International Criminal Tribunals as Actors of Domestic Change

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Conclusion and Outlook

Broadly two types of ICTs were considered in this publication, namely ad hoc international criminal tribunals, created by the UN, and the treaty based, permanent International Criminal Court (ICC). It can be said that Africa – with an abundance of case studies at hand – is as good a laboratory as any other to examine the question that is focused on in this volume, namely the measure of domestic change effected by ICTs in the selected jurisdictions. The African case studies each have their own nuances and measure of change, not to be repeated here in detail. In addition to the individual conclusions with respect to Rwanda, Sudan, Libya, Kenya, and South Sudan, which will be referenced here where appropriate, there is one aspect that warrants a more detailed exploration and shall serve as a kind of critical epilogue: *regionalization* and domestic change.

We have noted in the Introduction that the phenomenon of "Europeanization" is a relevant concept to (help) explain domestic change with regards to the ICTY. It was also noted that there is no equivalent driving force with respect to the African *ad hoc* tribunal case study, Rwanda, for the simple reason that there was no coordinated effort between the ICTR, as an international actor, and the relevant regional body, the African Union (and its predecessor, the OAU). There was a degree of political and moral support for the ICTR, of course, but nothing approximating the conditionality regime imposed by the EU with respect to domestic changes in Serbia and Croatia, and with respect to their relationship with the ICTY. Regarding domestic change and the relationship between ICTs and states, we postulated that the African regional impact (via the AU) on member states was much weaker than the above-mentioned EU conditionality regime.

Looking to the future, however, the impact of regionalization of international criminal justice in Africa may yet play a far more prominent role, certainly compared to the role that regional dynamics have played in the African case studies that we have examined. With regards to anticipated and projected domestic change caused by ICTs in Africa, we can point to four important areas. First, the relationship between the AU and the ICC; second, the evolving notion of complementarity; third, the future of the proposed Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes; and, fourth, developments concerning the adoption of the Malabo Protocol on the creation of an African regional criminal jurisdiction. It is not the aim here to analyse all these aspects in detail. Rather, we want to link these developments to

our most pertinent conclusions regarding the African case studies that we have examined in this publication in order to put forward some thoughts about the future of domestic institutional change resulting from the existence of ICTs.

The first, and arguably most contentious, development in international criminal justice in recent years has been the growing animosity between the AU and the ICC. It is prudent to note that there is a sizeable body of literature on this topic, and not all the writings on this are very sober or balanced. But it is fair to say that while African states were some of the earliest to sign, ratify, and implement the Rome Statute of the ICC, and while it is a fact that African states form one of the largest blocs in the Assembly of States Parties, there is at present a real institutional rift between the AU and the ICC. This is true also with regards to individual African states party to the Rome Statute in terms of their bilateral relationships with the ICC, as we have for instance noted in the chapter on Kenya. The picture is, however, not so binary as many would want to project it. There is not a monolithic African stance on the ICC. Even AU decisions reflect nuance and debate. It is worth recalling that 34 African states (more than two-thirds of the members of the AU) are states parties to the Rome Statute.[1] Within this group there is also diversity of views regarding the AU-ICC relationship. To add to the complexity, one should also note the evolving and fluctuating views of individual states. A case in point is South Africa. In 2010, when the institutional relationship between the AU and the ICC had started to deteriorate, South Africa insisted that African states party to the Rome Statute cannot ignore their obligations under the Rome Statute, and that these obligations must be balanced with their obligations to the AU. At that stage, a number of African states called on AU members to take a stance of non-cooperation with the ICC, but the initial absolutist call was watered down, as reflected by South Africa's efforts that resulted in a more balanced AU decision.[2] We know, of course, that the calls for African states to withdraw from the Rome Statute and to stop cooperating

1 For more analysis, see M. du Plessis, T. Maluwa and A. O'Reilly, *Africa and the International Criminal Court* Chatham House Occassional Paper 01/2013, 2, available at www.chathamhouse.org).

