewpoint—Elections in Africa in 2018: Lessons from Kenya’s 2017 Electoral Experiences*, THE BROOKINGS INSTITUTION (Feb. 1, 2018), <https://www.brookings.edu/blog/africa-in-focus/2018/02/01/foresight-africa-viewpoint-elections-in-africa-in-2018-lessons-from-kenyas-2017-electoral-experiences/>.

321. The Extraordinary African Chambers was a tribunal that was established under an agreement between the Government of Senegal and the African Union. It was designed to prosecute the “person or persons” most responsible for international crimes committed in Chad from June 7, 1982 to December 1, 1990. See Roland Adjovi, *Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers*, 52 INT’L L. MATERIALS 1020 (2013) (providing an overview of the statute establishing the Extraordinary African Chambers).

estimated that about 40,000 people were killed and another 200,000 people tortured by Habré's Directorate of Documentation and Security ("DDS").<sup>322</sup> After his ouster, the new government in Chad, under the leadership of Idriss Déby, created a commission of inquiry to look into Habré's alleged crimes. After it finished its work, the commission recommended that the Chadian government bring to trial any person or persons responsible for serious violations of international human rights and international humanitarian law. Unfortunately, Habré could not be brought to trial in Chad because he was living in Senegal.<sup>323</sup>

In 1999, the British House of Lords ruled on "head of state immunity" in the Pinochet case.<sup>324</sup> Augusto Pinochet, former president of Chile, had traveled to the U.K. to seek medical treatment and while in London, a Spanish court had invoked *universal jurisdiction* to prosecute him for crimes, which he was alleged to have committed while he was head of state in Chile.<sup>325</sup> Universal jurisdiction has been defined as "a form of jurisdiction in international law which grants the court of any state, the ability to bring proceedings with respect to certain (internationally defined) crimes, without regard to the location of the crime, the nationality of the offender, or the nationality of the victim."<sup>326</sup>

Under the concept of universal jurisdiction, domestic courts can prosecute "persons for specific treaty based international crimes that have been committed outside of their territory."<sup>327</sup> However, before the Spanish court invoked it against Pinochet, universal jurisdiction had never been

---

322. *Commission of Inquiry into the Crimes and Misappropriations Committed by ex-President Habré, His Accomplices and/or Accessories, 1990–1992*, <http://www.icla.up.ac.za/images/un/commissionsofinquiries/countries/Chad-Commission-of-Inquiries.pdf>. In French, DDS stands for "la Direction de la Documentation et de la Sécurité."

323. Sofie A. E. Høgestøl, *The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity*, 34 NORDIC J. HUM. RTS. 147, 148 (2016).

324. *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and others (Appellant), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division) (No. 3), Judgment of 24 March 1999, reported as Regina v. Bow Street Metropolitan Magistrate and Others, ex parte Pinochet Ugarte (No. 3) [2000] 1 AC 147*, [http://www.asser.nl/upload/documents/20120516T100228-Pinochet\\_House\\_of\\_Lords\\_Opinion\\_25-11-1998.pdf](http://www.asser.nl/upload/documents/20120516T100228-Pinochet_House_of_Lords_Opinion_25-11-1998.pdf).

325. For more on Spanish efforts to prosecute General Pinochet, see, e.g., Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001).

326. Roozbeh (Rudy) B. Baker, *Universal Jurisdiction and the Case of Belgium: A Critical Assessment*, 16 ILSA J. INT'L & COMP. L. 141, 142 (2009).

327. Høgestøl, *supra* note 323, at 148.

invoked against a former head of state before. The attempt to extradite Pinochet to face charges before a Spanish court raised many questions, particularly whether, as a former head of state, he was still protected by immunity from the national courts of a foreign State, such as Spain.<sup>328</sup> The House of Lords rejected Pinochet's claim to immunity from arrest and subsequently asked that he remain in custody in the U.K. until Spain could seek his extradition on charges of mass murder and terrorism.<sup>329</sup> Many observers considered the ruling by the House of Lords to be ground-breaking for, it showed that former heads of state could be prosecuted for international crimes in the courts of other States based on universal jurisdiction.<sup>330</sup> Spain, however, never filed an application to extradite Pinochet because the latter was deemed too sick to stand trial.<sup>331</sup>

Although Pinochet was able to escape extradition to Spain to stand trial, leaving his victims without the justice that they deserved, the victims of Habré, however, were not willing to allow him to equally escape judgment. Inspired by the ruling in the Pinochet case, Habré's victims in Chad contacted Human Rights Watch lawyers to see if the precedent set by the House of Lords could be utilized to bring Habré to account for his criminal activities while he was president.<sup>332</sup>

But, why did Habré's victims not appeal to the International Criminal Court ("ICC") to intervene and take control of the case against him? The ICC was authorized by the Rome Statute<sup>333</sup> and became functional on July 1, 2002. However, Article 11 of the Rome Statute, which deals with the ICC's jurisdiction, states that "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."<sup>334</sup> Thus, it would not have been possible for Habré to be brought to trial at the ICC since the

---

328. Although sitting heads of state have normally enjoyed full immunity from the domestic courts of other States, the status of former heads of states was not clear in 1999. See J. Craig Barker, Colin Warbrick and Dominic McGoldrick, *The Future of Former Head of State Immunity after ex parte Pinochet*, 48 INT'L & COMP. L. Q. 937, 938 (1999).

329. *Regina v. Evans*, *supra* note 324. See also Warren Hoge, *The Pinochet Ruling: The Overview; British Court Rules Against Pinochet; New Cabinet Must Weigh Extradition*, N.Y. TIMES (Nov. 26, 1998), <https://www.nytimes.com/1998/11/26/world/pinochet-ruling-overview-british-court-rules-against-pinochet-now-cabinet-must.html>.

330. Høgestøl, *supra* note 323, at 149.

331. *Id.*

332. Inbal Sansani, *The Pinochet Precedent in Africa: Prosecution of Hissène Habré*, 8 HUM. RTS. BRIEF 32 (2001); Reed Brody, *The Prosecution of Hissène Habré — An "African Pinochet,"* 35 NEW ENG. L. REV. 321 (2001).

333. See *Rome Statute of the International Criminal Court* (July 17, 1998), *supra* note 116.

334. Rome Statute, *supra* note 116, art. 11(1).

period covered by his alleged crimes was June 7, 1982 to December 1, 1990, long before the Rome Statute entered into force.

At this time, Reed Brody, a lawyer with Human Rights Watch, decided to begin the process of working with victim groups, primarily but not exclusively, in Chad to prepare a case, which they believe, could be brought against Habré in Senegalese courts by invoking the Pinochet precedent. Working together with several non-governmental organizations, “Brody and the victim groups travelled to Chad and collected vital victim testimony, documentation from Habré’s torture centers and other evidence that could be used in a trial against him.”<sup>335</sup> In early 2000, Brody and the groups brought a case before the Dakar Regional Court, backed up by the evidence and documentation that they had collected in Chad.<sup>336</sup> After all the evidence had been presented, a Senegalese judge indicted Habré on February 3, 2000, with acts of torture and barbarity.<sup>337</sup> This indictment was significant in that it marked the first time a former African head of state had been indicted in another country for violations of human rights in his own country.<sup>338</sup>

Nevertheless, the victory delivered to Habré’s victims by the Dakar Regional Court was short-lived. On July 4, 2000, the Indictments Chamber of the Court of Appeal of Dakar ruled in favor of Habré and cancelled the indictment against him and barred any legal proceedings against him on the ground that “Senegalese law did not provide for jurisdiction over crimes against humanity or acts of torture committed by foreign nationals outside the territory of Senegal.”<sup>339</sup> The ruling was later upheld on appeal by the Supreme Court of Senegal in a decision on March 20, 2001.<sup>340</sup>

---

335. Høgestøl, *supra* note 323, at 149.

336. Brody, *supra* note 332.

337. See, e.g., Mark Tran, *Human Rights Breakthrough as African Ex-Dictator Is Indicted*, THE GUARDIAN (UK) (Feb. 4, 2000), <https://www.theguardian.com/world/2000/feb/04/marktran>.

338. Tran, *supra* note 337.

339. *Habré v. Republic of Senegal*, Judgment (Nov. 18, 2010), <http://www.internationalcrimesdatabase.org/Case/220>.

340. Office of the U.N. Commissioner for Human Rights, *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of December 10, 1984, entry into force June 26, 1987. Senegal ratified the treaty in 1986 and hence, is subject to its provisions. See *Association des Victimes des Crimes et Répressions politiques au Tchad (AVCRP) et al. v. Hissène Habré*, <http://www.internationalcrimesdatabase.org/Case/751> (last visited July 30, 2018). Critics of the ruling argued that, not only was it at odds with the Pinochet precedent, but it was also at odds with Senegal’s obligations under Articles 5–7 of the Convention Against Torture, which mandate that States are

Many observers believed that the decision, by Senegalese courts, to prohibit the prosecution of Habré for the crimes that he was alleged to have committed in Chad, was delivered under political pressure. It was argued that former Senegalese president, Abdoulaye Wade, was not in favor of holding Habré accountable for his crimes. For example, after Senegalese judge Demba Kandji indicted Habré for torture and barbarous acts and crimes against humanity on February 3, 2000, the Superior Council of the Magistracy, presided over by President Abdoulaye Wade, transferred Judge Kandji and effectively removed him from the Habré investigation. President Wade also proceeded to promote the president of the Dakar Appeals Court—the latter was, at the time, considering Habré’s appeal. As already mentioned, later on July 4, 2000, the Dakar Appeals Court ruled in favor of Habré.<sup>341</sup>

After the case against Habré was dismissed, President Wade asked Habré to leave Senegal. Nevertheless, before Habré could leave, Human Rights Watch and Habré’s victims took their case to the U.N. Committee against Torture (“UNCAT”), where they argued that Senegal was in breach of its obligations under the 1984 Convention Against Torture by not prosecuting him.<sup>342</sup> The UCAT responded that Senegal should keep Habré until the problem could be resolved. This represented the beginning of a ten-year stalemate in the case against Habré that was only broken when Macky Sall became president of Senegal in 2012. At this time, the International Court of Justice ordered Senegal to either prosecute Habré “without delay” or extradite him for trial elsewhere.<sup>343</sup>

After the indictment against Habré was withdrawn by the Senegalese courts, twenty-one of Habré’s victims<sup>344</sup> brought a complaint against Habré for genocide, crimes against humanity and torture under Belgium’s universal

---

obliged to either prosecute or extradite any person within their territory who is suspected of having committed acts of torture.

341. See Office of the U.N. Commissioner for Human Rights, *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, U.N.T.S. 1465.

342. *The Trial of Hissène Habré: Time is Running Out for the Victims: Background*, HUMAN RIGHTS WATCH, Jan. 26, 2007, [https://www.hrw.org/legacy/backgrounder/africa/habre0107/2.htm#\\_Toc156364880](https://www.hrw.org/legacy/backgrounder/africa/habre0107/2.htm#_Toc156364880).

343. Marlise Simons, *Senegal Told to Prosecute Ex-President of Chad*, N.Y. TIMES, July 20, 2012, available at <https://www.nytimes.com/2012/07/21/world/africa/senegal-to-prosecute-former-president-of-chad-hissene-habre.html> (last visited July 30, 2018); *World Court: Important Victory for Habré Victims: Senegal Should Bring Chad’s Former Dictator to Justice ‘Without Further Delay,’* HUMAN RIGHTS WATCH, July 20, 2012, <https://www.hrw.org/news/2012/07/20/world-court-important-victory-habre-victims>.

344. These included three Belgian nationals. See Laura Bingham, *Trying for a Just Result? The Hissène Habré Affair and Judicial Independence in Senegal*, 23 TEMPLE INT’L & COMP. L.J. 77 (2009).

jurisdiction statute.<sup>345</sup> On September 19, 2005, the Belgian judge who had been assigned to the Habré case, Judge Daniel Fransen, issued an arrest warrant against Habré.<sup>346</sup> On the same day, the government of Belgium formally requested that Habré be extradited from Senegal so that he could be tried in Belgium.<sup>347</sup>

When Belgium's extradition request reached Senegal, the Dakar Appeals Court Indictment Chamber, on November 25, 2005, refused to hear the matter, claiming that it did not have the jurisdiction to rule on an extradition request involving a former head of state. Under Senegalese law, the matter went directly to President Wade.<sup>348</sup> On November 26, 2005, Senegal's interior minister issued an order, which placed Habré "at the disposition of the President of the African Union."<sup>349</sup> On November 27, 2005, Senegal's foreign minister, Cheikh Tidiane Gadio, issued a communiqué, which stated that:

The State of Senegal, sensitive to the complaints of victims who are seeking justice, will abstain from any act, which could permit Hissène Habré to not face justice. It therefore considers that it is up to the African Union summit to indicate the jurisdiction, which is competent to try this matter.<sup>350</sup>

At the Assembly of the African Union Sixth Ordinary Session in Khartoum in January 2006, the AU established a Committee of Eminent African Jurists ("CEAJ") and charged it with the duty of determining where Habré should be tried for the alleged crimes that he committed while serving as president of Chad. Senegal, of course, remained a possible venue for the trial.<sup>351</sup> The CEAJ issued its report on May 1, 2006.<sup>352</sup> Specifically, the

---

345. *Id.* at 86.

346. *Id.* See also HUMAN RIGHTS WATCH, *supra* note 342.

347. Human Rights Watch, *Belgique: Résolution 136* *urisdi par le Sénat belge*, 15 juin 2006, available at <https://www.hrw.org/legacy/french/docs/2006/06/15/belgiu13586.htm>.

348. Bingham, *supra* note 344, at 86; Høgestøl, *supra* note 323, at 150.

349. *The Trial of Hissène Habré: Time is Running Out for the Victims*, HUMAN RIGHTS WATCH, No. 2, January 2007, <https://www.hrw.org/legacy/background/africa/habre0107/>.

350. *Quoted in* HUMAN RIGHTS WATCH, *supra* note 349, at 7. The foreign minister's communiqué was issued in French and here it is: "L'État du Sénégal, sensible aux plaintes des victimes qui demandent justice, s'abstiendra de tout acte qui pourrait permettre à M. Hissène Habré de ne pas comparaître devant la justice. Il considère, en conséquence, qu'il appartient au sommet de l'Union africaine d'indiquer la juridiction compétente pour juger cette affaire."

351. Assembly of the African Union Sixth Ordinary Session, *Decision on the Hissène Habré Case and the African Union*, Doc. Assembly/AU/8(VI) Add.9, <https://au.int/>

CEAJ was “mandated to consider all aspects and implications of the Hissène Habré Case as well as the options available for his trial, taking into account the following benchmarks:

- (a) Adherence to the principles of total rejection of impunity;
- (b) Adherence to international fair trial standards including the independence of the judiciary and impartiality of proceedings;
- (c) Jurisdiction over the alleged crimes for which Mr. Habré should be tried;
- (d) Efficiency in terms of cost and time trial
- (e) Accessibility to the trial by alleged victims as well as witnesses;
- (f) Priority of an African mechanism.<sup>353</sup>

Stating that the Assembly of the African Union Sixth Ordinary Session had unanimously rejected impunity, the CEAJ went on to argue that Habré could not hide behind “the immunity of a former Head of State to defeat the principle of total rejection of impunity that was adopted by the Assembly.”<sup>354</sup> With respect to jurisdiction over the Habré case, the CEAJ recommended what it referred to as an “African option.”<sup>355</sup> It stated as follows: “The Committee within the framework of an African solution considered, in the first instance, the two (2) African States, Senegal and Chad, which have the necessary link to the Hissène Habré case. Both countries have ratified the Convention Against Torture.”<sup>356</sup> The CEAJ’s report recommended that “Senegal is the country best suited to try Habré as it is bound by International law to perform its obligations.”<sup>357</sup> In addition, the report also imposed an obligation on Chad, arguing that since Chad has the primary responsibility “to try and punish Hissène Habré,” it should provide Senegal with all necessary cooperation.<sup>358</sup>

Subsequently, the African Union Assembly took note of the CEAJ’s recommendations and mandated “the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent

---

sites/default/files/decisions/9554-assembly\_en\_23\_24\_january\_2006\_auc\_sixth\_ordinary\_session\_decisions\_declarations.pdf (last visited July 31, 2018).

352. African Union, *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré*, [https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA\\_Repor0506.pdf](https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf) (last visited Oct. 25, 2018).

353. *Id.* ¶ 1.

354. *Id.* ¶ 13.

355. *Id.* ¶ 27.

356. *Id.* ¶ 16.

357. *Id.* ¶ 29.

358. *Id.* ¶ 30.

Senegalese court with guarantees of fair trial.”<sup>359</sup> Despite the fact that he had been reluctant to bring Habré to trial, President Wade appeared to be more welcoming to the A.U.’s decision, when he proclaimed as follows: “We thought Senegal was the country best placed to try [Habré] and I think we must not flee from our responsibility.”<sup>360</sup>

However, it would take a few months before either the A.U. or Senegal could take any decision on the Habré case. On November 2, 2006, the Senegalese government reported that it had decided to establish a commission within the Ministry of Justice to procure the necessary legislative amendments to allow the trial of Habré to proceed.<sup>361</sup> Then, on January 31, 2007, Senegal’s National Assembly enacted legislation granting the country’s courts, jurisdiction over Habré and his crimes.<sup>362</sup> One year later, a delegation from the European Union, which was headed by ICC Registrar, Bruno Cathala, arrived the Senegalese capital, Dakar, on January 21, 2008, to provide assistance to the trial.<sup>363</sup>

On July 23, 2008, Senegal passed a constitutional amendment permitting the retroactive application of certain crimes in the country’s Code of Criminal Procedure. Specifically, the amendment states as follows:

---

359. *Id.*

360. *Quoted in Senegal Trial for ex-Chad Leader*, BBC NEWS, July 2, 2006, <http://news.bbc.co.uk/2/hi/africa/5139350.stm>.

361. République du Sénégal, Présidence de la République, *Communiqué: Le Sénégal prépare activement le jugement de M. Hissène Habré*, Dakar (Nov. 2, 2006), <https://www.hrw.org/legacy/french/themes/communiquedHabre110206.pdf> (last visited Oct. 25, 2018).

362. Press Release, Human Rights Watch, *Senegal: New Law Will Permit Habré’s Trial*, (Feb. 2, 2007), <https://www.hrw.org/news/2007/02/02/senegal-new-law-will-permit-habres-trial>. The target was Article 669 of the Code of Criminal Procedure, which provides the grounds for Senegal’s domestic courts to have and exercise jurisdiction over crimes committed in other States (i.e., on foreign soil) by non-nationals of Senegal. The issue of retroactivity was raised, but several human rights groups, including Human Rights Watch, argued that the changes to Senegal’s Code of Criminal Procedure do not raise the issue of retroactivity since Senegal had already criminalized torture and other forms of cruel and inhumane treatment when it ratified the U.N. Convention Against Torture. *See, e.g.*, Time is Running Out, *supra* note 342.

363. *See, e.g.*, Press Release, Human Rights Watch, *EU to Aid Senegal in Preparing Hissène Habré’s Trial* (Jan. 19, 2008), <https://www.hrw.org/news/2008/01/19/eu-aid-senegal-preparing-hissene-habres-trial>; Press Release, Human Rights Watch, *Senegal: EU Parliament Calls for Support of Hissène Habré Trial: Senegal Should Present Reasonable Plan to Prosecute Chad’s Ex-Dictator*, <https://www.hrw.org/news/2007/04/26/senegal-eu-parliament-calls-support-hissene-habre-trial> (last visited July 31, 2018).

No one may be condemned if it is not by virtue of law [which] entered into force before the committed act.