2 Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), July 2010, Doc. Assembly/AU/10(XV), par 6. See also comments and background information by Dire Tladi 'The duty on South Africa to arrest and surrender President Al Bashir under South African and international law' *Journal of International Criminal Justice* 13 (2015) 1027–1047, at 1030.

with the ICC only intensified as a result of cases like the Kenyan case as well as the arrest warrant against President Al Bashir of Sudan. And yet, despite the heated rhetoric, by July 2016, on occasion of the 27th AU Summit, there was still no official AU call for a collective withdrawal of African states parties from the Rome Statute. Indeed, observers noted that there was considerable pushback from some state parties (notably Nigeria, Senegal, Ivory Coast, and Tunisia), as well as Algeria, which is not a member state of the ICC. These states (correctly) pointed out that the AU as an institution is not (and cannot be) a member of the ICC.[3] Membership of, and thus legal and institutional relationships with, the ICC is a matter for sovereign states. Given this state of affairs, it is assumed that for the foreseeable future there will be a significant number of African states that are members of the ICC. Some of these states (for instance Nigeria, Senegal, and Botswana) will presumably be more enthusiastic than others. Some, like South Africa, which has one of the most comprehensive domestic implementation regimes, will, at least for the short to medium term be ambivalent, or worse, schizophrenic, in terms of its relationship with the ICC. The saga surrounding the South African government's failure to arrest President Omar Al Bashir on occasion of his visit to South Africa during the 2015 AU Summit in Johannesburg[4] illustrated the regrettable lack of legal and political conviction on the side of South Africa, in stark contrast with the more principled stance that the country took in 2010, as noted above.

3 E. Keppler 'Dispatches: Governments defend ICC at African Union Summit' Human Rights Watch, 20 July 2016, available at www.hrw.org/print/292277.

4 For factual background and a chronology of events surrounding Al Bashir's visit to South Africa, see Manuel Ventura 'Escape from Johannesburg – Sudanese President Al Bashir visits South Africa, and the implicit removal of head of state immunity by the UN Security Council in light of Al-Jedda' *Journal of International Criminal Justice* 13 (2015) 995–1025. See also the decision by South Africa's Supreme Court of Appeal in *Minister of Justice and Constitutional Development & others v Southern Africa Litigation Centre & others* 2016 (3) SA 317 (SCA), where the Court held that the South African government failed to uphold its obligations in terms of the Rome Statute of the ICC, South Africa's domestic implementation legislation, as well as South Africa's Constitution. For a discussion of the decision by the Supreme Court of Appeal, see G. Kemp 'International and transnational criminal procedure' in Du Toit et al *Commentary on the Criminal Procedure Act* (Revision Service 57) Appendix B, B59.

In September 2016, it was reported that the Republic of Gabon, a state party to the Rome Statute, had referred the post-election violence[5] situation in that country, starting from May 2016 with no end-date, to the ICC Prosecutor for further investigation and consideration.[6] Whatever the ICC organs may ultimately decide with regards to the admissibility of the Gabon situation, at a minimum it can be regarded as a rebuttal of the proposition that there is an African consensus to withdraw from the ICC.

A second important aspect affecting the future of domestic change as a result of or caused by ICTs is the evolving notion of complementarity. This only really applies to the ICC, and not the ad hoc tribunals, because, as we know, the ad hoc tribunals were established on the basis of primary, not complementary, jurisdiction. Complementarity is at the heart of the Rome Statute of the ICC. This principle essentially entails that the ICC should be a tribunal of last resort, only taking on cases where states are either unwilling or unable to investigate or prosecute crimes that are within the jurisdiction of the ICC. It is worth recalling that the Preamble of the Rome Statute puts the emphasis on effective prosecution at the national level as well as enhanced international cooperation. Furthermore, it is noted that it is each state's duty to exercise its criminal jurisdiction over those responsible for international crimes.[7] It is worth restating the legal and policy effects of the principle of complementarity as embodied in the Rome Statute: "It serves to ensure state sovereignty and takes advantage of the benefits of decentralized prosecution by states closest to the crime and most directly affected by it. At the same time, it bestows *de jure* oversight powers upon the Court that reach far into the core areas of domestic criminal law. The ICC Statute thus regulates the relationship between international and domestic criminal jurisdictions through a carrot-and-stick mechanism. Ideally, the state parties will fully discharge their obligation to prosecute and thereby make intervention by the International Criminal Court unnecessary."[8] At present, there is not a lot of jurisprudence on the practical meaning and implications of complementarity, given the fact that the first number of situations before the ICC

5 For background, see 'ICC opens preliminary probe into Gabon unrest', 29 September 2016 (available at www.france24.com/en/20160929-icc-opens-preliminary-probe).