However, the provisions of the preceding paragraph may not be opposed to the prosecution, to the judgment and to the condemnation of any individual for reason of acts or omissions which, at the moment when they were committed, were held [to be] criminal in terms of [après] rules of international law relating to acts of genocide, of crimes against humanity and of crimes of war.<sup>364</sup>

Thus, in order to try Habré, Senegal amended its Code of Criminal Procedure in order to introduce provisions on genocide, war crimes and crimes against humanity, as well as to introduce universal jurisdiction for “international crimes in certain circumstances.”<sup>365</sup> Habré challenged the amendments before the Court of Justice of the Economic Community of West African States (“ECOWAS Court”).<sup>366</sup> The ECOWAS Court held that Senegal could not try Habré without violating the *nullum crimen sine lege principle*.<sup>367</sup> The ECOWAS Court then ruled further that Habré should only be tried by a tribunal with an international character.<sup>368</sup> In January 2011, the

---

364. Constitution de la République du Sénégal art. 9, Jan. 22, 2001. The original French version of the amendment states: “Toute atteinte aux libertés et toute entrave volontaire à l’exercice d’une liberté sont punies par la loi. Nul ne peut être condamné si ce n’est en vertu d’une loi entrée en vigueur avant l’acte commis. Toutefois, les dispositions de l’alinéa précédent ne s’opposent pas à la poursuite, au jugement et à la condamnation de tout individu en raison d’actes ou omissions qui, au moment où ils ont été commis, étaient tenus pour criminels d’après les règles du droit international relatives aux faits de génocide, de crimes contre l’humanité et de crimes de guerre. La défense est un droit absolu dans tous les états et à tous les degrés de la procédure.”

365. Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts*, J. INT’L CRIM. JUSTICE 1139 (2013). See also Mandiaye Niang, *The Senegalese Legal Framework for the Prosecution of International Crimes*, 7 J. INT’L CRIM. JUSTICE 1047 (2009).

366. The court is actually called Community Court of Justice of the Economic Community of West African States (*Cour de Justice de la Communauté Économique des États de l’Afrique de l’Ouest*). The case is Hissène Habré v. Republic of Senegal, ECW/CCJ/APP/07/08 (Nigeria, Nov. 18, 2010).

367. For more on *nullum crimen sine lege principle*, see, e.g., MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES 117 (2002). The principle states that a person cannot and should not be criminally liable except for an act that was criminalized by law before that person performed the act.

368. Williams, *supra* note 365, at 1142–43; See also Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*, HUMAN

African Union responded to the ruling issued by the ECOWAS Court and proposed a plan to establish such a special chambers within the legal system of the Republic of Senegal to prosecute Habré.<sup>369</sup> The African Union would reserve the right to choose some of the judges who would undertake the trial.<sup>370</sup> Senegal, however, rejected the A.U.'s plan<sup>371</sup> and, in May 2011, the country withdrew from the negotiations to create the special tribunal.<sup>372</sup> In July 2011, the foreign minister of Senegal announced that Habré would not be tried in Senegal.<sup>373</sup> Subsequently, the government of Chad then announced that it would support the extradition of Habré to Belgium to face trial there for his alleged criminal activities while he was president in Chad.<sup>374</sup>

On July 20, 2012, the International Court of Justice ("ICJ"),<sup>375</sup> in response to a case filed by Belgium,<sup>376</sup> ruled that Senegal had failed to meet its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The ICJ then asked Senegal to proceed with the prosecution of Habré without further efforts to

---

RIGHTS WATCH, May 3, 2016, <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>.

369. *Senegal: Accept AU Plan for Hissène Habré Case: African Union Proposed Special Court for Long-Awaited Trial of Chad's Ex-Dictator*, HUMAN RIGHTS WATCH, Mar. 22, 2011, <https://www.hrw.org/news/2011/03/22/senegal-accept-au-plan-hissene-habre-case>.

370. *Id.*

371. *Le président Wade refuse qu'Hissène Habré soit jugé au Sénégal et se dit «dessaisi» du dossier*, RFI AFRIQUE (Aug. 8, 2011), <http://www.rfi.fr/afrique/20110208-affaire-habre-wade-dessaisi-proces-refuse-il-soit-juge-senegal> (the headline says that President Wade has refused to have Habré tried in Senegal and has divested himself of the case).

372. *Senegal: Habré Trial an 'Illusion': After Senegalese Walkout, Victims Seek Ex-Dictator's Extradition to Belgium*, HUMAN RIGHTS WATCH (June 9, 2011), <https://www.hrw.org/news/2011/06/09/senegal-habre-trial-illusion> (last visited Aug. 1, 2018).

373. *Dakar suspend l'expulsion de l'ex-président tchadien Hissène Habré*, RFI AFRIQUE, 11 août 2011, <http://www.rfi.fr/afrique/20110710-dakar-suspend-expulsion-ex-president-tchad-ien-hissene-habre> (the headline says "Dakar suspends expulsion of former Chadian president Hissène Habré").

374. *Senegal: Chad asks for the Extradition of Hissène Habré to Belgium*, HUMAN RIGHTS WATCH, July 22, 2011, <https://www.hrw.org/news/2011/07/22/senegal-chad-asks-extradit-ion-hissene-habre-belgium>.

375. The International Court of Justice is the highest judicial organ of the United Nations. See MOHAMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 42–45 (2003) (stating, *inter alia*, that the International Court of Justice is "the principal judicial organ of the U.N.).

376. *Belgium v. Senegal*, 2012 ICJ 422 (July 20, 2012), [http://www.worldcourts.com/icj/eng/decisions/2012.07.20\\_Belgium\\_v\\_Senegal.pdf](http://www.worldcourts.com/icj/eng/decisions/2012.07.20_Belgium_v_Senegal.pdf).

delay the process.<sup>377</sup> Macky Sall, who became president of the Republic of Senegal on April 2, 2012, unlike his predecessor, Abdoulaye Wade, acted positively and quickly to the ICJ decision and expressed regret that Senegal had not brought Habré to trial sooner.<sup>378</sup> Senegal's Justice Minister, Aminata Touré, expressed the views of the new government when she reminded the international community that President Sall, who was elected in March 2012 and took office in April 2012, had stated publicly that his government would proceed with the trial of Habré. She went on to state that Habré would be tried under the law of Senegal and by a panel of Senegalese and African judges under an agreement between Senegal and the African Union.<sup>379</sup>

Under the new government, led by President Sall, negotiations with the African Union resumed and eventually led to an agreement to create the Extraordinary African Chambers.<sup>380</sup> On December 17, 2012, Senegal's National Assembly enacted legislation establishing the Extraordinary African Chambers.<sup>381</sup> The inauguration of the special court on February 8, 2013 brought to a conclusion more than two decades of efforts by Habré's victims, with the assistance of various civil society organizations, including Human Rights Watch, to bring Habré to justice for the crimes that he was alleged to have committed during his tenure as president of Chad.<sup>382</sup>

On July 2, 2013, the Extraordinary African Chambers ("EAC") indicted Habré for (1) crimes against humanity; (2) torture; and (3) war crimes. The EAC's four investigating judges then undertook a 19-month investigation, which found sufficient evidence to charge Habré specifically with (1) the practice of murder, summary executions, and kidnapping followed by enforced disappearance and torture, amounting to crimes against humanity; (2) torture; and (3) the war crimes of murder, torture, unlawful transfer and unlawful confinement, and violence to life and physical well-being.<sup>383</sup>

---

377. *Id.*

378. Simons, *supra* note 343.

379. *Id.*

380. *Senegal: New Court to Try Chad Ex-Dictator in Senegal*, HUMAN RIGHTS WATCH, Aug. 22, 2012, <https://www.hrw.org/news/2012/08/22/senegal-new-court-try-chad-ex-dictator-senegal>.

381. *Senegal: Proceedings Against Hissène Habré Draw Near: National Assembly Passes Laws for 'Extraordinary African Chambers'*, HUMAN RIGHTS WATCH, Dec. 19, 2012, <https://www.hrw.org/news/2012/12/19/senegal-proceedings-against-hissene-habre-draw-near>.

382. *Senegal: Hissène Habré Court Opens: Extraordinary African Chambers to Try Former Chadian Dictator*, HUMAN RIGHTS WATCH, Feb. 8, 2013, <https://www.hrw.org/news/2013/02/08/senegal-hissene-habre-court-opens>.

383. HUMAN RIGHTS WATCH, *supra* note 368.

The long-awaited trial of Habré started on July 20, 2015. Subsequently, the EAC sat for 56 days and heard evidence from 93 witnesses, two-thirds of whom were survivors of Habré's criminal activities and who had fought hard to bring him to justice. These victims had an opportunity, not only to face their oppressor, but also to tell the world about the atrocities committed against them.<sup>384</sup> On May 30, 2016, the EAC announced judgment before a packed audience. The EAC found Habré guilty of "the commission of crimes against humanity, for the underlying crimes of rape, sexual slavery, the massive and systematic practice of summary executions, and kidnapping of persons followed by their enforced disappearance and of torture."<sup>385</sup> The court also found Habré guilty of "war crimes, including murder, torture and inhuman treatment, under the principle of command responsibility"<sup>386</sup> and sentenced him to life imprisonment.

Two months after the EAC rendered its ruling and after thoroughly reviewing written submissions from various parties, the Chambers' judges ordered that each of the survivors of rape and sexual slavery be paid € 30,490; those of torture and arbitrary detention and each mistreated prisoner, € 22,865; and each heir of a deceased victim, € 15,243.<sup>387</sup> So far, however, the EAC has only allocated € 600,000's worth of assets belonging to Habré.<sup>388</sup>

Lawyers appointed to represent Habré appealed his conviction, "alleging that one of the judges of the trial court should not have been appointed because of his background as a prosecutor and that the trial court made mistakes in its factual findings."<sup>389</sup> Habré's victims cross-appealed "portions of the compensation order."<sup>390</sup> The EAC, in keeping with its statutes,<sup>391</sup> named an appeals chamber—the latter was headed by Justice Ougadeye Wafi of the Supreme Court of Mali, who was assisted by two

---

384. Reed Brody, *Victims Bring a Dictator to Justice: The Case of Hissène Habré*, BREAD OF THE WORLD (2d updated ed., June 2017), [https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2\\_Downloads/Fachinformationen/Analyse/Analysis70-The\\_Habre\\_Case.pdf](https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis70-The_Habre_Case.pdf).

385. *Id.* at 18.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. *Statute of the Extraordinary African Chambers Within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990*, <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>.

Senegalese judges. The appeals chamber heard oral arguments from the lawyers representing both sides in January 2017.<sup>392</sup>

The appeals chamber delivered its decision on April 27, 2017. It rejected all, but one of the arguments advanced by Habré's lawyers. It reversed Habré's conviction for the rape of Khadidja Hassan Zidane, arguing that the charge had not been included in the indictment that framed the trial.<sup>393</sup> Nevertheless, the appeals chamber explained that while it did not doubt or question Zidane's credibility or truthfulness, it could not allow to stand, a charge that had been added after the trial had started. Finally, the appeals chamber held that dropping the charge of rape against Habré did not change the justification for the life sentence handed out to him by the trial chamber.<sup>394</sup>

With respect to the compensation order, the appeals chamber "cured the deficiencies in the compensation aspects of the trial court's verdict by fixing the total amount of Habré's liability at 82 billion CFA francs (approximately 123 million euros) and listing the 7,396 victims eligible for reparations and the amount to which each was entitled."<sup>395</sup> Most importantly, the appeals chamber provided victims with hope that Habré's assets would actually be recovered and used to provide reparations for his victims.<sup>396</sup>

## ii. Lessons from the Habré Case

Reed Brody, who worked tirelessly with Human Rights Watch and Habré's victims in order to bring the former Chadian dictator to trial, has stated that the most important benefit from the trial is that "justice is achievable."<sup>397</sup> Throughout the continent, from South Sudan, Central African Republic, Democratic Republic of Congo, and Somalia, to Cameroon, victims of human rights violations and other atrocities committed by state- and non-state actors, often do not have a voice, either because they are dead or live within States in which all avenues for protest, even peacefully, have been taken away by the government. For example, in Cameroon, the government is using laws against terrorism to suppress all forms of

---

392. Brody, *supra* note 384, at 18.

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. Reed Brody: "The Greatest Lesson from Habré's Trial is that Justice is Achievable," TRIAL INTERNATIONAL (Feb. 2, 2017), <https://trialinternational.org/latest-post/reed-brody-the-greatest-lesson-from-habres-trial-is-that-justice-is-achievable/>.

dissent<sup>398</sup>—in fact, Anglophones who have attempted to peacefully protest their marginalization and exploitation by the Francophone-dominated central government have been labelled by the government as terrorists and visited with brutal treatment from the security forces. In Cameroon, impunity remains a major concern as state- and non-state actors who commit international crimes are not being brought to justice by the government.<sup>399</sup>

Nevertheless, the successful conviction and sentencing of Habré gives hope to victims of impunity in other African countries that it is possible that they too can be granted the opportunity to testify against those who had tortured, demeaned, and committed atrocities against them and in doing so, achieve a certain measure of justice. In this section, we briefly examine other lessons that Africa and Africans can learn from the Habré trial.

The Habré trial revealed an important truth about international justice, which is that although many victims of international crimes in Africa remain voiceless, they are actually the cornerstone of the delivery of international justice and the fight against impunity. In the Habré case, victims took the lead and worked relentlessly to force the international community, including the African Union, to recognize the need to force Habré to account for his crimes. Hence, the Habré trial shows victims of international crimes, particularly those in Africa, that they too, can receive justice.

When Habré's trial began on July 20, 2015, it was the first universal jurisdiction case to take place in Africa. It was also the first time that the

---

398. *Cameroon using 'anti-terror' law to silence media: CPJ*, ALJAZEERA, Sept. 20, 2017, <https://www.aljazeera.com/news/2017/09/cameroon-anti-terror-law-silence-media-cpj-170920112612527.html>; see MANISULI SSENIONJO, ECON., SOC. & CULTURAL RTS. IN INT'L L. 368 (2016) (arguing, *inter alia*, "that individuals and groups suffering the most from human rights violations—the poor in general and poor women in particular—often lack the political voice needed to claim or assert their human rights." *Journalists Not Terrorists: In Cameroon, anti-terror legislation is used to silence critics and suppress dissent*, COMMITTEE TO PROTECT JOURNALISTS (Sept. 20, 2017), <https://cpj.org/reports/2017/09/journalists-not-terrorists-cameroon-ahmed-abba-anti-terror-imprisoned.php>.

399 Since Anglophone teachers and lawyers went on strike in late 2016 to protest efforts by the central government to impose French language and French legal institutions (notably the French Civil law system) on the Anglophone Regions, which since reunification in 1961, have retained the English language and the Common law of England and Wales, the country's security forces have burned down several Anglophone villages and killed a lot of people. Yet, no one has been held accountable for these atrocities. See, e.g., Moki Edwin Kindzeka, *Villages Burn as Cameroon Troops Clash with Separatists*, VOA NEWS (Apr. 19, 2018), <https://www.voanews.com/a/villages-burn-cameroon-troops-/4356309.html>; Ruth Maclean, *Cameroon's Military Accused of Burning Alive Unarmed Civilians: Charity Says 20 Villages Set Ablaze in English-Speaking Areas in Escalating Conflict*, THE GUARDIAN (UK) (July 20, 2018), <https://www.theguardian.com/world/2018/jul/20/cameroon-military-accused-of-burning-alive-unarmed-civilians-villages-english-speaking>.

courts of one State had prosecuted the former head of State of another for international crimes. This is an important precedent for the fight against impunity in Africa—dictators and others who violate human rights and/or commit other atrocities have, by the Habré trial, been put on notice that they would no longer be able to hide behind immunities granted to them by their countries' dysfunctional institutions.<sup>400</sup>

Already, victims of the atrocities of former Gambian president, Yahya Jammeh, have indicated a desire to follow in the footsteps of Habré's victims and organize to bring their torturer to justice. Habré's trial has given victims of international crimes in Africa the hope that with courage and tenacity, they too can bring their torturers and oppressors to justice.

Most lawyers and victims' advocates are quite aware of the "emancipating" and "cathartic" benefits that victims can get from participating fully in the prosecution of their oppressors—that is, those who have committed atrocities against them. For example, granting victims the opportunity to testify in open court against their oppressors can allow them to "engage in a form of cathartic denunciation of the political leaders who had imprisoned, exploited, and marginalized them."<sup>401</sup> Unfortunately, such participation is rarely available to Africa's victims of international crimes. Thus, the fact that Habré's victims were actually able to participate fully in his trial in Senegal augurs well for the fight against impunity in Africa. Perhaps, more important is the fact that such participation has returned victims to the center of international justice.

---

400. Consider, for example, the fact that the constitutions of some African countries actually grant some high-ranking government officials immunity from prosecution for any crimes that they commit while in office. Such immunity can contribute significantly to impunity in these countries. The Constitution of the Republic of Cameroon, for example, grants the President of the Republic of Cameroon, immunity from prosecution for all crimes committed during his tenure in office. Consider Article 53(3): "Acts committed by the President of the Republic . . . shall be covered by immunity and he shall not be accountable for them after the exercise of his functions." Here is the French version of Article 53(3): "Les acts accomplis par le président de la République . . . sont couverts par l'immunité et ne sauraient engager sa responsabilité à l'issue de son mandat." See Présidence de la République (du Cameroun), *Loi no 2008/001 du 14 avril 2008 modifiant et complétant certaines dispositions de la loi 96/06 du 18 janvier 1996 portant révision de la constitution du 02 juin 1972*, [http://www.minsep.cm/uploads/media/CONSTITUTION\\_du\\_Cameroun-1996\\_et\\_2008.pdf](http://www.minsep.cm/uploads/media/CONSTITUTION_du_Cameroun-1996_et_2008.pdf).

401. As argued by Reed Brody, the team that helped the victims of Habré seek justice went to the Gambia in 2017 and described "their long campaign" to seek justice to Yahya Jammeh's victims. Accordingly, "[t]he meeting inspired the Gambians who saw in the Chadians' struggle proof that justice can be achieved, despite the obvious obstacles." See REED BRODY, VICTIMS BRING A DICTATOR TO JUSTICE: THE CASE OF HISSÈNE HABRÉ 20 (Brot für die Welt/Bread for the World, 2017), [https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2\\_Downloads/Fachinformationen/Analyse/Analysis70-The\\_Habre\\_Case.pdf](https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis70-The_Habre_Case.pdf) (last visited Oct. 18, 2018).

---

---

The pleas of Habré's victims were especially important in convincing policymakers at both the national and international levels to take action to make the prosecution of Habré possible. The tenacity and courage of Habré's victims created the enabling political environment within which various actors could be brought together to make possible the prosecution of Habré.<sup>402</sup>

The trial of Habré required working across international borders and that necessitated the building of a transnational advocacy coalition that included individuals and institutions from Chad, Senegal and other countries. The success of this transnational coalition, which was ably assisted and advised by several international non-governmental organizations, notably, Human Rights Watch, provides a learning opportunity for other African victims of international crimes. How this coalition was organized, the challenges that it faced, which included language problems, considering the fact that many of the Chadian victims were illiterate in French—the official languages of Senegal and Chad—provides an important template for other victims throughout the continent.

Reed Brody, the international human rights lawyer, who was instrumental in bringing Habré to trial, has argued that “[a] major challenge in any universal jurisdiction case is creating the necessary political will in the forum state.”<sup>403</sup> Unfortunately, getting politicians in the forum state to muster the courage to help the international community fight impunity in other countries is often quite difficult. For example, in November 1999, Ethiopia's former military dictator, Mengistu Haile Mariam, who was living in exile in Zimbabwe but was wanted in Ethiopia on charges of genocide and crimes against humanity, was visiting South Africa for medical treatment. Local and international groups called on South African authorities to arrest him and subsequently extradite him to Ethiopia to stand trial for crimes committed

---

402. One cannot underestimate the importance of victim participation in the prosecution of Habré. Consider, for example, the “[t]he visible leadership of the victims made it impossible for Habré to paint himself as a political victim or to tar his prosecution as imperialistic.” See Brody, *supra* note 384, at 20. In fact, after the Extraordinary African Chambers arrested Habré in 2013, his wife wrote a letter to Senegal's President Sall to complain that “his arrest had disrupted their family life and that her children now had to pass Ramadan without their father.” *Id.* Shortly afterward, one of Habré's victims responded to the pleas of Habré's wife—“Khaltouma Daba, a Chadian widow and vice-president of the victims' association, responded that *her* family life had been shattered when *her* husband was taken away by Habré's political police, that *her* children had now passed 26 Ramadans without their father.” *Id.*

403. Brody, *supra* note 384, at 23.

during a dictatorship that lasted from 1977 to 1991.<sup>404</sup> Despite South Africa's strong record on human rights, the government of Thabo Mbeki failed to arrest Mengistu and instead allowed him to return to his home in Zimbabwe.<sup>405</sup> In mid-June 2015, when Sudanese president Omar al-Bashir was visiting Johannesburg to attend the African Union summit, the government failed to arrest al-Bashir, who was wanted by the International Criminal Court ("ICC") for genocide, war crimes and crimes against humanity.<sup>406</sup> Since then, al-Bashir has traveled to other African countries without fear of being arrested. For example, al-Bashir has been to Uganda and Djibouti and neither country has made any efforts to arrest him.<sup>407</sup> It appears many African governments have yet to develop the political will to assist in the arrest and prosecution of high-ranking government officials engaged in serious human rights abuses.

In 2001, when political interference led to the dismissal of the case against Habré, the transnational advocacy coalition that was fighting to bring the ex-Chadian dictator to justice realized that it would not be able to succeed unless it convinced political leaders in Senegal and Chad that it was not in their best interest to continue to stand against the prosecution of Habré. This is an important lesson for other victims in Africa—garnering necessary political will, especially in the forum State, is critical to successfully bring those who commit serious human rights violations to justice.

Another lesson that the Habré trial provides for Africans who are interested in combatting impunity is that, even if there is not full support domestically for bringing the perpetrators of serious international crimes to justice, victims can mobilize international pressure and use it to force domestic policymakers to cultivate the political will to act to combat impunity. Victim advocacy organizations, for example, can seek the assistance of various international human rights committees, which can use their moral and political (and perhaps, legal) authority to force national governments to meet their obligations under international law. For example, during the struggle to bring Habré to justice, victims worked closely with the

---

404. For more on Mengistu Haile Mariam, see ANDARGACHEW TIRUNEH, *THE ETHIOPIAN REVOLUTION 1974–1987: A TRANSFORMATION FROM AN ARISTOCRATIC TO A TOTALITARIAN AUTOCRACY* (1993).

405. Brody, *supra* note 384, at 23.

406. Shiraz Mohamed, *South Africa Flouted Law by Failing to Arrest Sudanese President al-Bashir: ICC*, THE GLOBE AND MAIL (SOUTH AFRICA), July 6, 2017, <https://www.theglobeandmail.com/news/world/south-africa-flouted-law-in-failing-to-arrest-sudanese-president-bashir-icc/article35574102>.

407. *ICC Refers Uganda and Djibouti to U.N. for not Arresting al-Bashir*, DW NEWS (July 12, 2016), <https://www.dw.com/en/icc-refers-uganda-and-djibouti-to-un-for-not-arresting-al-bashir/a-19396326>.

U.N. Committee against Torture (CAT) to make certain that the case was not derailed. Of great importance is the fact that it was CAT's preliminary ruling in April 2001 that "Habr  should stay in Senegal pending an extradition request" that "preserved the status quo all the way through to the 2012 ICJ ruling."<sup>408</sup> It was the ICJ who demanded that Senegal prosecute Habr  without further delay.<sup>409</sup>

Political will in Belgium played a very important part in making possible the trial of Habr . As argued by Brody,<sup>410</sup> "[a]fter the victims' initial lobbying saved the pre-trial investigation from the repeal of the universal jurisdiction law, the Coalition<sup>411</sup> reached out to lawyers, professors and especially parliamentarians across Belgium's notorious linguistic and political divides."<sup>412</sup> In addition, victims from Chad visited Belgium and interacted with policymakers and ordinary citizens, and others authored op-eds that educated people on the merits of the case.<sup>413</sup>

The African Union ("A.U.") emerged as a key player in the effort to bring Habr  to justice. Despite the fact that, at the time the AU was "[e]ngaged in a tug of war with the International Criminal Court,"<sup>414</sup> individuals at the A.U. Secretariat, including especially the organization's Legal Counsel—Ben Kioko—were "able to see the benefit of being able to prosecute African crimes in Africa."<sup>415</sup> The A.U.'s decision to create the Committee of Eminent African Jurists ("CEAJ") was significant—the CEAJ became a major player in mobilizing policymakers to support the prosecution of Habr . In fact, in 2007, with lobbying from members of the Coalition, the A.U. appointed Robert Dossou, who was head of the CEAJ, as the A.U.'s Special Representative to the trial. In that capacity, Mr. Dossou made several visits to Senegal and Chad that were critical in keeping "the process on track."<sup>416</sup>

Belgium was not the only non-African State to play a key role in the prosecution of Habr . The United States, under the presidency of Barack Obama, became quite instrumental in making the trial a reality. In addition to

---

408. Brody, *supra* note 384, at 23, 25.

409. *Belg. v. Sen.*, *supra* note 376.

410. Brody, *supra* note 384, at 25.

411. That is, the transnational advocacy coalition, which included victims of Habr 's atrocities in Chad, civil society organizations, NGOs, and other volunteers, that worked tirelessly to bring Habr  to justice. See Brody, *supra* note 384, at 25–26.

412. *Id.*

413. *Id.* at 25.

414. *Id.* at 26.

415. *Id.*

416. *Id.*

the fact that, while on a State visit to Senegal, President Obama congratulated Senegalese President Macky Sall on his leadership, Obama's government also supported the prosecution of Habré in other ways.<sup>417</sup> After several members of the Coalition, who included Reed Brody, had visited the U.S. Congress, the latter, in December 2011, requested then Secretary of State, Hillary Rodham Clinton, to report on "steps taken by the Government of Senegal to assist in bringing Habré to justice."<sup>418</sup> Stephen J. Rapp, who at the time was U.S. ambassador-at-large for war crimes issues, visited Senegal and Chad on several occasions to make sure that the prosecution of Habré was on track.<sup>419</sup>

The participation of many Africa-based civil society organizations was critical—this was necessary, not only because these groups possessed information about Habré's crimes that could not be secured from other sources, but also because their participation ensured that no one would argue that the trial was an attempt by Western countries to impose their will and values on Africans. Given the fact that the ICC has been accused of being a tool of Western imperialism for its efforts to prosecute al-Bashir (Sudan) and Uhuru Kenyatta (Kenya) and William Ruto (Kenya), it was important that the effort to bring Habré to justice not be viewed in the same light. Hence, the participation of several African NGOs in the Habré trial was quite important.

The Coalition also sought and secured the support of France,<sup>420</sup> the European Union,<sup>421</sup> the European Parliament,<sup>422</sup> Special Rapporteur on

---

417. It was President Sall, who, unlike his predecessor (President Wade), gave full support to the prosecution of Habré for the atrocities that he was alleged to have committed in Chad. *See* Brody, *supra* note 384, at 26.

418. Brody, *supra* note 384, at 26.

419. *Id.*

420. Although France had originally been reluctant to support the prosecution, the country changed its policy after its Human Rights Minister, Rama Yade, a woman of Senegalese origin, spoke to Reed Brody and another member of the Coalition. She was able to convince President Nicolas Sarkozy to announce support of the case by the government of France. *See Id.* at 27.

421. The European Union negotiated the trial's final budget with the government of Senegal and continued to put pressure on Senegal to follow through with the trial. *See* Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal: Questions and Answers (Revised Sept. 25, 2003)*, ¶ 22, <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal> (last visited Oct. 27, 2018).

422. The European Parliament passed two resolutions on the Habré case. Motion for a Resolution, EUR PARL. DOC. B6-0176 (2006), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B6-2006-0176+0+DOC+PDF+V0//EN> (last visited Aug. 2, 2018); *Senegal: EU Parliament Calls for Support of Hissène Habré*

Torture,<sup>423</sup> and the U.N. High Commissioner on Human Rights.<sup>424</sup> All these actors were quite instrumental in helping the victims of Habré's atrocities bring him to justice. Of course, the most important lesson that can be learned from Habré's trial, besides putting victims in the center of such proceedings, is that persistence and tenacity on the part of victims and their supporters is critical for success. This is evidenced by the type and nature of the persistence and tenacity exhibited by the victims of Habré.

## V. INTERNATIONAL LAW AND IMPUNITY IN AFRICA

### A. Introduction

During the last several years, there have been many developments in international law that have significantly improved the ability of the international community to deal with impunity. Shortly after World War II, the world was confronted with what to do to prevent a repeat of the atrocities that occurred prior to and during the war, particularly, the extermination of millions of the Jewish citizens of Europe. The international community made concerted efforts to create laws and institutions that would put an end to such serious crimes. In addition to other actions, the international community created the United Nations<sup>425</sup> and adopted several conventions and treaties directed at fighting international crimes and maintaining international peace and security.

---

*Trial*, Apr. 26, 2007, <https://www.hrw.org/news/2007/04/26/senegal-eu-parliament-calls-support-hissene-habre-trial>.

423. The Special Rapporteur for Torture criticized the decision by Senegal to dismiss the case against Habré and kept pressure on the country to proceed with the trial. See International Justice Resource Center, *Extraordinary African Chambers: Hybrid Court to Try Former Chad Dictator Hissène Habré*, Feb. 13, 2013, <https://ijrcenter.org/2013/02/13/extraordinary-african-chambers-hybrid-court-to-try-former-chad-dictator-hissene-habre/>.

424. The U.N. High Commissioner for Human Rights intervened several times to make sure that the trial was not derailed or stopped. See BRODY, *supra* note 384, at 27.

425. The United Nations was established as an intergovernmental organization on October 24, 1945, and empowered to promote international cooperation and peace and security. The U.N. has several organs (e.g., the Security Council) that deal with various aspects of international peace and security. For more on the United Nations and its various agencies and organs, see U.N. DEPARTMENT OF PUBLIC INFORMATION, *BASIC FACTS ABOUT THE UNITED NATIONS* (2000); STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS—A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD* (2003). For more on the U.N. Security Council, see *STRENGTHENING THE RULE OF LAW THROUGH THE U.N. SECURITY COUNCIL* (Jeremy Farall & Hilary Charlesworth eds., 2016).

Of special note are the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), which was adopted by the U.N. General Assembly on December 9, 1948, and entered into force on January 12, 1951.<sup>426</sup> Article I of the Genocide Convention speaks directly to threats to international peace and security: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.”<sup>427</sup> Article III provides a list of international crimes that shall be punished under the Convention: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; and (e) complicity in genocide.<sup>428</sup>

The Genocide Convention<sup>429</sup> directed all Contracting Parties to “undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.”<sup>430</sup> Then, there are the Geneva Conventions, which comprise four treaties and three protocols—these provide or establish the foundation for international humanitarian law in the aftermath of World War II. The four conventions were designed to regulate armed conflict and provide protection for people who are no longer taking part in hostilities—the sick and wounded members of armed forces fighting on land, as well as those fighting at sea (including those who are shipwrecked), prisoners of war, and civilians.<sup>431</sup> Specifically,

---

426. Office of the U.N. High Commissioner for Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 277, <https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx>.

427. *Id.* art. I.

428. *Id.* art. III.

429. The word “convention,” as used here means “treaty” or “international agreement.” States that “[a] treaty thus embraces all instruments formed between two or more international judicial persons; conventions, agreements, protocols, and exchanges of letters or notes may all constitute treaties.” Bryan H. Druzin, *Opening the Machinery of Private Order: Public International Law as a Form of Private Ordering*, 58 ST. LOUIS U. L.J. 423, 452–53 (2014).

430. Genocide Convention, *supra* note 426, art. V.

431. The four Geneva Conventions are (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War. These four treaties significantly extended and expanded the scope of international humanitarian law. Note that Article 3 common to the four Geneva Conventions extends the principles of the Geneva Conventions to non-international armed conflicts and eliminated certain problems of national sovereignty regarding the ability of the international

the first Geneva Convention protects wounded and sick soldiers on land during war or hostilities.<sup>432</sup> The second Geneva Convention protects wounded, sick and shipwrecked military personnel at sea during war.<sup>433</sup> The third Geneva Convention applies to the treatment of prisoners of war and replaced the Prisoners of War Convention of 1929.<sup>434</sup> The fourth Geneva Convention protects civilians, including those in occupied territory.<sup>435</sup>

Article 3, common to the four Geneva Conventions covered, for the first time, situations that involved non-international armed conflicts. These include “traditional civil wars, internal armed conflicts that spill over into other States or internal conflicts in which third States or a multinational force intervenes alongside the government.”<sup>436</sup> Article 3, common to the four Geneva Conventions “establishes fundamental rules from which no derogation is permitted.”<sup>437</sup> The four Geneva Conventions have been ratified by all States and are universally applicable.<sup>438</sup>

Nevertheless, in the absence of credible enforcement mechanisms, “violations of international humanitarian law [have] continued with glaring

---

community to confront impunity. See *The Geneva Conventions of 1949 and Their Additional Protocols*, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols> (last visited Aug. 3, 2018). According to the ICRC, “[t]he Geneva Conventions and their Additional Protocols are international treaties that contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war). See, *id.*

432. See ICRC, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12, 1949, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument>.

433. See ICRC, *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva, Aug. 12, 1949, 75 U.N.T.S. 85, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/370?OpenDocument>.

434. See ICRC, *Convention (III) Relative to the Treatment of Prisoners of War*, Geneva, Aug. 12, 1949, 75 U.N.T.S. 135, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument>.

435. See ICRC, *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, Aug. 12, 1949, 75 UNTS 287, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380?OpenDocument>.

436. ICRC, *supra* note 432.

437. *Id.*

438. *Id.* For a list of States Parties to the Four Geneva Conventions, see ICRC, *Treaties, States Parties and Commentaries*, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=365](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=365) (last visited Aug. 3, 2018).

impunity.”<sup>439</sup> Faced with this conundrum, the international community decided to create an international legal mechanism to more effectively confront the problem of impunity. This international legal tool for fighting impunity by prosecuting those committing international crimes came in the form of the permanent international criminal court. Such a court was created by the multilateral treaty called the Rome Statute of the International Criminal Court. The ICC has already been fully examined, especially as it applies to impunity in Africa. In the following sections, we provide an overview of other ways in which international law can help the fight against impunity in Africa.

*B. International Law and Impunity in Africa: The Problem of Immunity for Diplomats and State Officials in Missions in Other States*

Since the end of World War II, there have been significant developments in “substantive norms of international human rights and international criminal law.”<sup>440</sup> Unfortunately, these developments have not been accompanied or matched by the provision of mechanisms or procedures for enforcing these norms. Historically, “the primary methods of judicial enforcement envisaged by international law are the domestic courts of the state where the human rights violation or international crime occurred and the courts of the state responsible for that violation.”<sup>441</sup> International law, thus, imposes obligations on States to fully bring to justice those individuals who commit international crimes within their territories. Where a state has violated a substantive human right, international human rights law provides “a right to a remedy or to reparation”<sup>442</sup>—the latter are to be paid by the State that has committed the human right violation. Unfortunately, these approaches to the enforcement of human rights violations and international criminal law have usually failed to accomplish the task of minimizing impunity and enhancing international peace and security. First, States may not incorporate provisions of international human rights laws in their national constitutions or legislation. That is, States may not make the rights contained in the various international human rights instruments justiciable in national

---

439. Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, U.N. CHRONICLE, vol. 49, No. 4 (2012), <https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>.

440. Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUROPEAN J. INT’L L. 815 (2010).

441. *Id.* at 816.

442. *Id.*

courts. Second, in many situations,<sup>443</sup> the perpetrators of the atrocities are actually state actors and the crimes may be committed as part of official government policy.<sup>444</sup> Of course, in these countries, governments do not prosecute their own officials.<sup>445</sup>

Over the years, what has evolved, especially in Africa, is a culture of impunity in which human rights are regularly violated without any effort by national governments to bring violators or perpetrators to account for their crimes. Given the fact that national governments are either unwilling or unable to bring these perpetrators to justice, it has been suggested that the prosecution of these criminals can take “place in international (including regional) courts: such as the human rights tribunals or quasi-judicial bodies dealing with state responsibility or international criminal tribunals dealing with the penal responsibility of individuals.”<sup>446</sup> A major problem to this latter approach to the prosecution of perpetrators of international crimes is the fact that there may not exist an international court with the necessary jurisdiction to try the crimes in question. As a consequence, it has been suggested that prosecution should be undertaken by the domestic courts of other States.<sup>447</sup>

---

443. For example, the Rwandan Genocide, which was perpetuated by the government of Rwanda and its supporters. *See, e.g.*, LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE (2004) (providing a comprehensive overview of the genocide that took place in Rwanda in early summer 1994). Consider also the Darfur Genocide, which was organized and carried out by the government in Khartoum and militias either directly hired and paid by the State or those whose interests are congruent with those of the State. *See* GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN (Samuel Totten & Eric Markusen eds., 2009) (providing a series of essays that examines the evolution of the Darfur Genocide and its impact on the peoples of the Darfur region of the Republic of Sudan).

444. Both the Genocide in Rwanda and that in Darfur, Sudan, are good examples. In both cases, the atrocities that constituted the genocides were carried out by the governments of these countries and their agents. *See, e.g.*, DENISE BENTROVATO, NARRATING AND TEACHING THE NATION: THE POLITICS OF EDUCATION IN PRE- AND POST-GENOCIDE RWANDA (2015) (stating that the Rwandan Genocide was carried out by the extremist government-backed Hutu militia called Interahamwe); MODERN GENOCIDE: THE DEFINITIVE RESOURCE AND DOCUMENT COLLECTION 641 (Paul R. Bartrop & Leonard Jacobs eds., 2014) (stating that the genocide in Darfur, Sudan, was carried out by “Sudan’s regular armed forces” and “government-backed militias, namely the Janjaweed”).

445. It is important to note, however, that a change in government, as occurred in Chad, could bring about a change in policy, leading to the prosecution of officials of the *ancien régime* for international crimes. In Africa, the prosecution of Hissène Habré is a good example. *See* CELESTE HICKS, THE TRIAL OF HISSÈNE HABRÉ: HOW THE PEOPLE OF CHAD BROUGHT A TYRANT TO JUSTICE (2018) (detailing the trial and conviction of former Chadian dictator, Hissène Habré).

446. Akande & Shah, *supra* note 440, at 816.

447. These are States other than the ones in which the crimes were actually committed. This approach, of course, implicates the concept of universal jurisdiction, which made it

This approach has been criticized for several reasons, including: (1) it would be quite difficult to obtain the evidence on crimes that took place abroad; (2) the political will needed to facilitate the trial may be lacking in the State being called upon to carry out the trial; (3) there may be a lack of motivation among prosecutors in the State that is being called upon to prosecute cases that have no connection to their country; (4) it would still have to be established that the foreign State has jurisdiction, as a matter of international law, to prescribe rules to govern the trial and to subject the alleged crimes to its domestic courts for adjudication; and (5) it has to be established that the individuals to be tried do not enjoy immunity from the jurisdiction of the forum.<sup>448</sup>

It is generally accepted that the officials of a State are immune, under certain circumstances, from the jurisdiction of foreign States.<sup>449</sup> One type of immunity is that which is conferred by international law on “*certain state officials*” and it attaches to “the office or status of the official.”<sup>450</sup> Immunities of this type remain valid only as long as the official remains in office and are described as “personal immunity” (or immunity *ratione personae*).<sup>451</sup> Under customary international law, the Head of State and all diplomats that are duly accredited to a foreign state “possess such immunity from the jurisdiction of foreign states.”<sup>452</sup> Of course, treaties also confer “similar immunities on diplomats, representatives of states to international organizations, and other officials on special mission in foreign states.”<sup>453</sup>

---

possible for Hissène Habré to be prosecuted in Senegal for crimes committed in Chad. According to Anne-Marie Slaughter, “universal jurisdiction purports to remove the need for a particular connection to any one” and hence, allows courts in countries other than those in which the crimes were committed to prosecute the accused persons. Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 168, 168 (Stephen Macedo ed., 2004).

448. Akande & Shah, *supra* note 440, at 816.

449. See, e.g., *UN Convention on Jurisdictional Immunities of States and Their Property*, adopted by the General Assembly of the United Nations, December 2, 2004, [http://legal.un.org/ilc/texts/instruments/english/conventions/4\\_1\\_2004.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf). However, this Convention is not yet in force.

450. Akande & Shah, *supra* note 440, at 816.

451. *Id.* at 818.

452. *Id.* See also Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers*, 247 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INT’L L.* 13 (1994).

453. Akande & Shah, *supra* note 440, at 818. According to Article 29 of the Vienna Convention on Diplomatic Relations, 1961, “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.” Vienna Convention on Diplomatic Relations, Apr. 2, 1961, 500

But, what is the justification for these immunities? The usual thinking is that such immunities are needed and critical for the effective undertaking of international relations. In negotiations between States, for example, it is argued that the diplomats who undertake these negotiations would not be able to negotiate freely and perform their jobs effectively if they are subjected to harassment by other States.<sup>454</sup> In its decision in the case of *U.S. Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, the International Court of Justice (“ICJ”) has held that there is “no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies.”<sup>455</sup> These immunities, it is argued, are necessary, not only for the peaceful coexistence of the world’s States, but also for the conduct of international affairs.

i. Immunity *Ratione Personae* and Impunity of Officials

Senior government officials who are granted immunity *ratione personae* will not be able to perform their functions effectively and fully if they are subjected to arrest and detention during their tenure in a foreign State.<sup>456</sup> Thus, in the case where this type of immunity is applicable, it is generally understood that there is an absolute prohibition on the exercise of criminal jurisdiction by the host State—under this international law doctrine, the host State is prohibited from exercising criminal jurisdiction, not only in situations or “cases involving the acts of these individuals<sup>457</sup> in their official capacity but also in cases involving private acts.”<sup>458</sup>

But, what if the act in question was committed before the individual actually took office or commenced his or her official duties? Does immunity

---

UNTS 95 (entered into force on Apr. 24, 1964), [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf). This provision is supplemented by that in Article 31: “A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction.” *Id.*

454. Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 656 (2002).

455. *U.S. Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, 1980 I.C.J. 3, ¶ 91 (May 24) (quoting *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order*, 1979 I.C.J. (Dec. 15)).

456. Akande & Shah, *supra* note 440, at 819.

457. These individuals, according to the U.N. Convention on Special Missions, include heads of state and government, ministers of foreign affairs, and other persons of high rank, “when they take part in a special mission of the sending State,” as well as members of the sending country’s diplomatic staff residing in the host receiving State. *See* U.N. Convention on Special Missions, art. 21, 31, 39, 1400 U.N.T.S. 231 (Dec. 8, 1969).

458. Akande & Shah, *supra* note 440, at 819.

*ratione personae* still attach? As was made clear by the International Court of Justice (“ICJ”) in the Arrest Warrant Case,<sup>459</sup> immunity applies, regardless of the nature of the activity and when it was carried out. In 2000, the Government of Belgium issued an arrest warrant against Abdoulaye Yerodia Ndombasi, Minister of Foreign Affairs of the Democratic Republic of Congo under Belgium’s law of universal jurisdiction.<sup>460</sup> The warrant was challenged before the International Court of Justice in the case generally referred to as the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*.<sup>461</sup> The pertinent parts of the ICJ’s judgment are presented in para. 54, which states as follows:

The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State[,] which would hinder him or her in the performance of his or her duties.<sup>462</sup>

The critical issue here is that the individual be allowed to enjoy such immunity as is necessary to allow him or her to perform his or her duties. As such, any legal process invoked by the host or receiving State must not subject the official to “a constraining act of authority at the time when the official was entitled to the immunity.”<sup>463</sup>

In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private capacity”, or, for that matter, between acts

---

459. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 2002 I.C.J. 3 (Feb. 14).

460. Belgium’s law of universal jurisdiction was enacted in 1993 to allow the country’s domestic courts to judge people accused of war crimes, crimes against humanity or genocide. *See, e.g.*, MITSUE INAZUMI, *UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW* 93 (2005) (describing, inter alia, Belgium’s universal jurisdiction law of 1993).

461. *Case Concerning the Arrest Warrant of 11 April 2000*, *supra* note 459.

462. *Id.* ¶ 54.

463. Akande & Shah, *supra* note 440, at 819. It is important to note that while any attempts to arrest and prosecute, for example, high ranking officials or those on a diplomatic mission would constitute a violation of the immunity granted them under international law, an invitation by the host or receiving State’s government for the officials clothed by such immunity to testify voluntarily would not be a violation. *See Case Concerning the Arrest Warrant of 11 April 2000*, *supra* note 459, ¶¶ 55, 70–71 .

---

---

performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an “official” visit or a “private” visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an “official” capacity or a “private” capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.<sup>464</sup>

The nature of the alleged activity or when it was committed are not important to this doctrine of immunity. With respect to the *Arrest Warrant* case, the ICJ held that a Foreign Minister is entitled to immunity *ratione personae* and that that immunity remains valid even when and if it is alleged that the said minister had committed an international criminal offense. On this point, the ICJ held as follows:

The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords<sup>465</sup> or the French Court of Cassation.<sup>466</sup> It has

---

464. *Id.* ¶ 55.

465. The House of Lords is the Upper House of the Parliament of the United Kingdom. Until the U.K. established a Supreme Court in 1999, the House of Lords, through the Law Lords, served as the final court of appeal in the U.K. judicial system. The Law Lords or Lords of Appeal in Ordinary were judges that were appointed under the Appellate Jurisdiction Act 1876 to the British House of Lords to perform certain judiciary functions, which included acting as the highest court of appeal for most domestic cases. The House of Lords lost its judicial functions after the Supreme Court of the United Kingdom was established in 2009. For more on Britain’s Law Lords, see MAXWELL BARRETT, *THE LAW LORDS: AN ACCOUNT OF THE WORKINGS OF BRITAIN’S HIGHEST JUDICIAL BODY AND THE MEN WHO PRESIDENT OVER IT* (2000) and for the House of Lords, see MEG RUSSELL, *THE CONTEMPORARY HOUSE OF LORDS: WESTMINSTER BICAMERALISM REVIVED* (2013).

466. The French Court of Cassation (*Cour de cassation*), founded in 1804, is the court of final appeal for civil and criminal matters. For more on the French Court of Cassation, see EVA STEINER, *FRENCH LEGAL METHOD* (2002); MARTIN WESTON, *AN ENGLISH READER’S GUIDE TO THE FRENCH LEGAL SYSTEM* (1991); NICOLAS MOLFESSIS, *LA COUR DE CASSATION*

been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.<sup>467</sup>

In addition, the immunity applies even when the minister is traveling abroad on a private visit.<sup>468</sup> Given the fact that this type of immunity is designed primarily to enhance the ability of the official to effectively perform his or her international functions, the immunity is valid only as long as the individual concerned is in office or on assignment in another State.<sup>469</sup> The immunity *ratione personae* is generally accepted, recognized and applied in national courts in many countries and has become part of state practice throughout the world.<sup>470</sup>

While the doctrine of immunity *ratione personae* is well-established in international law and international relations, the question of how this doctrine impacts government impunity still remains unanswered. What happens if diplomats and other State officials on service abroad use their offices (e.g., an embassy or a diplomatic pouch) to commit international crimes? Such crimes could include, for example, transporting children in diplomatic planes for sex trafficking purposes or using diplomatic pouches to traffic illegal

---

ET L'ÉLABORATION DU DROIT (2004); JEAN-BAPTISTE SIREY, JURISPRUDENCE DE LA COUR DE CASSATION DE 1791 À 1813 (1822).

467. Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 459, ¶ 58.

468. *Id.* ¶ 55.

469. Akande & Shah, *supra* note 440, at 819.

470. Note, however, that there is one case in which a Head of State was denied immunity from prosecution for international crimes. On February 14, 1988, a federal grand jury, sitting in Miami (USA), returned a 12-count indictment against General Manuel Antonio Noriega, then de facto ruler of Panama (1983–1989), with taking part in an international conspiracy to import cocaine, as well as materials used in the production of cocaine, into and out of the United States. Noriega's lawyer moved to dismiss the indictment, arguing that the alleged illegal activities were committed outside "the territorial bounds of the United States" and that "Noriega was immune from prosecution as a head of state and diplomat, and that his alleged narcotics offenses constituted acts of state not properly reviewable by this Court" [i.e., the U.S. District Court for the Southern District of Florida]. *See United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

Noriega's lawyer argued that the Panamanian leader was immune from prosecution based on head of state immunity, the act of state doctrine, and diplomatic immunity. *Id.* Noriega's claim of immunity from prosecution was denied based on the ground that Noriega had never served as the constitutional leader of Panama, that Panama had not sought immunity for Noriega, and that the acts charged relate to Noriega's private pursuits of "personal enrichment." *See id.* at 1212.

substances. If these individuals are covered by immunity, as stated in various international legal instruments,<sup>471</sup> decisions of international judicial bodies,<sup>472</sup> and the writings of international legal scholars,<sup>473</sup> would not they be able to commit international crimes with impunity? Despite the loophole<sup>474</sup> used by U.S. courts to deny former Panamanian ruler General Manuel Antonio Noriega immunity for his alleged crimes, the doctrine of immunity *ratione personae* remains an important principle of international law and international relations.

ii. Who is Entitled to Immunity *Ratione Personae*?

Over the years, it has become clear that sitting Heads of State,<sup>475</sup> Heads of Government,<sup>476</sup> and diplomats<sup>477</sup> are usually granted or possess immunity

---

471. See, e.g., Vienna Convention on Diplomatic Relations, *supra* note 453; UN Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, <http://www.un.org/en/ethics/pdf/convention.pdf>; U.N. Convention on Special Missions, *supra* note 457.

472. Belgium v. Senegal, *supra* note 376.

473. See, e.g., HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY (2013) (providing a detailed guide to the operation of the international rule of State immunity, which bars the domestic courts of States from exercising criminal or civil jurisdiction over claims made against another State).

474. Although Noriega was, at the time of his indictment, the de facto ruler of Panama, U.S. prosecutors were able to argue that he could not be granted immunity on the ground that he had never been recognized by the U.S. Government as the constitutional leader of Panama. Implied in this reasoning is that had he been recognized as the legitimate head of state of Panama, he would have been granted immunity regardless of his alleged criminal activities. See, e.g., EDWARD CHUKWUEMEKE OKEKE, JURISDICTIONAL IMMUNITIES OF STATES AND INTERNATIONAL ORGANIZATIONS (2018) (stating, inter alia, that Noriega's claim of head of State immunity was denied by courts in the United States because the U.S. government had never recognized him as the legitimate constitutional ruler of Panama).

475. Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), 2008 I.C.J. 177 (June 4). In paragraph 170, the ICJ held as follows: "The Court has already recalled in the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) case 'that in international law it is firmly established that . . . certain holders of high-ranking office in a State, such as the Head of State . . . enjoy immunities from jurisdiction in other States, both civil and criminal' (Judgment, ICJ Reports 2002, ¶ 51). A Head of State enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another State which would hinder him or her in the performance of his or her duties' (Ibid., p. 22, para. 54). Thus the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority."

476. In *Case Concerning the Arrest Warrant of 11 April 2000*, *supra* note 459, ¶ 51, the ICJ ruled as follows: "The Court would observe at the outset that in international law it is

*ratione personae* to enhance their ability to perform their duties. In the *Democratic Republic of the Congo v. Belgium* case,<sup>478</sup> the ICJ was called upon to decide on the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs. The ICJ held that “the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.”<sup>479</sup>

But, does immunity *ratione personae* apply to other senior members of the government? It has been argued that in the *Arrest Warrant* case, when the ICJ held that “diplomatic and consular agents [and] certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal,”<sup>480</sup> the Court’s use of the expression “such as” indicates or suggests that the list of senior government officials entitled to immunity *ratione personae* is not exhaustive.

In the *Arrest Warrant* case, the ICJ held that Foreign Ministers are entitled to immunity *ratione personae* due to the nature of their jobs or public functions—these individuals are responsible for the international relations of their countries. Other government officials besides Ministers of Foreign Affairs also perform functions for their governments at the international level. Such functions may include, for example, negotiating on behalf of their governments with multilateral organizations, and other foreign-based entities. As stated in Article IV of the Convention on the Privileges and Immunities of the United Nations,<sup>481</sup> “[r]epresentatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities: (a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives,

---

firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”

477. *Id.*

478. *Id.*

479. *Id.* ¶ 54.

480. *Id.* ¶ 51.

481. U.N. Convention on the Privileges and Immunities, 1946, *supra* note 471, art. IV, § 11.

immunity from legal process of every kind.”<sup>482</sup> In addition, under the U.N. Convention on Special Missions, 1969,<sup>483</sup> “persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.”<sup>484</sup> Also, “[t]he representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.”<sup>485</sup>

These treaty-based conferrals of immunity, as well as those enunciated by the ICJ, are designed or intended to enhance the conduct of international relations.<sup>486</sup> But, have the immunity provisions in these treaties evolved into customary international law? If yes, then immunity *ratione personae* may be available to a much larger group of individuals than mentioned in the ICJ’s decision in the *Arrest Warrant* case.<sup>487</sup> The International Law Commission is of the opinion that the immunity of special missions has been established as a matter of international law.<sup>488</sup> However, in the case, *United States v. Sissoko*,<sup>489</sup> the U.S. District Court for the Southern District of Florida held that it “did not find that the U.N. Convention on Special Missions is ‘customary international law’ that binds this Court.”<sup>490</sup> The Executive Branch of the U.S. Government has asserted that foreign officials who are in the United States temporarily and on a “special diplomatic mission” are entitled to immunity from the criminal and civil jurisdictions of the courts of the United States.<sup>491</sup>

In the *Weixum v. Xilai* case, the foreign official involved was not a Head of State or Head of Government or Minister of Foreign Affairs. He was

---

482. *Id.* art. 11(a).

483. U.N. Convention on Special Missions, *supra* note 457.

484. *Id.* art. 29.

485. *Id.* art. 31.

486. Akande & Shah, *supra* note 440, at 821.

487. Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 459.

488. *Documents of the Nineteenth Session Including the Report of the Commission to the General Assembly*, 1967 Y.B. Int’l L. Comm’n, Vol. II, U.N. Doc. A/CN.4/SER.A/1967/Add.1. The relevant section is: “It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members. Such is also the opinion expressed by the Commission on several occasions between 1958 and 1965 51 and confirmed by it in 1967.” *Id.* at 358.

489. *United States v. Sissoko*, 995 F. Supp. 1469 (S.D. Fla 1997).

490. *Id.* at 1471.

491. *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008).

China's Minister of Commerce and International Trade, Bo Xilai.<sup>492</sup> The governments of many countries and their courts have also been "willing to accept the customary law status of the rule granting immunity to members of Special Missions."<sup>493</sup> For example, in *Re Bo Xilai*,<sup>494</sup> a court in the UK showed willingness to grant immunity to the same Chinese Minister of Commerce and International Trade on the ground that such action was required by international customary law.<sup>495</sup> Also, when, in April 2008, Rwanda's Chief of State Protocol, Lt. Col. Rose Kabuye,<sup>496</sup> was on an official visit to Germany, the government of the latter refused to arrest her on a warrant from France on charges of terrorism and stated that it had made the decision based on the belief that she was immune. Nevertheless, in a subsequent visit to Germany in November 2008, Ms. Kabuye was arrested by German authorities and extradited to France—German authorities argued that she was on a private visit this time and hence, did not qualify for immunity.<sup>497</sup> The arrest warrant was later lifted by French judges and she returned to Rwanda.<sup>498</sup>

It appears that "special mission immunity" does not apply to state officials who are on a private visit abroad and can be distinguished from the immunity *ratione personae* examined by the ICJ in the *Arrest Warrant* case. In the latter case, the ICJ ruled that the Foreign Minister, as well as the Head of State and the Head of Government, would be granted immunity even if they are traveling abroad on a private visit. While international law had granted Heads of State absolute immunity *ratione personae* from the criminal jurisdiction of foreign courts, even when traveling abroad for a private purpose, it was not until the ICJ's decision in the *Arrest Warrant* case

492. *Id.*

493. Akande & Shah, *supra* note 440, at 822.

494. *Re Bo Xilai*, 128 I.L.R. 713 (Bow St. Magistrate Ct. 2005).

495. *Id.*

496. Lt. Col. Rose Kabuye is a retired officer in the Rwandan Army and remains the highest-ranking woman to ever serve in the country's armed forces. *See, e.g.*, JENNIE E. BURNET, *GENOCIDE LIVES IN US: WOMEN, MEMORY, AND SILENCE IN RWANDA* 12 (2012) (identifying Rose Kabuye as the "highest-ranking woman in the armed wing of the [Rwandan Patriotic Front]" who went on to serve in "several important administrative positions after the genocide."

497. Rwandan authorities disputed this claim and stated that Kabuye traveled to Germany on a diplomatic mission. *See Germany Arrests Woman in Rwanda Genocide: Rwandan President Says Holding of Aide Violates Country's Sovereignty*, AFRICA ON NBC NEWS.COM (Nov. 11, 2008), [http://www.nbcnews.com/id/27665617/ns/world\\_news-africa/t/germ-any-arrests-woman-rwanda-genocide/#.W2iJithKhBw](http://www.nbcnews.com/id/27665617/ns/world_news-africa/t/germ-any-arrests-woman-rwanda-genocide/#.W2iJithKhBw).

498. Hereward Holland, *Rwanda Says France Drops Kabuye Arrest Warrant*, REUTERS, (Mar. 31, 2009), <https://www.reuters.com/article/ozatp-rwanda-france-kabuye-idAFJOE53001S20090401>.

that immunity was conferred on a serving Foreign Minister (whether the Minister was traveling abroad on private or official business). The decision was justified on the basis that such immunity was necessary to enhance the ability of the minister to perform his or her obligations at the international level.<sup>499</sup>

Besides the functional basis, there are other justifications for conferring immunity *ratione personae* on state officials. It has been argued that “[t]he person and position of the Head of State reflects the sovereign equality of the state and the immunity accorded to him or her is in part due to the respect for the dignity of the office and of the state which that office represents.”<sup>500</sup> In addition, another justification for the absolute immunity from criminal jurisdiction that is accorded Heads of State can be found in the principle of non-intervention, whose corollary is the principle of sovereign equality of states. This, it is argued, “is the basis for the immunity of states from the jurisdiction of other states (*par in parem non habet imperium*).”<sup>501</sup>

Similarly, arresting and detaining the Head of Government of a State would produce similar results, especially considering the fact that in many countries, Heads of State are also Heads of Government. In many countries, the Head of Government is the effective leader of the country and his or her arrest and detention could have the same political implications for the country as the arrest and detention of the Head of State. Other state officials, including ministers, however, “do not embody the supreme authority of the state, and their removal does not signify a change in government of the state.”<sup>502</sup> Thus, removing immunity for other senior state officials<sup>503</sup> who travel abroad on a private visit should not have the same effect as if such immunity were withdrawn from the Head of State and the Head of Government. Akande and Shah<sup>504</sup> have argued that “by restricting the allocation of broad immunity *ratione personae* to Heads of State and Heads of Government, a balance is struck between sovereign equality and respect

---

499. Akande & Shah, *supra* note 440, at 823–24.

500. Akande & Shah, *supra* note 440, at 824.

501. Arresting and detaining the Head of State of a country, it is argued, is tantamount to a form of regime change, even if temporary, and hence, represents interference with the independence and autonomy of a State. *See id.*

502. Akande & Shah, *supra* note 440, at 825.

503. That is, senior government officials besides the Head of State and the Head of Government. *See, e.g.,* JOANNE FOAKES, THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW 7 (2014) (identifying senior government officials (other than the head of state) as including “Foreign Ministers” and “a very narrow category of other high-ranking State representatives by virtue of their office”).

504. Akande & Shah, *supra* note 440, at 825.

for the rule of (international and domestic) law”<sup>505</sup> and that “extending such broad immunity *ratione personae* to other ministers, as the ICJ did in the *Arrest Warrant* case, is erroneous and unjustified.”<sup>506</sup>

### 3. What About Immunity *Ratione Materiae*?

Immunity *ratione materiae* or functional immunity is that which attaches to the *official act* (performed or to be performed by the state official) instead of to the *status of the state official*.<sup>507</sup> This type of immunity, hence, may be relied on by any individual who is (1) acting on behalf of the state; and (2) is performing an official act. Since this type of immunity is conduct-based, it can “be relied on by former [state] officials in respect of official acts performed while in office as well as by serving state officials.”<sup>508</sup> Of course, individuals who are not in the service of the State but who, at some time in the past, had served the State, can rely on immunity *ratione materiae* to cover those acts that they had performed while they were in the service of the State.<sup>509</sup>

The conferment of immunity *ratione materiae* implicates two important policies. In the first one, the state official in question can argue that he is not legally responsible for acts, which are effectively those of the State. These acts, which were, in effect, undertaken on behalf of the State by the state official, must be imputed only to the State.<sup>510</sup> The principle of immunity *ratione materiae* can be used to place responsibility for certain acts<sup>511</sup> where

---

505. *Id.*

506. *Id.*

507. Mizushima Tomonori has discussed a few cases from several jurisdictions that are relevant to the concept of *ratione materiae*. See Mizushima Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct*, 29 DENV. J. INT’L L. & POL’Y 261 (2001).

508. Akande & Shah, *supra* note 440, at 825. For immunity from jurisdiction for consular officers, see Vienna Convention on Consular Relations, 1963, at Article 43(1): “Consular officer and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.” Vienna Convention on Consular Relations art. 43(1), Apr. 24, 1963, 596 UNTS 261.

509. See, e.g., C. A. Whomersley, *Some Reflections on the Immunity of Individuals for Official Acts*, INT’L & COMP. L.Q. 848 (1992); H. F. van Panhuys, *In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities*, 13 INT’L & COMP. L.Q. 1193 (1964).

510. Akande & Shah, *supra* note 440, at 826.

511. These are acts that are “committed” by a state official in the performance of his or her official duties. Thus, “a plea of immunity *ratione materiae* is essentially a plea by a State that the act of its official or former official was an act of the State itself and, therefore, one

it belongs—on the State. Consider, for example, what the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia said in the case of *Prosecutor v. Blaškić*:

The acts of state officials acting in that capacity are not attributable to them personally but only to the state: ‘Such [State]<sup>512</sup> officials are mere instruments of a state and their official action can only be attributed to the state. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a state. In other words, state officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the state on whose behalf they act: they enjoy so-called ‘functional immunity’. This is a well-established rule of customary international law going back to the 18th and 19th centuries, restated many times since.<sup>513</sup>

But, is immunity of state officials co-extensive with that of the State? International legal scholars argue that “[o]ne consequence of this function of immunity *ratione personae* is that the immunity of state officials is not co-extensive with, but broader than, the immunity of the state itself.”<sup>514</sup> That is, the state official is immune with respect to the “sovereign acts for which the state is immune,”<sup>515</sup> as well as other acts, which are official but non-sovereign.

Secondly, without immunity granted to state officials in foreign courts, the latter can circumvent the immunity of the State by bringing proceedings against those who represent or act on behalf of the State. Hence, immunity *ratione materiae* provides a mechanism through which the circumvention of the immunity of sovereign states can be prevented. As was held by the U.S. Court of Appeals for the 9th Circuit in *Chuidian v. Philippine National Bank*,<sup>516</sup> “[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the

---

for which it is responsible.” JOANNE FOAKES, *THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW* 7 (2014).

512. *Prosecutor v. Blaškić*, Objection to the Issue of Subpoena duces Tecum, ¶ 38 (Oct. 29, 1997).

513. *Id.*

514. Akande & Shah, *supra* note 440, at 827.

515. *Id.* See also Zachary Douglas, *State Immunity for the Acts of State Officials*, 82 BRIT. YEARBOOK OF INT’L L. 281 (2012).

516. *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990).

sovereign directly.”<sup>517</sup> This means, essentially, that this type of immunity “operates as a jurisdictional, or procedural, bar and prevents courts from indirectly exercising control over the acts of the foreign state through proceedings against the official who carried out the act.”<sup>518</sup>

But, can a state official who is on official duty abroad rely on immunity *ratione materiae* if he is charged with an international crime? There are three reasons why the state official cannot rely on immunity *ratione materiae* in order to evade liability for his or her international crimes. First, one can argue that given the fact that “immunity is accorded only to sovereign acts,”<sup>519</sup> officials and the states that they represent, “can never be immune from the jurisdiction of other states in respect of international crimes because these crimes, for the most part, constitute violations of *jus cogens* norms<sup>520</sup> and thus cannot be sovereign acts.”<sup>521</sup> Second, immunity *ratione materiae* can only be invoked by a state official to prevent being scrutinized for acts that are sanctioned by the state (i.e., official acts). However, acts that constitute international crimes cannot be considered official acts. Finally, since *jus cogens* norms “supersede all other norms they overcome all inconsistent rules of international law providing for immunity.”<sup>522</sup> Below, we take a closer look at these three arguments and see how they relate to the struggle against impunity in Africa.<sup>523</sup>

State immunity, it has been argued, applies only in cases involving “sovereign acts” and that “international crimes,” especially those which are contrary to *jus cogens* norms cannot be considered “sovereign acts.” Additionally, it has been argued, acts that constitute or amount to international crimes, can never be considered sovereign acts. Thus, if a state engages in or is responsible for acts that are contrary to *jus cogens* norms, that state is said to have impliedly waived “any rights to immunity as the

---

517. *Id.*

518. Akande & Shah, *supra* note 440, at 827.

519. *Id.*

520. According to Article 53 of the Vienna Convention on the Law of Treaties, 1969, a peremptory norm of general international law (*jus cogens*) is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

521. Akande & Shah, *supra* note 440, at 828.

522. *Id.*

523. *Id.*

state has stepped out of the sphere of sovereignty.”<sup>524</sup> In line with this argument, since the state does not have the authority to violate *jus cogens* norms, any acts of the state that are contrary to *jus cogens* norms cannot be considered sovereign acts. The *Prefecture of Voiotia v. Federal Republic of Germany*<sup>525</sup> case can shed some light on this point. The facts of the case are that in June 1944, military units belonging to the German occupation government in Greece massacred more than 300 citizens of the village of Distomo and burnt down the village. A case was brought against Germany for those atrocities in 1995 before Greek courts by relatives of the victims. The Court of Livadia held that Germany was liable and ordered it to pay compensation to the claimants. Germany then appealed the court’s decision and the appeal was heard by the Hellenic Supreme Court, the *Areios Pagos*.<sup>526</sup> The *Areios Pagos* upheld the judgment of the Court of Livadia based on the argument that acts which violate *jus cogens* norms<sup>527</sup> do not and cannot qualify as sovereign acts (acts *jure imperii*) and that by committing such atrocities, Germany had impliedly waived its immunity.<sup>528</sup> Although the majority of the *Areios Pagos* affirmed the lower court’s ruling and ordered Germany to pay the amount of money fixed by the Livadia court, “a strong dissenting opinion asserted that no such customary rule restricting sovereign immunity existed.”<sup>529</sup> Germany, nevertheless, declined to honor the ruling of the *Areios Pagos*.

---

524. Akande & Shah, *supra* note 440, at 829. See also Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365 (1989).

525. *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre Case)*, 129 I.L.R. 514 (Court of Cassation 2000) (Greece).

526. *Id.*

527. The massacre of more than 300 civilians by German forces in the village of Distomo definitely qualifies as an act that violates *jus cogens* norms. See, e.g., CHRIS BISHOP, SS: HELL ON THE WESTERN FRONT: THE WAFFEN-SS IN EUROPE 1940-1945, 73 (2003) (detailing the massacre of Greek civilians in the village of Distomo during World War II).

528. Adam C. Belsky et al., were among the first legal scholars to bring up this argument. Since then, it has gained some support among judges in the United States. Belsky, Merva & Roht-Arriaza, *supra* note 524. Nevertheless, as argued by Kerstin Bartsch and Björn Elberling, this “does not seem to be a very convincing argument for the limitation of state immunity in cases such [the *Prefecture of Voiotia* case]: While it is generally accepted that states may waive their immunity, the circumstances must be such that an implied waiver can be clearly inferred from the state’s behavior.” Kerstin Bartsch & Björn Elberling, *Jus Cogens v. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision*, 4 GERMAN L.J. 477, 480 (2003).

529. *Id.*

The matter eventually reached the Greek Special Highest Court and by six votes to five, the Court held that Germany enjoyed unrestricted immunity and hence, could not be brought before any Greek courts for torts committed by its soldiers.<sup>530</sup> In its ruling, the Special Highest Court “asserted a general norm of customary international law that rendered inadmissible any claim against a foreign state for torts committed by its armed forces.”<sup>531</sup> The Court then went on to state that there does not yet exist a norm of customary international law that excludes certain acts from the international law of state immunity. Nevertheless, a minority of five judges on the Special Highest Court held that such an exception “did exist under customary law.”<sup>532</sup> Finally, the Court held that there was no exception from jurisdiction under customary law. Within the Greek legal system, this decision of the Greek Special Highest Court was final and binding.<sup>533</sup>

On December 12, 2002, the European Court of Human Rights (“ECtHR”) decided on several claims emanating from the *Prefecture of Voiotia* case. One of the rulings by the ECtHR concerned Germany’s immunity—the ECtHR declared, after referring to its ruling in *Al-Adsani*, that it “does not find established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity. The Greek Government cannot therefore be required to override the rule of State immunity against their will.”<sup>534</sup>

The most important legal question in the *Prefecture of Voiotia* case concerned the immunity of States, on the one hand, and *jus cogens* norms, on the other. In 2001, the ECtHR in the *Al-Adsani* case,<sup>535</sup> had already decided in favor of state immunity. The decision, however, was split, although legal scholars, through commentary and other writings, appeared to unanimously support the ruling of the ECtHR.<sup>536</sup>

---

530. *Id.* at 481. *See also* Federal Republic of Germany v. Miltiadis Margellos, Case 6/17–9–2002, Decision of September 17, 2002.

531. *Bartsch & Elberling, supra* note 528.

532. *Bartsch & Elberling, supra* note 528, at 482.

533. *Id.* *See also* Federal Republic of Germany v. Miltiadis Margellos, *supra* note 530.

534. ECtHR, *Kalogeropoulou and Others v. Greece and Germany*, Admissibility Decision, § D1(b) (Dec. 12, 2002), [https://hudoc.echr.coe.int/eng#%7B%22itemid%22:\[%22001-23539%22%7D](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-23539%22%7D)}. *See also* ECtHR, *Al-Adsani v. United Kingdom*, Judgment (Nov. 21, 2001), <https://www.dipublico.org/1571/case-of-al-adsani-v-the-united-kingdom-european-court-of-human-rights/>.

535. *Al-Adsani v. United Kingdom, supra* note 534.

536. *See, e.g.,* Markus Rau, *After Pinochet: Sovereign Immunity in Respect of Serious Human Rights Violations—The Decision of the European Court of Human Rights in the Al-Adsani Case*, 3 GERMAN L.J. 6 (2002); *Bartsch & Elberling, supra* note 528.

Recall that *jus cogens* can be defined as international law norms from which no derogation is permitted and in the case of conflict of rules, a *jus cogens* norm would trump every other rule of international law that is not of the same superior status.<sup>537</sup> The prohibition of certain war crimes, it is argued, forms part of *jus cogens*. Since state immunity is not absolute but is “limited to certain acts of the state and that it may be derogated from in a variety of circumstances,”<sup>538</sup> one can conclude that “state immunity may *not* serve to bar the judicial enforcement of the *jus cogens* norm prohibiting certain war crimes.”<sup>539</sup> Those who support the *Al-Adsani* decision have put forth two arguments to support their claim that state immunity is not barred in cases that violate *jus cogens*, such as war crimes.

First, it is argued that there does not exist any actual conflict of rules between the *jus cogens* norm that is being violated and states’ reliance on state immunity before the courts.<sup>540</sup> International law does not have an authority that makes and executes the laws. It is argued that in this system, “one must always distinguish between material rules and the ways in which these rules are enforced.”<sup>541</sup> If a *jus cogens* norm prohibits, for example, war crimes or crimes against humanity, the same norm “still does not bar states from relying on state immunity before national courts in cases concerning war crimes, since state immunity only concerns the enforcement, not the material content of the *jus cogens* rule.”<sup>542</sup> As argued by Zimmermann, “it seems to be more appropriate to consider both issues as involving two different sets of rules which do not interact with each other.”<sup>543</sup>

Another argument was also mentioned in the *Al-Adsani*<sup>544</sup> decision by one of the majority judges and is of a largely political rather than a legal character. Some legal scholars have argued that any attempt to deny state immunity could create judicial chaos: States, whose agents (e.g., their militaries) had committed atrocities, even a very long time ago, can suddenly be inundated with a significantly large number of civil claims.<sup>545</sup> For example, it is feared that courts in countries that were colonized or subjected

---

537. Vienna Convention on the Law of Treaties, *supra* note 520, art. 53, 64.

538. Bartsch & Elberling, *supra* 528, at 484.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens—Some Critical Remarks*, 16 MICH. J. INT’L L. 433, 438 (1995).

544. *Al-Adsani v. United Kingdom*, *supra* note 534.

545. Bartsch & Elberling, *supra* note 528, at 484–85.

to various forms of exploitation by the Europeans may not adjudicate cases involving long-ago atrocities fairly if the defendant is a European State. For example, as argued by Christian Maierhöfer,<sup>546</sup> “[a]n international order in which the judges of developing states sit in judgment over industrialized states or Arab judges over Israel—and *vice versa*-, enforcing their notion on the observance of international law—or at least or *jus cogens*, hardly seems desirable.”<sup>547</sup>

But, how convincing are these arguments? Some scholars have argued that “the material *jus cogens* rule also contains a procedural *jus cogens* rule prohibiting certain limits to enforcement.”<sup>548</sup> In other words, the “*jus cogens* character of a norm presupposes superior means of enforcement.”<sup>549</sup> Hence, a state may not rely on state immunity in any case that concerns or involves the violations of *jus cogens* norms.<sup>550</sup> Also, as made evident in the work of the International Law Commission with respect to the law of state responsibility, *jus cogens* norms “are afforded superior means of enforcement.”<sup>551</sup>

But, what about the fear that the courts of some States would be used in an opportunistic manner to produce rulings that are unfair to other States? This does not seem to be a very convincing argument against any proposal to restrict the immunity of states. *Jus cogens*, as a concept in international law, presupposes wide agreement among States that there may not be any derogation from the rule concerned.<sup>552</sup> Hence, no State may, on its own accord or unilaterally, “declare that a certain rule forms part of *jus cogens*.”<sup>553</sup> Bartsch and Elberling<sup>554</sup> argue that “this concept alone makes frivolous court cases hard to imagine.”<sup>555</sup> More important is the fact that if the courts of a State adjudicate a case and make their judgments based on “a subjective and false understanding of *jus cogens*,”<sup>556</sup> such decisions or rulings would not be enforceable or enforced by other States.

---

546. Christian Maierhöfer, *De EGMR als “Moderniseierer” des Völkerrechts?—Staatenimmunität und ius cogens auf dem Prüfstand*, 29 EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 391 (2002).

547. Translated by and quoted in Bartsch & Elberling, *supra* note 528, at 485.

548. *Id.* at 487.

549. *Id.*

550. *Id.*

551. *Id.* at 488. See also Pierre-Marie Dupu, *A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13 EUROPEAN J. INT’L L. 1053 (2002).

552. Bartsch & Elberling, *supra* note 528, at 489.

553. *Id.*

554. *Id.*

555. *Id.*

556. *Id.*

It is not necessary to deal with the past atrocities of States by simply using the principle of state immunity. States can enter into reparation treaties that impose a duty on the offending State to pay compensation for damages done. Such treaties can contain provisions designed to deal with claims that were not covered by the treaties concluded. In addition to the fact that these treaties would serve as a statement of responsibility for the atrocities committed, they would also provide compensation for the victims or their surviving relatives of violations of *jus cogens*. It has been argued that reparation treaties would form a much more effective tool to deal with past atrocities committed by States or their agents than the blocking, through state immunity, of the efforts of victims and/or their surviving relatives to seek compensation for the atrocities committed against them.<sup>557</sup>

The prevailing opinion in the legal literature is that legal or political reasons can be advanced to allow state immunity to be used to bar States from being held accountable for violations of *jus cogens* norms. Nevertheless, some legal scholars have argued that “legal or political reasons do not call for allowing state immunity to bar claims concerning the violation of *jus cogens* norms.”<sup>558</sup> But, what is the view of the courts? The courts are divided: the Special Highest Court of Greece decided in favor of state immunity for crimes that violate *jus cogens* norms. Nevertheless, it did so, not unanimously, but only by a plurality of six to five votes. The European Court of Human Rights affirmed the decision in *Al-Adsani*, which itself was a sharply divided decision, but only through a majority opinion.

It appears that both the courts and the legal literature are divided on how to deal with violations of *jus cogens* norms. In fact, there remains a lot of uncertainty regarding whether heads of state and heads of government should be prosecuted by national courts or by the courts of other States under the doctrine of universal jurisdiction. In the following section, we look at the Statute of the Special Court for Sierra Leone to see if we can get some answers to this legal quagmire. We will also return to the discussion of the trial of Hissène Habré by the Extraordinary African Chambers to see if they provide a way to deal with impunity in Africa, especially that which is connected to activities by Heads of State and other high-ranking government officials.

---

557. For an example of a reparation treaty, see The Peace Treaty of Versailles art. 231–47 and Annexes Reparations, June 28, 1919, <http://net.lib.byu.edu/~rdh7/wwi/versailles.html>.

558. Bartsch & Elberling, *supra* note 528, at 591.

*C. Recent Developments in the Fight Against Impunity in Africa*

According to Article 6(2) of the Statute of the Special Court for Sierra Leone,<sup>559</sup> “[t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”<sup>560</sup> This rule, it is argued by some scholars, is now “so entrenched in state practice and international jurisprudence that it reflects a rule applicable before international courts.”<sup>561</sup> Many scholars now believe that the uncertainty surrounding the rules about immunity are no longer unsettled but that the rules have “crystallized precisely in the form stated in Article 6(2) in respect of the power of international courts to exercise international jurisdiction over heads of state and other political and military leaders.”<sup>562</sup>

It is argued that this power to prosecute heads of state and other high-ranking officials for international crimes or violations of *jus cogens* is “unvarnished and unrestricted in the sense that it has no place for distinctions which have been made in the municipal laws governing immunities, e.g., distinctions between absolute immunity (*ratione personae*) which exists for all acts committed during a head of state or ambassador’s tenure of office, and the more limited immunity (*ratione materiae*) which applies to ex-heads and lesser officials, protecting them from acts performed as part of their official functions but not for acts done for private gratification.”<sup>563</sup>

When the accused asserts immunity in national law, these distinctions might be meaningful because motivation is relevant. However, such distinctions do not have a place in international criminal law, whose main objective is to prosecute and bring to justice those who are engaged in planning, designing, inciting, and providing the leadership for the commission of international crimes. With respect to crimes such as war crimes, crimes against humanity, and genocide, the motivation for those who plan and incite these acts is not necessary or required in order for the international community to hold the culprits accountable. As argued by Robertson, “[t]hese are people of power or wealth or both and their motivation for widespread and systematic abuse of power, whether private

---

559. U.N. Statute for the Special Court for Sierra Leone, Jan. 16, 2002, <http://legal.un.org/avl/ha/scsl/scsl.html>. The Special Court for Sierra Leone was established by an agreement between the United Nations and the Government of Sierra Leone pursuant to U.N. Security Council Resolution 1315(2000) of August 14, 2000.

560. *Id.* art. 6(2).

561. Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT’L L.J. 649, 665 (2005).

562. *Id.*

563. *Id.*

---

---

greed or public aggrandizement, is irrelevant.”<sup>564</sup> This is evident in the trials of former Liberian President Charles Taylor and former Chadian dictator Hissène Habré for international crimes—motivation was not a relevant variable in the decision to bring these men who had abused their power to justice.

It has been argued that the “State immunity of rulers or officials or ambassadors derives from [the] seventeenth century when states ruled by divine right or feudal inheritance, and lacked the facilities for instantaneous communication.”<sup>565</sup> In today’s relatively more enlightened world, especially one in which there is greater recognition of and respect for human rights, justifications such as the argument that it is undignified to put a sovereign or head of state on trial, no longer garner much respect among many communities. In addition, significant advancements in information and communication technologies (e.g., Internet, e-mail, video conferencing, etc.) have lessened the need for Heads of State and foreign ministers to travel abroad in order to engage in international transactions. As a consequence, the so-called “functional rationale of immunity . . . is less crucial in the age of e-mail and video conferencing.”<sup>566</sup> Perhaps, more important is the fact that “[i]nternational law now acknowledges the imperative need to end impunity for crimes against humanity, and the logical consequence of this imperative is to end all immunity of state officials, past and present, who are credibly arraigned on such charges by international courts.”<sup>567</sup> The impetus to this significantly changed attitude towards international crimes include the atrocities of World War II (1939-1945), ethnic cleansing in the Balkans (1991-1999), crimes of the apartheid regime in South Africa (1948-1994), the Rwandan Genocide (1994), the Khmer Rouge Killing Fields in Cambodia (1970-1975), the atrocities committed by the Revolutionary United Front during the civil war in Sierra Leone (1991-2002), and many others.

These atrocities, many of them committed by or at the direction of governments, have forced the international community to become more determined to fight impunity and in doing so, emphasis has been placed on ending immunity for all state officials. Nevertheless, there is still a lot of uncertainty regarding the ability or capacity of municipal law to prosecute heads of state where the international crimes were committed or in other

---

564. *Id.*

565. *Id.* at 665–66.

566. *Id.* at 666.

567. *Id.*

States through the exercise of universal jurisdiction.<sup>568</sup> As was seen in the trials of Charles Taylor and Hissène Habré, a duly constituted hybrid court, which is properly vested with international criminal jurisdiction, can prosecute any individual, including a head of state, who is alleged to have committed international crimes.

It is clear that international law prohibits certain crimes (e.g., genocide, crimes against humanity, war crimes, torture) regardless of the motivation for committing these atrocities. Also, if international law is to contribute significantly to the fight against impunity, the traditional approach to State immunity in civil actions must be reexamined.<sup>569</sup> Courts, such as the International Criminal Court (“ICC”), the Special Court for Sierra Leone (“SCSL”), and the International Criminal Tribunal for Rwanda (“ICTR”), are considered “purpose-built” international courts that are designed to prosecute crimes, which by their very nature, are “often committed by state officials in pursuance of state policy.”<sup>570</sup> International law has, during the last several years, set aside the immunities to which these state officials are entitled through the statutes that establish the international courts. The elimination of these immunities is to allow the prosecution of state officials who engage in activities that violate *jus cogens* norms (e.g., international crimes) without such constraints as state immunity.<sup>571</sup> What remains unclear is the place of immunity for state officials before national courts.

It appears that there is a general consensus among legal scholars and human rights activists, especially in the West, “that there is an exception from immunity when former leaders are prosecuted in foreign courts for international crimes.”<sup>572</sup> In addition, significant developments in international law, particularly in international treaties, which provide “for the exercise by states parties of extra-territorial jurisdiction over crimes that are themselves defined as official acts, or that are linked closely with such acts,

---

568. *Id.*

569. In addition to Charles Taylor and Hissène Habré, the former prime minister of Rwanda, Jean Kambanda, was convicted of international crimes before the International Tribunal for Rwanda, and Sudan’s president, Omar al-Bashir, was indicted by the International Criminal Court for war crimes, crimes against humanity, and genocide. *See, e.g.,* JOHN LAUGHLAND, *A HISTORY OF POLITICAL TRIALS: FROM CHARLES I TO SADDAM HUSSEIN* 207, 210 (2008) (detailing, inter alia, the trials Jean Kambanda and Charles Taylor); Paul Moorcraft, *Omar Al-Bashir and Africa’s Longest War* 81 (2015) (detailing, inter alia, arrest warrants issued by the ICC against Sudanese president, Omar al-Bashir).

570 Jonathan Foakes, *Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts*, CHATHAM HOUSE BRIEFING PAPER, IL BP 2011/02 (November 2011), <https://www.chathamhouse.org/publications/papers/view/179865>.

571. *Id.*

572. *Id.*

---

---

suggests that international law now contemplates the prosecution in national courts of foreign officials accused of such crimes.”<sup>573</sup>

It has been argued that with respect to the commission of international crimes, international law rules that deal with State immunity must strike a fair balance between “the need to ensure that undue interference with the functioning of foreign states is avoided and the need to ensure that those who perpetrate international crimes are punished.”<sup>574</sup> Senior state officials, diplomats serving their country abroad, and other officials who are abroad on special missions, “are entitled to immunity and may not be arrested or subjected to prosecution while in office or working as part of the mission.”<sup>575</sup> However, the situation is not clear for two categories of individuals: (1) other state officials; and (2) former state officials, regardless of the rank that they held during their tenure of service. The recent development of the rule of universal jurisdiction has provided States with the wherewithal to prosecute any individual within their territory who commits certain international crimes, regardless of the nationality of the individual in question and also irrespective of where the crime was committed.

The States Parties to the Rome Statute of the International Criminal Court went beyond developments in international customary law and subjected all state officials to the jurisdiction of the ICC and expressly removed the international law immunities of senior state officials, including heads of state. Article 27 of the Rome Statute states as follows:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.<sup>576</sup>

---

573. *Id.*

574. Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 432 (2004).

575. *Id.*

576. *Rome Statute of the International Criminal Court*, *supra* note 116.

The Rome Statute provided, not only for prosecution by the ICC, but also for “the possibility that senior officials may be arrested and surrendered to the ICC by other states.”<sup>577</sup> Of course, there is Article 98 of the Rome Statute, which states as follows:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>578</sup>

The interpretation of the provisions of Article 98, as preserving the international law immunities of officials of States Parties to the Rome Statute when those individuals are in a third State, must ultimately be rejected because it would invalidate or render ineffective certain parts of Article 27. Article 27 subjects all persons, regardless of official capacity, to the jurisdiction of the ICC.

Many international legal scholars have argued that the “conferral of a power on states to arrest a visiting serving head of state or a serving ambassador is very far-reaching but is probably the only way in practice that such persons will be subjected to the jurisdiction of the Court” (i.e., the ICC).<sup>579</sup> Although the ICC can issue arrest warrants, it does not have the wherewithal to arrest those individuals listed in its warrants—it must rely on States Parties to do so. Hence, the cooperation of States Parties is very important and critical to the international community’s efforts to combat impunity. The determination of the international community to fight impunity and bring all perpetrators of international crimes to justice is fully reflected in the Rome Statute’s Preamble.<sup>580</sup>

---

577. Akande, *supra* note 574.

578. *Rome Statute*, *supra* note 116, art. 98.

579. Akande, *supra* note 574, at 433.

580. *Rome Statute*, *supra* note 116, preamble.

The States Parties to this Statute, [a]ffirming 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 by enhancing international cooperation, [d]etermined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes, [r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, [r]esolved to guarantee lasting respect for and the enforcement of international justice.<sup>581</sup>

Given this determination by the international community to fully confront impunity and significantly enhance respect for human rights, the Rome Statute must necessarily be construed only in a way that enhances the ability of the international community to bring perpetrators of international crimes to justice. That applies, as stated in Article 27(1), “official capacity,” even as “Head of State or Government,” cannot be used to “exempt a person from criminal responsibility” under the Rome Statute.<sup>582</sup>

State immunity, it has been argued, is based on the independence and sovereign equality of States.<sup>583</sup> Nevertheless, “where a state is acting in support of an international tribunal,” such as the ICC, “it is appropriate to set this principle aside.”<sup>584</sup> One cannot apply the maxim *par in parem non habet imperium*<sup>585</sup> given the fact that the issue is not one of a conflict between two sovereign States<sup>586</sup> over who should exercise jurisdiction over the individual being accused of international crimes. Here, the entity seeking the arrest and extradition is not a State with sovereign equality to the arresting State but the ICC. Nevertheless, it is important to emphasize the fact that “this waiver of

---

581. *Id.*

582. *Id.* art. 27(1).

583. See HAZEL FOX AND PHILLIPPA WEBB, *THE LAW OF STATE IMMUNITY* 30 (2013).

584. Akande, *supra* note 574, at 433.

585. This is the principle in public international law that one sovereign power cannot exercise jurisdiction over another sovereign power. This is the basis of the act of state doctrine and sovereign immunity. See, e.g., XIAONDONG YANG, *STATE IMMUNITY IN INTERNATIONAL LAW* 52–55 (2012).

586. The State that is arresting the individual that is alleged to have committed international crimes and the one that seeks extradition and subsequent prosecution. Specifically, the maxim *par in parem non habet imperium* means that “equals cannot exercise jurisdiction over one another”—that is, “no State can claim jurisdiction over another Sovereign State.” ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 50 (2008).

immunity vis-à-vis other states applies only when the ICC requests an arrest and surrender and not in relation to domestic prosecutions.”<sup>587</sup>

Of course, it is important to note that although the ICC may exercise jurisdiction over the nationals and officials of States that are not parties to the Rome Statute, there are no provisions in the Rome Statute that affect the immunities that States that are not parties to the Rome Statute would otherwise enjoy.<sup>588</sup> Hence, Article 98 of the Rome Statute is quite instructive—it instructs the ICC and States Parties that

State officials of nonparties are not to “interfere with those officials of nonparties who ordinarily possess immunity in international law.”<sup>589</sup>

## VI. COMBATING IMPUNITY IN AFRICA: THE WAY FORWARD

### A. Introduction

The main issue in this paper is how Africans can fight impunity and improve respect for human rights. Immunity, especially for Heads of State and Government, as well as other senior State officials, is a major problem for the struggle against impunity in many countries around the world, including those in Africa. Nevertheless, during the last several years, it has become evident that the international community is no longer willing to allow individuals, regardless of their public positions, to assert immunity in an international court in order to bar their indictment, arrest or trial for war crimes or crimes against humanity.<sup>590</sup> It should not matter if the person being indicted is a serving or former head of state or official; what is critical in the fight against impunity is that there exists a competent international criminal court that is vested with the power to override sovereign immunities.<sup>591</sup>

---

587. Akande, *supra* note 574, at 433.

588. *Id.*

589. *Id.*

590. Robertson, *supra* note 561, at 667.

591. *Id.* The international community now has such a court in the Rome Statute’s International Criminal Court (ICC). The ICC withdrew its case against Uhuru Kenyatta in December 2014, after the court was unable to show that it had sufficient evidence to proceed. See Marlise Simons and Jeffrey Gettleman, *International Court Ends Case Against Kenyan President in Election Unrest*, N.Y. TIMES, Dec. 5, 2014, <https://www.nytimes.com/2014/12/06/world/africa/uhuru-kenyatta-kenya-international-criminal-court-withdraws-charges-of-crimes-against-humanity.html> (last visited Aug. 13, 2018). On April 5, 2016, the ICC withdrew charges of crimes against humanity against Deputy President William Ruto due to a lack of evidence. See Marlise Simons and Jeffrey Gettleman, *International Criminal Court*

In the courts of the various States, immunity may be asserted “under municipal law to bar civil claims against incumbent or retired officials which are based on the commission of criminal offenses.”<sup>592</sup> Nevertheless, in “international civil courts or arbitral tribunals” that apply international law, “there is no reason in principle why immunity claims should not be overridden when the claim is based on commission of crimes against humanity.”<sup>593</sup> The international community has already applied this principle in, for example, the trials of former heads of state Charles Taylor and Hissène Habré,<sup>594</sup> as well as the failed prosecutions of Uhuru Kenyatta and William Ruto.<sup>595</sup>

The Statute of the Special Court for Sierra Leone has what has been referred to as “an immunity-busting clause.”<sup>596</sup> Nevertheless, that provision alone is not enough to provide the court with the wherewithal to bring national leaders who commit international crimes to justice. In addition to the fact that the international court’s competence to override state immunity must bear what has been referred to as the “imprimatur of . . . international consensus,”<sup>597</sup> the international community must support such an effort. The court must not just be one that can apply international law or one that has been set up through the concluding of an international treaty. Take the ICC, for example. Granted, it is an international tribunal created by an

---

*Drops Case Against Kenya’s William Ruto*, N.Y. TIMES, Apr. 5, 2016, <https://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html>.

592. Robertson, *supra* note 561, at 667.

593. *Id.*

594. Taylor, former president of Liberia, was prosecuted by the Special Court for Sierra Leone and Habré, former president of Chad, was tried by the Extraordinary African Chambers.

595. Kenyatta and Ruto were, at the time of their indictment by the International Criminal Court, president and vice president of Kenya respectively. The pair won the 2017 presidential election in Kenya and are now, respectively, president and vice president of the country. *See, e.g.*, Kimiko de Freytas-Tamura, *President Uhuru Kenyatta is Declared Victor of Kenyan Election*, N.Y. TIMES, Aug. 11, 2017, <https://www.nytimes.com/2017/08/11/world/africa/kenya-uhuru-kenyatta-president-election.html> (last visited Oct. 27, 2018); Lauren Said-Moorhouse, Susannah Cullinane & Briana Duggan, *Uhuru Kenyatta Wins Disputed Kenya Presidential Rerun*, CNN INTERNATIONAL, Oct. 31, 2017, <https://www.cnn.com/2017/10/30/africa/kenya-election-rerun-results/index.html>.

596. Robertson, *supra* note 561, at 667.

597. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 n.78 (S.D.N.Y. 2001). If, for example, such a court is created by or with the full support of the U.N. Security Council, or other important U.N. organ, it would bear this imprimatur of international consensus. The Special Court for Sierra Leone, for example, was a creation of the United Nations and the Government of Sierra Leone and hence, was clothed with the imprimatur of international consensus.

international treaty. Nevertheless, it is clothed with other important elements that make it a true international court, capable of overriding immunity claims when they are based on the commission of crimes against humanity. First, it was established by an international treaty—the Rome Statute.<sup>598</sup> Second, it entered into force on July 1, 2002 and only after at least sixty States had ratified the treaty. Finally, eighteen *international* judges were elected to serve on the court.

But what about the Special Court for Sierra Leone, does it fall into this category? It was established by treaty to which the U.N. Security Council (“UNSC”) is party; it was expressly clothed with “immunity-busting jurisdiction”;<sup>599</sup> it is made up of a “majority of international judges and an international prosecutor,”<sup>600</sup> and its establishment was initiated and supported by the U.N. Security Council, which was acting on behalf of all members of the United Nations. As argued by many scholars, when the UNSC issued Resolution 1315, in which it directed the Secretary-General to “negotiate an agreement with the Government of Sierra Leone to create an independent and special court consistent with this Resolution,”<sup>601</sup> it was acting on behalf of all the members of the United Nations. In Resolution 1315, the UNSC recommended that the Special Court for Sierra Leone “should have personal jurisdiction over persons who bear the greatest responsibility for the commission of [crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone], including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”<sup>602</sup>

An international court, such as the ICC, which is empowered with the jurisdiction to prosecute individuals for international crimes, would, unlike a domestic court, be able to confront the sovereign immunity issue from an international law perspective without being bound by amnesty clauses in national constitutions.<sup>603</sup> As has been made clear by many international legal

---

598. *Rome Statute*, *supra* note 116.

599. Robertson, *supra* note 561, at 668.

600. *Id.*

601. U.N. Security Council, *Res. 1315 (2000)* ¶ 1, adopted by the Security Council at its 4186th meeting, on Aug. 14, 2000, <http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf>.

602. Robertson, *supra* note 561, at 668.

603. For example, in the case of Cameroon’s head of state, a domestic court would be bound by Article 53(3) of the Constitution, which grants the President of the Republic immunity for any crimes committed while in office. *See Law No. 2008-1 of 14 April 2008 to amend and Supplement Some Provisions of Law No. 96-6 of 18 January 1996 to amend*

---

---

scholars, international law, unlike domestic or national law, “operates in a different dimension to local law and overrides pardons, amnesties and immunities when the charge is genocide or the commission of crimes against humanity.”<sup>604</sup> Reference is usually made to former Chilean dictator, Gen. Augusto Pinochet, who, during his many years in power, granted himself and his close associates, constitutional immunities. Nevertheless, these immunities, although legal in Chile, could not override the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>605</sup> In the case of impunity in Africa, then, an international court (such as the ICC) or a continental court established under the auspices of the African Union, supported by the international community, and clothed with impunity-busting jurisdiction, should provide the continent with the wherewithal to fight impunity and improve recognition and respect for human rights. Nevertheless, it is important to mention that the most effective way to deal with impunity in the continent is for each country to provide itself with institutional arrangements that adequately constrain the State and minimize the chances that any government official, regardless of his or her position, can escape prosecution and punishment for their engagement in international crimes. An international court, such as the ICC, should be a court of last resort.

*B. International Criminal Justice is Here to Stay*

The trial of Charles Taylor, a former head of state, was authorized by the U.N. Security Council.<sup>606</sup> It was the U.N. Security Council, which granted the ICC the authorization to investigate and prosecute incumbent Sudanese president, Omar al-Bashir. In its Resolution 1593 (2005), adopted at its 1593th meeting on March 31, 2005, the UNSC referred the situation in

---

*the Constitution of 2 June 1972*, art. 53(3), <http://www.wipo.int/edocs/lexdocs/laws/fr/cm/cm013fr.pdf>.

604. Robertson, *supra* note 561, at 669.

605. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 and entered into force on June 26, 1987, in accordance with Article 27(1), <https://www.ohchr.org/en/professionalinterest/pages/CAT.aspx>. For example, Article 2(2) states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

606. The Statute of the Special Court for Sierra Leone, which established the Special Court for Sierra Leone, was established through an agreement between the United Nations and the Government of Sierra Leone, pursuant to U.N. Security Council Resolution No. 1315 of 2000.

Sudan's Darfur region to the Prosecutor of the ICC. After investigation, al-Bashir was later charged by the ICC on ten counts of genocide, crimes against humanity, and war crimes. There were two warrants issued by the ICC against al-Bashir, one on March 4, 2009 and the other on July 12, 2010.<sup>607</sup> Chad's former president, Hissène Habré, was tried and convicted by the Extraordinary African Chambers within the courts of the Republic of Senegal ("EAC"), which was set up under an agreement between the African Union and Senegal. The EAC was empowered to prosecute international crimes committed on the territory of the Republic of Chad during the period June 7, 1982 to December 1, 1990. The EAC was expressly provided with an impunity-busting provision, when it stated in Article 20 that "[a]n amnesty granted to any person falling within the jurisdiction of the Extraordinary African Chambers with respect to the crimes referred to in Articles 5 to 8 of this Statute shall not be a bar to prosecution."<sup>608</sup>

In addition to supporting the establishment of an international court and its support for special courts such as the Special Court for Sierra Leone and the Extraordinary African Chambers, the international community, which includes countries in Africa, has shown its interest and determination to fight impunity in other ways. For example, at the 2005 World Summit, the global community endorsed the Responsibility to Protect ("R2P"), as a global political commitment to fight the crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity. The R2P is designed to complement existing programs, such as economic sanctions, mediation, etc., to fight impunity and prevent subjection of citizens to gross human rights abuses. The R2P was endorsed by all Member States of the United Nations—the African countries not only endorsed the global R2P, but have developed a regional approach called "non-indifference."<sup>609</sup> Article 4(h) of the Constitutive Act of the African Union grants the African Union the "right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."<sup>610</sup> The R2P can be considered part of the overall global architecture to fight impunity and promote respect for human rights.

---

607. See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.

608. *Statute of the Extraordinary African Chambers*, [http://www.forumchambre-safricaines.org/docs/Statute\\_of\\_the\\_Extraordinary\\_African\\_Chambers.pdf](http://www.forumchambre-safricaines.org/docs/Statute_of_the_Extraordinary_African_Chambers.pdf) (last visited Aug. 13, 2018).

609. For more on Africa's policy of non-indifference, see Ndubuisi Christian Ani, *The African Union Non-Indifference Stance: Lessons from Sudan and Libya*, 6 AFRICAN CONFLICT & PEACEBLDG. REV. 1 (2016).

610. *Constitution Act of the African Union*, [https://au.int/sites/default/files/pages/32020-file-constitutiveact\\_en.pdf](https://au.int/sites/default/files/pages/32020-file-constitutiveact_en.pdf) (last visited Aug. 13, 2018).

Another way that the global community has shown its determination to fight impunity can be found in the work of the U.N. Commission on Human Rights (“UNHR”). Beginning in 1998, with the issuance of its Resolution 1998/53, in which it indicated its interest to combat impunity and prevent the violation of international human rights and humanitarian law, the UNHR has developed the *Principles for the Protection of Human Rights through Action to Combat Impunity*.<sup>611</sup> Not only have these Principles underscored the global community’s desire to fully confront impunity, but they have emerged as an important foundation for the development of national anti-impunity programs and institutions. In addition to the fact that they provide an official definition for “impunity,” as well as for “serious crimes under international law,” they impose several obligations on Member States of the United Nations that can significantly enhance the fight against impunity. While States must take effective action to combat impunity, they must also guarantee victims of international crimes and their relatives, the right to know and the right to justice.<sup>612</sup>

Whether one is reviewing the legal literature, especially that dealing with international human rights and humanitarian law, documents produced by the U.N. Commission on Human Rights, as well as those issued by regional organizations, such as the African Union, the evidence points to a determination by the global community to fight impunity and improve the environment for the protection of human rights through the minimization of engagement in crimes that violate *jus cogens* norms. It appears that the global fight against impunity is here to stay.

### *C. Fighting Impunity in Africa: Is There a Role for the Rule of Law?*

Impunity in any country, including those in Africa, is directly related to the nature of each country’s laws and institutions and specifically to whether the country’s governing process is undergirded by the rule of law. For example, according to the Principles for the Protection and Promotion of

---

611. See U.N., *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, Feb. 8, 2005, <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx> (last visited Oct. 19, 2018).

612. Comm’n on Human Rights, *Promotion and Protection of Human Rights: Impunity, Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, *Addendum: Updated Set of Principles for the Protection of Human Rights Through Action to Combat Impunity*, U.N. Doc. E/CN.4/2005/102/Add.1, Feb. 8, 2005, <https://undocs.org/E/CN.4/2005/102/Add.1>.

Human Rights Through Action to Combat Impunity,<sup>613</sup> “[i]mpunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and dully punished.”<sup>614</sup>

Impunity regularly occurs in States with dysfunctional institutional arrangements, that is, those in which the laws do not adequately constrain the State and hence, some individuals, primarily senior members of the government, consider themselves above the law and act accordingly. In many of these States, the law is not supreme and many civil servants and political elites usually do not accept and respect the law. It is often the case that in such States, the governing process is not undergirded by the rule of law and civil servants and politicians (i.e., state custodians) routinely engage in various forms of opportunism (e.g., corruption and rent seeking) to maximize their private interests at the expense of those of the general public.

The dysfunctional nature of the governing process means that many of the state custodians who engage in corrupt and other illegal activities are hardly ever held accountable for their opportunism. For example, under the laws and institutions that currently exist in the Republic of Cameroon, it is virtually impossible for the judiciary to prosecute a member of President Biya’s inner-circle who has been alleged to have engaged in corruption and other criminal activities. In fact, since November 2016, many of the country’s security forces have attacked and killed many peaceful demonstrators in the country’s Anglophone Regions, as well as burned down many Anglophone villages. Nevertheless, there is no evidence that the government has launched an investigation into these atrocities and other violations of international human rights and humanitarian law.<sup>615</sup>

As determined by several scholarly studies, many of those individuals who are members of the President’s inner-circle are usually referred to as “untouchables.”<sup>616</sup> These individuals usually “benefit from special protection

---

613. See Updated Set of Principles, *supra* note 199.

614. *Id.* at Principle 1.

615. See, e.g., Isaac Mugabi, *Cameroonian Army Kills Scores in Anglophone Region*, DW NEWS, May 27, 2018, <https://www.dw.com/en/cameroonian-army-kills-scores-in-anglophone-region/a-43950288>; Peter Zongo, “*This is Genocide*”: Villages Burn as War Rages in Blood-soaked Cameroon, THE GUARDIAN (UK), May 30, 2018, <https://www.theguardian.com/global-development/2018/may/30/cameroon-killings-escalate-anglophone-crisis>.

616. See, e.g., Charles Manga Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY-CASE STUDIES 234 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000).

in the form of immunities which defy exact legal rationalization.”<sup>617</sup> Professor Charles Manga Fombad, an expert on the judiciary system and constitutional law in Cameroon, states that within Cameroon’s legal system, there exist two types of protections for untouchables: “One is the right of the Minister of Justice to intervene at any stage and stop [court] proceedings. The other is the rule that some specified categories of civil servants, as well as those of senior ranks, can only be prosecuted with the fiat of their ministers. Thus, complaints of corruption against the police, gendarmes, or the military forces, for example, must be made to their superior officers who have an absolute discretion on whether to allow the culprit to be prosecuted.”<sup>618</sup> It is no wonder that many people in Cameroon, especially those who are not politically connected, do not trust their legal and judicial systems. It is also not surprising that impunity has become quite endemic in the country.

Today, in Cameroon and many other countries in Africa,<sup>619</sup> the government has actually emerged as the source of most of the violence directed at citizens. In these countries, many state- and non-state actors routinely engage in the violation of the fundamental rights of citizens without any fear of being held accountable. In many of these countries, perpetrators of heinous crimes continue to enjoy immunity from prosecution, either because the government does not have the capacity to hold these individuals accountable or is unwilling to do so. It is no wonder that during the last few decades Africa has emerged as the region of the world that has suffered the most from or has experienced a significantly large amount of the atrocities committed in the world.<sup>620</sup>

Studies of impunity in Africa point to weak and dysfunctional legal and judicial systems as a major reason why perpetrators of heinous crimes are

---

617. *Id.* at 252.

618. *Id.*

619. Examples include South Sudan, Democratic Republic of Congo, Equatorial Guinea, Sudan (Republic of), and Zimbabwe.

620. These atrocities include war crimes, genocide, extra-judicial killings, and other violations of international human rights and humanitarian law. *See, e.g.*, Sasha van Katwyk, *The Fight over Impunity: How Political Forces are Misdirecting the Efforts to Establish Accountability in Africa*, Atlantic International Studies Organization, [https://books.google.com/books?id=PCOeAwAAQBAJ&printsec=frontcover&dq=the+rule+of+law:+the+common+sense+of+global+politics&hl=en&sa=X&ved=0ahUKEwj-4e\\_E3ZLeAhWtFzQIHVhDCXQQ6AEIzAA#v=onepage&q=the%20rule%20of%20law%3A%20the%20common%20sense%20of%20global%20politics&f=false](https://books.google.com/books?id=PCOeAwAAQBAJ&printsec=frontcover&dq=the+rule+of+law:+the+common+sense+of+global+politics&hl=en&sa=X&ved=0ahUKEwj-4e_E3ZLeAhWtFzQIHVhDCXQQ6AEIzAA#v=onepage&q=the%20rule%20of%20law%3A%20the%20common%20sense%20of%20global%20politics&f=false) (last visited Aug. 14, 2018). *See also* GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (2013) (putting forth a case for holding political and military leaders accountable in international courts for genocide, torture, and mass murder).

rarely ever brought to justice. Thus, although the international community—through international tribunals, such as the International Criminal Court—is very important to the struggle to combat impunity in Africa, an effective approach is one that begins with efforts to improve and strengthen national legal and judicial systems, since the latter are the first line of defense against impunity. Impunity is likely to be minimized in States that have governance processes that are undergirded by the rule of law. For example, fidelity to the rule of law in a State implies that the law is supreme and all citizens, regardless of their public positions, are subject to the law. Hence, under such a system, no one is above the law; even heads of state and government, as well as Ministers of Foreign Affairs, must subject themselves to the law. Thus, if any of these people commit international crimes, the municipal legal system can bring them to justice. In the following sections, we examine the rule of law and show why the most effective anti-impunity program must begin with making sure that each African country provides itself with a governing process undergirded by the rule of law.

i. Introduction to the Rule of Law

For more than a hundred years, legal and other scholars have struggled to define the concept referred to as the “rule of law.”<sup>621</sup> It is generally believed that the foundation for the modern definition of the rule of law was provided by British jurist and constitutional theorist, Albert Venn Dicey,<sup>622</sup> who argued that the rule of law must embody three important concepts: (1) the law is supreme; (2) all citizens are equal before the law; and (3) the rights of individuals must be established through court decisions—this is a principle that must be accepted and respected.<sup>623</sup>

In recent years, notable contributors to the definition of the rule of law have included the late Rt. Hon. Lord Bingham of Cornhill KG,<sup>624</sup> a very distinguished British jurist and legal philosopher, who, before he passed

---

621. See CHRISTOPHER MAY, *THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS* (2014) (examining, *inter alia*, the role played by the rule of law in political economy).

622. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1915) (providing a definition for the rule of law).

623. *Id.* at 179.

624. See TOM BINGHAM, *THE RULE OF LAW* (2011) (examining, *inter alia*, the rule of law, providing a definition for it, and arguing that the rule of law is the foundation for the modern state system).

away in 2010, served as Master of the Rolls,<sup>625</sup> Lord Chief Justice,<sup>626</sup> and Senior Law Lord.<sup>627</sup>

On November 16, 2006, at the Center for Public Law, University of Cambridge,<sup>628</sup> Lord Bingham spoke about eight sub-rules, which, he argued, comprised the rule of law.<sup>629</sup> He went on to argue that “the core of the existing principle” of the rule of law is that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking into effect (generally) in the future and publicly administered in the courts.”<sup>630</sup> Lord Bingham elaborated the following sub-rules, which he argued undergird the rule of law in any society:

1. the law must be accessible and so far as possible intelligible, clear and predictable;
2. questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. the law must afford adequate protection of fundamental human rights;
5. means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
6. ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the

---

625. See generally GARY SLAPPER AND DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* (8th ed. 2006) (explaining the position and roles of the Keeper or Master of the Rolls and Records of the Chancery of England, commonly referred to as the Master of the Rolls).

626. CONSTITUTIONAL COMMITTEE, *CONSTITUTIONAL REFORM ACT, 2005: REPORT WITH EVIDENCE, 2005–6*, HL 83, at 5 (UK) (defining and explaining the roles of the Lord Chief Justice of England and Wales before and after the Constitutional Reform Act of 2005).

627. REBECCA HUXLEY-BINNS & JACQUELINE MARTIN, *UNLOCKING THE ENGLISH LEGAL SYSTEM* (3d ed. 2010) (explaining the “Law Lord” system as it applies to England and Wales).

628. Bob Hepple, *Sir David Williams Obituary*, *THE GUARDIAN* (UK), Sep. 22, 2009, <https://www.theguardian.com/uk/2009/sep/22/david-williams-obituary>.

629. Thomas Bingham, President of the Supreme Court of the United Kingdom, *The Rule of Law*, Lecture at Sir David Williams Lecture (Nov. 16, 2006), *The Rule of Law’ Text Transcript*, Center for Public Law, University of Cambridge (UK), <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures2006-rule-law/rule-law-text-transcript>.

630. *Id.*

- purpose for which the powers were conferred and without exceeding the limits of such powers;
7. that adjudicative procedures provided by the state should be fair; and
  8. the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.<sup>631</sup>

Another modern scholar who has contributed to the definition of the rule of law is Professor Robert Stein.<sup>632</sup> In examining the rule of law, Stein refers to Lord Bingham's work and interprets the latter's sub-rules to mean that "the law is superior, applies equally, is known and predictable, and is administered through a separation of powers."<sup>633</sup> Stein then proffers his own definition of the rule of law and argues that a State, which is governed by institutional arrangements that guarantee the rule of law must be characterized by the following:

1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.
2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.
3. Members of society have the right to participate in the creation and refinement of laws that regulate their behaviors.
4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.
5. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.<sup>634</sup>

---

631. *Id.*

632. At the time of writing this paper, Robert Stein was the Everett Fraser Professor of Law at the University of Minnesota Law School. *See generally* Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT'L L. 293 (2009) (examining the rule of law generally).

633. *Id.* at 301.

634. *See id.* at 302. Stein argues that although his definition is not revolutionary, it is based on the writings of experts in legal philosophy.

Among organizations that have also taken an active part in defining and promoting the rule of law are the American Bar Association (“ABA”) and the United Nations. Arguing that “[t]he rule of law does not depend upon a U.S.-style separation of powers,” the ABA states that “[t]he key point is that every form of government has to have some system to ensure that no one in the government has so much power that they can act above the law.”<sup>635</sup> Although the rule of law consists of several elements, the most important for the fight against impunity in Africa is that no one, “not even the people who hold leadership positions in the government, including the executive, judicial officers, and legislators, is above the law—the law is supreme.”<sup>636</sup>

The United Nations has also provided a definition for the rule of law and in doing so, it stated as follows:

The ‘rule of law’ refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>637</sup>

Despite the tremendous improvements in governance systems in many African countries and the fact that many of these countries have actually transitioned to democratic electoral systems, the rule of law remains an ideal that most citizens seek and hope to achieve some day. A governing process that is undergirded by the rule of law will ultimately enhance the prosecution of anyone, regardless of his economic and political position, for both domestic and international crimes. Hence, within such a governance system, impunity will be minimized.

---

635. *Part I: What is the Rule of Law?* ABA DIV. FOR PUB. EDUC., DIALOGUE ON THE RULE OF LAW 4, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf> (last visited Aug. 14, 2018).

636. *Id.*

637. U.N., *United Nations and the Rule of Law: What is the Rule of Law?* <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Aug. 14, 2018).

ii. Elements of the Rule of Law

Where there is fidelity to the rule of law, even individuals who serve in government must obey the law. This implies that everyone is subject to the law and are bound by it. Thus, the first element of the rule of law is that the law is supreme. Former Associate Justice of the U.S. Supreme Court, Justice Anthony Kennedy, has stated that “[t]he Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all of its officials.”<sup>638</sup>

It is not possible for a country to effectively maintain the rule of law if the majority of its citizens do not voluntarily accept and respect the law. If the majority of a State’s citizens do not voluntarily accept and respect the laws, it would be very difficult and perhaps, impossible, for the enforcement arm of the government to fully and effectively enforce the law—that is, to maintain law and order. Within such a State, ensuring compliance to the laws would be very costly and the government would be forced to devote a significant portion of the gross domestic product to maintaining law and order. Where governments have to devote most public revenues to law-and-order activities, they may not be able to meet the public’s demand for critical services for development, which include health care, child nutrition, clean water, affordable housing, and human capital development. Thus, the second element of the rule of law is that the majority of citizens must voluntarily accept and respect the law.<sup>639</sup>

Throughout its existence, the U.S. Supreme Court has made many rulings that have contributed to the development of jurisprudence on the rule of law. For example, in *United States v. United Mine Workers*,<sup>640</sup> the United States Supreme Court held as follows:

In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent

---

638. Stein, *supra* note 632, at 299.

639. See Margaret Levi, Tom R. Tyler & Audrey Sacks, *The Reasons for Compliance with Law*, UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 70 (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012) (arguing, *inter alia*, that “voluntary compliance with the law is influenced by individuals’ views of the government’s legitimacy” and that “individuals’ conception of legitimacy depends significantly on the government’s trustworthiness (including its perceived competence) and its commitment to procedural justice”).

640. *United States v. United Mine Workers*, 330 U.S. 258 (1947) (holding that a trial court appropriately issued a restraining order to prevent a strike).

judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.<sup>641</sup>

Virtually all of the definitions for the rule of law that one can find in the legal literature share the U.S. Supreme Court's ruling in *U.S. v. United Mine Workers*<sup>642</sup> that "[t]here can be no free society without law administered through an independent judiciary."<sup>643</sup> According to Professor Erwin Chemerinsky,<sup>644</sup> "[a]n independent judiciary is essential to the rule of law."<sup>645</sup> While stating that "[t]he 'rule of law' refers to a principle of governance in which all persons, institutions and entities, public or private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated,"<sup>646</sup> the United Nations also acknowledged that the independent judiciary is a very important element of the rule of law. Thus, the third element of the rule of law is judicial independence.

In every State, the law can only function effectively if citizens "are aware of, understand, and appreciate the law."<sup>647</sup> Robust and broad-based educational programs, including especially those targeting heretofore marginalized and deprived groups,<sup>648</sup> can help citizens, not only understand the laws, but also appreciate them and the role that they play in their daily lives. These educational programs must be considered as supplementing but not replacing the participation of citizens in constitutional design and the enactment of post-constitutional laws. Both processes—the design of the

---

641. *Id.* at 312.

642. *Id.* (citing historical legal authority).

643. *Id.* (warning of the chaos that could arise should a man be allowed to determine for himself what the law is).

644. See Erwin Chemerinsky, *Toward a Practical Definition of the Rule of Law*, 46 JUDGES' J. 4, 6 (2007) (quoting Joseph Raz, *The Rule of Law and Its Virtue*, LIBERTY AND THE RULE OF LAW 3–21 (Robert J. Cunningham ed. 1979) (emphasizing that this element is part of the definition of the rule of law)).

645. *Id.* at 8 (emphasizing this principle as "unassailable").

646. See Robert H. Wagstaff, *The Aftermath of Terrorism: Rule of Law Applies to Detainees in U.S. and U.K.*, 58 VA. LAWYER Mag., February 2010, at 32 (quoting U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 6, U.N. doc. S/2004/616.23 (August 2004) (stating the principle must also conform with international human rights principles)).

647. John M. Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 999 (2013).

648. That is, groups that have historically been marginalized and excluded from participation in political discourse, such as women, young people, rural inhabitants, religious and ethnic minorities, and the urban poor.

constitution and the enactment of post-constitutional laws—must be open, transparent and participatory. The application of laws must be predictable and uniform and must not be capricious or arbitrary.<sup>649</sup> Thus, the fourth and fifth elements of the rule of law are openness and transparency, and predictability.

It is argued that the rule of law developed in many countries “around the belief that a primary purpose of the rule of law is the protection of certain basic rights.”<sup>650</sup> In fact, many of the freedom fighters who participated in the struggle against colonialism and for independence in the African colonies believed that independence would provide them with the opportunity to rid themselves of the dysfunctional European institutions and replace them with institutional arrangements designed exclusively by Africans and which would be undergirded by the rule of law.<sup>651</sup> It was generally hoped that the post-independence constitutional order would adequately constrain the state and prevent all government workers, including even high-ranking elites from immunizing themselves from being held accountable for their criminal activities. Most importantly, post-independence laws and institutions were expected to guarantee recognition and respect for human rights, as well as fully constrain non-state actors so that they, too, could not violate the fundamental human rights of their fellow citizens, including especially those of women, children, and ethnic and religious minorities. Thus, the sixth element of the rule of law is the recognition and protection of the fundamental human rights of citizens.

### iii. The Rule of Law and the Struggle to Combat Impunity in Africa

Impunity takes place when the government is either unwilling or unable to enforce the law or selectively does so, allowing some individuals to act above the law. Where the government is not enforcing the law because it does not have the capacity to do so, the solution lies in the reconstruction of the state to provide it with the wherewithal to do so. If the government is simply unwilling to enforce the laws, then the people, through a participatory and inclusive constitution-making process, should reconstruct the state and provide laws and institutions that adequately constrain the government and

---

649. Part I: What is the Rule of Law?, *supra* note 635, at 5.

650. Part I: What is the Rule of Law?, *supra* note 635 (stating that the United States was the first nation to produce a document that gives rights to its people and binds the government to those rights).

651. See generally John M. Mbaku and Julius O. Ihonvbere, *Introduction: Issues in Africa's Political Adjustment in the New Global Era*, THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 1, 2 (John M. Mbaku & Julius O. Ihonvbere eds., 2003).

---

---

place those who serve in it in a position in which they cannot avoid being held accountable to both the constitution and the people.

In a study of administrative tribunals and common-law courts in the United States, John Dickinson<sup>652</sup> determined that the law is an important check on the exercise of government power.<sup>653</sup> Not only can the law force government officials to perform their assigned jobs, but it can also prevent them from acting opportunistically and engaging in activities that violate the fundamental human rights of citizens. Hence, the ability of the people to effectively check on the activities of those who serve in government is critical to the minimization of impunity. Legal scholars and practitioners who deal with rule-of-law issues are aware that in order for the rule of law to work effectively and fully in any country, all of that country's citizens, including its civil servants and political elites, must be subject to the laws that were agreed upon in earlier period.<sup>654</sup>

In such a legal regime, civil servants and politicians are not granted wide discretion to "either make their own laws, or subvert existing ones"<sup>655</sup> in an effort to benefit themselves or their supporters or benefactors. All the people who work in the government, including the Head of State and Government, like their fellow citizens, "must accept and respect the country's laws, subject themselves to these laws"<sup>656</sup> and refrain from engaging in activities that violate international human rights and international humanitarian law. Thus, where the law is supreme, immunity is unlikely to become pervasive.

Nevertheless, it is important to note that in countries, such as the United States, which have strong and fully-functioning rule-of-law systems, individuals or groups can still commit crimes against humanity. However, the critical point is that where the governing process is undergirded by the supremacy of law, those who commit atrocities, such as mass murder, are usually brought to justice by the country's legal and judicial system. In other words, the country's democratic institutions serve to make certain that impunity is minimized.<sup>657</sup> Thus, for African countries that are interested in

---

652. JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 32 (1927).

653. Dickinson, *supra* note 652, at 32.

654. See, e.g., Mbaku, *supra* note 647, at 964; Stein, *supra* note 632, at 301–02.

655. Mbaku, *supra* note 647, at 955.

656. John Mukum Mbaku, *Rule of Law, State Capture, and Human Development in Africa*, 33 *AM. U. INT'L L. REV.* 771, 826 (2018).

657. For example, Dylann Roof, a 21-year-old white supremacist, murdered 9 (nine) African Americans at the Emanuel African Methodist Episcopal Church in downtown Charleston, South Carolina on the evening of June 17, 2015. The dead included the church's

minimizing impunity, the principle of the supremacy of law must be a central feature of their governing processes.<sup>658</sup>

Combating impunity would be extremely difficult, if not impossible, if a majority of an African country's citizens do not voluntarily accept and respect the law. As has been stated by many legal scholars, "[i]t is very difficult for a nation to maintain the rule of law if its citizens do not respect the law."<sup>659</sup> The police, the judiciary, and other organs of the State, whose job is to maintain law and order, are most likely to perform their job more effectively and fully if the majority of the citizens voluntarily accept and respect the law. Therefore, voluntary acceptance and respect of the law by a majority of each African country's citizens is critical for the minimization of impunity.

But, how can an African country make certain that the majority of its citizens voluntarily accept and respect the laws? First, the laws that the country chooses must be "relevant to the lives of the people whose behaviors the laws are expected to regulate, reflecting their values."<sup>660</sup> Second, the laws must be developed by the people themselves and not imposed by some external actor and they must be those that "the people understand, respect, and are able and willing to obey."<sup>661</sup> If the people design the laws by themselves, without outside interference, they are likely to pick only those laws that are relevant to their daily lives and which they can obey.<sup>662</sup>

---

senior pastor, as well as state senator, Clementa C. Pinckney. In December 2016, Roof was convicted of 33 federal hate crime and murder charges stemming from the massacre. In addition, the State of South Carolina also charged Roof with nine counts of murder. In April 2017, Roof pleaded guilty to all 9 state charges and was sentenced to life imprisonment for each count. On January 17, 2017, Roof was sentenced to death. *See, e.g.*, Matt Zapposky, *Charleston Church Shooter: 'I Would Like to Make It Crystal Clear, I Do Not Regret What I Did,'* WASH. POST, Jan. 4, 2017, [https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd\\_story.html?utmterm=.339bb86ee66f](https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd_story.html?utmterm=.339bb86ee66f); Jason Horowitz, Nick Corasaniti & Asley Southall, *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES, June 17, 2015, <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html>; Glenn Smith, Jennifer Berry and Abigail Darlington, *Dylann Roof Sentenced to Death for Emanuel AMC Church Massacre*, THE POST AND COURIER (Charleston, South Carolina), Jan. 10, 2017, [https://www.postandcourier.com/church\\_shooting/dylann-roof-sentenced-to-death-for-emanuel-ame-church-massacre/article\\_3c24cc44-d729-11e6-9e5d-2f037e89bddc.html](https://www.postandcourier.com/church_shooting/dylann-roof-sentenced-to-death-for-emanuel-ame-church-massacre/article_3c24cc44-d729-11e6-9e5d-2f037e89bddc.html).

658. Mbaku, *supra* note 656, at 827.

659. *See* Part I: What is the Rule of Law?, *supra* note 635, at 5 (stating that the rule of law is an essential element of the social contract).

660. Mbaku, *supra* note 647, at 1003.

661. *Id.*

662. Mbaku, *supra* note 656, at 827–28.

The third way that an African country can secure support for its laws is to make certain that the process through which the laws are designed and adopted is open and transparent. Such a process will significantly enhance and maximize participation, as well as help citizens “know what the law is, understand the law, and make certain that the law reflects their values and is relevant to their lives, effectively enhancing compliance.”<sup>663</sup> Within such an open and transparent process, “citizens will be able to understand why some laws have been selected instead of others and why they must obey the laws.”<sup>664</sup>

Finally, in order to make certain that citizens accept and respect the laws, the laws chosen must be those that are relevant to citizens’ lives and the issues and problems that they face on a daily basis. It is critical that citizens see the law as a tool or mechanism that they can use to (1) confront their everyday problems, including organizing their private lives; (2) peacefully resolve their conflicts, including those that arise from trade and other forms of free exchange; and (3) significantly enhance their ability to undertake various activities (e.g., get married and raise a family; start a business to create wealth; and bequeath their property to their progeny) to improve their standard of living.

A major problem for governance in Africa and a source of impunity, is that the majority of citizens in each country see their institutional arrangements as foreign impositions—remnants of the dysfunctional institutions left behind by the European colonialists or, in the case of post-independence constitutions, documents that were “cobbled together by a compliant constitution-making conference or convention, and then adopted by a ‘controlled’ plebiscite.”<sup>665</sup> A critical part of the effort to fight impunity is that citizens in each country take ownership of their laws and institutions so that they can utilize them, not only to organize their private lives and undertake those activities that help them maximize their values, but also so that they can effectively check on the exercise of government power and prevent or minimize impunity.

Independence of the judiciary is very important for the fight against impunity and the minimization of atrocities committed against citizens, either by state or non-state actors. Judiciary independence is a multifaceted concept that calls for all judicial officers to be granted “security of tenure,” “financial

---

663. Mbaku, *supra* note 647, at 1003.

664. Mbaku, *supra* note 656, at 828.

665. Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 188 (1997).

security,” and “institutional independence.”<sup>666</sup> Unless a country has an independent judiciary, it would not be able to deal effectively with impunity. Thus, African countries that seek to fully and effectively prosecute all those who commit international crimes within their jurisdictions, must make certain that they have judiciaries that are independent of the executive and legislative branches of government.<sup>667</sup>

Finally, openness and transparency are absolutely necessary and important inputs into an effective anti-impunity project. First, openness and transparency make certain that citizens have adequate access to relevant information about “the functioning of the polity,” making it possible for the people to check on the exercise of government power and force civil servants and political elites to be accountable to both the people and the constitution. Such accountability invariably minimizes impunity.

Second, since corruption, which by definition, “violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral).”<sup>668</sup> Since impunity is pervasive in countries pervaded by corruption, minimizing the latter is critical to the fight against impunity.

Openness and transparency in government communication are important to the fight against impunity because they enhance the ability of citizens to effectively and fully monitor and check on the activities of their governors. Perhaps, more importantly is the fact that “transparency enhances the ability of an individual who is interested in a public policy, or thinks or believes a decision might affect them, to understand and appreciate how that decision was made or arrived at and why.”<sup>669</sup> In addition to the fact that this

---

666. See, e.g., CONST. OF THE UNITED STATES OF AMERICA art. III (showing that the framers saw these elements as very important to the independence of the judiciary. See also the South African Constitutional Court case, *De Lange v. Smuts*, 1998 (3) SA 785 (CC) ¶ 59 (holding that judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.” The Court endorsed the ruling of the Canadian Supreme Court in *Valente v. The Queen*, [1985] 2 S.C.R. 673, ¶¶ IV, V, VI (setting the standard for judicial independence in Canada).

667. This necessarily calls for a governing process within the country that is undergirded by the separation of powers with effective checks and balances. See, e.g., James Fowkes & Charles M. Fombad, SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM 1–9 (Charles M. Fombad ed., 2016) (presenting a series of essays that examine, *inter alia*, efforts by various African countries to introduce the concept of separation of powers into their constitutions).

668. John Gerring & Strom C. Thacker, *Political Institutions and Corruption: The Role of Unitarism and Parliamentarism*, 34 BRIT. J. POL. SCI. 295, 316 (2004).

669. See, e.g., Mbaku, *supra* note 647, at 1012–13.

---

---

will improve the chances that the majority of citizens will voluntarily accept and respect the law and hence, enhance compliance and the maintenance of law and order, it will also make it much more difficult for those who engage in criminal activities to go unpunished.

In general, openness and transparency provide citizens with the information that they need to monitor and check on the activities of political elites and civil servants, forcing the government to remain accountable to the constitution and the people. In addition to the fact that accountability of the government to the people and the constitution can significantly minimize corruption, it can also ensure that the laws are enforced, hence, minimizing impunity.

The key to combatting impunity in Africa lies in recognizing the fact that a country's ability to deal with impunity is highly dependent on the quality of its governing process. For, countries that have governing processes that are undergirded by a separation of powers with effective checks and balances (e.g., an independent judiciary, a robust and politically active civil society, and an independent press) are more likely to be able to bring to justice all those individuals who commit serious and egregious crimes, effectively minimizing impunity.

#### *D. International Law and the Fight Against Impunity in Africa*

While making certain that African countries have legal and judicial systems that are capable of bringing to justice individuals who commit international crimes in their jurisdictions is the first line of the fight against impunity in the continent, the second line of the struggle is international law. As discussed earlier, the international justice system, as embodied in the International Criminal Court ("ICC"), is now being recognized as the last line of defense against international crimes. In situations where certain serious crimes (e.g., war crimes, crimes against humanity, torture, and genocide) have been committed and the courts of the jurisdiction where the crimes were committed are either unwilling or unable to bring the perpetrators to justice, the ICC can be called upon, by the U.N. Security Council, or other relevant authority, to intervene and prosecute the perpetrators.<sup>670</sup>

---

670. Richard Dicker, *ICC: The Court of Last Resort*, FOREIGN POLICY, June 29, 2012, <https://foreignpolicy.com/2012/06/29/the-court-of-last-resort/>; *International Criminal Court serves as a "court of last resort,"* 2010 Jonathan I. Charney Distinguished Lecture in International Law, Vanderbilt Law School (Nashville, Tennessee) delivered by Christian Wenaweser, President of the Assembly of States Parties of the International Criminal Court, Apr. 6, 2010, <https://law.vanderbilt.edu/news/international-criminal-court-serves-as-a-court-of-last-resort/>.

The ICC has been criticized, supposedly, for being an ineffective international tool for the fight against impunity. The Court's critics have referred to the ICC's failure to successfully prove its cases against President Uhuru Kenyatta and Vice President William Ruto of Kenya, as well as the recent reversal of the conviction of Jean-Pierre Bemba, as evidence that the Court does not have the wherewithal to fight impunity and bring perpetrators of serious human rights violations to justice. In addition, many Africans have criticized the ICC and argued that it is essentially a tool of Western imperialism, designed to continue the oppression of Africa and its peoples that began in the late-19th century.<sup>671</sup> Nevertheless, some of Africa's most important moral and political leaders have argued that the ICC, rather than being a tool of Western imperialism, is actually a mechanism to force accountability in African governments and bring an end to impunity.<sup>672</sup>

Since the ICC came into being in 2002, it has indicted exclusively only Africans. The Court's first judgment was delivered in 2012 in a case against Congolese rebel leader Thomas Lubanga Dyilo, who was convicted of war crimes related to the forced recruitment of children and their subsequent use as child soldiers.<sup>673</sup> Nevertheless, the ICC has begun investigations into the possibility of ethnic cleansing in the 2008 war in the Republic of Georgia.<sup>674</sup> Despite these and other shortcomings of the ICC, and until African countries arm themselves with democratic institutions that can fully ensure the prosecution of those who commit international crimes, the ICC will remain an important player in the struggle against impunity in the continent.

As the successful prosecution of Charles Taylor by the Special Court for Sierra Leone, a court that was created by the United Nations, in cooperation with the Government of Sierra Leone, has shown, the

---

671. John Campbell, *Is the International Criminal Court a Tool of Western Imperialism? No*, THE CHRISTIAN SCIENCE MONITOR, Oct. 15, 2013, <https://www.csmonitor.com/World/Africa/Africa-Monitor/2013/1015/Is-the-International-Criminal-Court-a-tool-of-Western-imperialism-No>.

672. *Id.*

673. See Habeeb Kolade, *Is the ICC a Western Imperialist Tool Against Africa*, SWALIAFRICA, Dec. 29, 2016, <http://blog.swaliafrica.com/is-the-icc-a-western-imperialist-tool-against-africa/>; France 24, *The ICC: A Tool of Imperialism?*, FRANCE 24, Jan. 28, 2016, <https://www.msn.com/en-us/foodanddrink/foodnews/the-icc-a-tool-of-imperialism/vi-BBoO7v7>.

674. In 2016, judges at the ICC approved the opening of an official investigation into the 2008 war in the former Soviet Republic of Georgia, effectively allowing the Court to step out of Africa into a country outside the continent. See Mark Kersten, *Why Is the International Criminal Court Stepping Out of Africa and into Georgia?* WASH. POST, Feb. 5, 2016, [https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/05/why-is-the-international-criminal-court-stepping-out-of-africa-and-into-georgia/?utm\\_term=.b51a6b027cb5](https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/05/why-is-the-international-criminal-court-stepping-out-of-africa-and-into-georgia/?utm_term=.b51a6b027cb5).

international community, working with African governments, as well as regional organizations, such as the African Union, can effectively bring to justice, perpetrators of international crimes, who, otherwise, would escape prosecution.<sup>675</sup> In addition, the successful trial and conviction of former Chadian dictator, Hissène Habré, by the Extraordinary African Chambers in the courts of the Republic of Senegal, has shown that with determination, the African Union, working with its Member States and other actors, can contribute significantly to the elimination of impunity in Africa.

Finally, since the early-1990s, the international community has taken a more concerted effort to fight impunity globally and in Africa in particular. As part of that determination to fight impunity, the international community has adopted programs, such as the Responsibility to Protect (“R2P”) and the Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, that are expected to significantly enhance the ability of the international community to combat impunity.

## VI. CONCLUSION AND POLICY RECOMMENDATIONS

Impunity, which can be defined as “the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account,”<sup>676</sup> has become pervasive throughout virtually all African countries. In some African countries, the existence of impunity is due to the inability of the government to bring to justice individuals that are engaged in the commission of international crimes. In others, such as South Sudan, Somalia, and the Democratic Republic of Congo, central governments no longer have control of many geographic parts of the country and as a consequence, it has become quite difficult for the forces of law and order to deal with all those people who engage in criminal activities. In fact, in these countries, many non-state actors who commit international crimes, such as serious violations of human rights, are not being held to account for these crimes.

In other countries, such as Sudan, both state- and non-state actors routinely engage in the violation of international human rights and humanitarian law without being held responsible. Although the lack of

---

675. Marlise Simons & J. David Goodman, *Ex-Liberian Leader Gets 50 Years for War Crimes*, N.Y. TIMES, May 30, 2012, <https://www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html>.

676. U.N. Comm’n on Human Rights, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119*, E/CN.4/Sub.2/1997/20/Rev. 1, Oct. 2, 1997, Annex II (Definitions).

capacity to fully investigate and bring perpetrators of international crimes to justice is a problem for Sudan and many other countries in Africa, the more important reason why impunity is pervasive in Sudan is the lack of political will—the unwillingness of the government in Khartoum to forcefully pursue those engaged in the commission of serious international crimes. For one thing, especially with respect to human rights violations in the Darfur region of the country, most of the atrocities are committed by the government and its agents.<sup>677</sup> This state of affairs is not due, necessarily, to the lack of capacity but to the unwillingness of the government to act within the law and bring criminals, whether they are members of the government or not, to justice.

Effectively combatting impunity in Africa, then, must begin with the reconstruction of African states, through a democratic process, to create democratic institutions that are capable of adequately constraining the government and preventing civil servants and political elites from acting with impunity. Each African country must provide itself with a governing process that can make possible the bringing of perpetrators of human rights violations to account—“whether in criminal, civil, administrative or disciplinary proceedings.”<sup>678</sup> Where there exist governing processes undergirded by a separation of powers with effective checks and balances, which include an independent judiciary, a robust and politically active civil society, and an independent press, it is likely the case that impunity will be minimized.

In the meantime, continental legal mechanisms, similar to the Extraordinary African Chambers, and specially-constituted international tribunals, such as the Special Court for Sierra Leone, can be used to deal with impunity and improve the institutional environment for the recognition and respect of human rights. Finally, the International Criminal Court remains a court of last resort—the ICC can be called upon to intervene and assume jurisdiction where African countries are either unwilling or unable to bring to justice the perpetrators of human rights violations.

---

677. See, e.g., Barney Henderson, *Sudan's President Accepts Responsibility for Darfur Conflict*, THE TELEGRAPH (UK), Apr. 21, 2011, <https://www.telegraph.co.uk/news/world-news/africaandindianocean/sudan/8465085/Sudans-president-accepts-responsibility-for-Darfur-conflict.html>.

678. U.N. Comm'n on Human Rights, *supra* note 676, annex II(A).

\*\*\*