6 Statement of the Prosecutor of the ICC concerning referral from Gabonese Republic, 29 September 2016 (available at www.icc-cpi.int//Pages/item.aspx?name=160929-otp-stat-gabon).

7 Rome Statute of the ICC, Preamble paras 4 and 6.

8 G. Werle and F. Jessberger, *Principles of International Criminal Law* Oxford, 3ed, 2014, 95.

came about because of so-called self-referrals (Central African Republic, the Democratic Republic of Congo, and Uganda). Naturally, the issue of complementarity did not have any prominence because the states involved evidently did not wish to pursue the investigations and prosecutions at the national level, hence the involvement of the ICC. In this volume we considered two situations where the principle of complementarity did receive some substantive attention – the situations in Libya and Kenya. In the Libya matter, we have noted the pre-trial chamber's decision concerning the admissibility of Saif al-Islam's case, and Libya's ability and willingness to conduct his trial. It was also noted that a considerable part of the pre-trial chamber's decision concerned the question of whether the Libyan indictment covered the same conduct and events as the ICC warrant. In the case of Saif al-Islam Gadaffi, the Appeals Chamber determined the crucial issue to be whether the criminal proceedings at the national level 'sufficiently mirrors' the case of the ICC prosecutor.[9] In a number of decisions, including the *Ruto* Admissibility decision,[10] the relevant Pre-Trial Chamber held that the proceedings at the national level and the corresponding case before the ICC must involve the 'same conduct'. However, this standard is different from the one articulated by the Appeals Chamber in the Kenya cases (including the *Kenyatta* case). Indeed, in the latter case, the Appeals Chamber viewed the matter less restrictively, and held that it would be enough for the national criminal proceedings to involve 'substantially the same conduct' as the proceedings before the ICC.[11] The differentiation between 'same conduct' and 'substantially same conduct' goes beyond semantics. Commentators have criticised the Prosecutor's interpretation and justification (and the Appeals Chamber's acceptance of the interpretation) of 'same conduct' that should be understood as 'substantially the same conduct' for purposes of admissibility challenges of specific cases before the ICC.[12] As Heller

9 Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013, 'Decision on the admissibility of the case against Saif al-Islam Gaddafi', *Gadaffi and Al-Senussi* (CC-01/11-01/11), Appeals Chamber, 21 May 2014 (*Gadaffi* Appeal Judgment), par 73.

10 Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art 19(2)(b) of the Statute, *Ruto, Kosgey, and Sang* (ICC-01/09-01/11), Pre-Trial Chamber II, 30 May 2011, par 55.

11 Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to art 19(2)(b) of the Statute, *Muthaura, Kenyatta, and Ali*, (ICC-01/09-02/11 OA), Appeals Chamber, 30 August 2011, par 39.

12 C. Stahn 'Admissibility challenges before the ICC from quasi-primacy to qualified deference?' in C. Stahn (ed) *The Law and Practice of the International Criminal Court*

noted, there is a clear textual basis in the Rome Statute for the 'same conduct' test (referencing Articles 20(3) and 90(1) in particular), whereas the 'substantially the same conduct' standard simply does not appear in the Statute. It seems as if the Appeals Chamber borrowed the language from the European Convention on Human Rights, but as a matter of treaty interpretation the method of the Appeals Chamber seemed curious, indeed unprincipled.[13] Having said that, and without going into the minutiae of treaty interpretation, we can agree with Heller that the *practical* consequences of the differentiation between 'same conduct' and 'substantially the same conduct' for purposes of admissibility in the context of complementarity seem less important.[14] The degree of flexibility will be determined by the facts of the specific case. In the matter of Saif-Al Islam Gaddafi, the Appeals Chamber noted that the real issue is "the degree of overlap required as between the incidents being investigated by the Prosecutor and those being investigated by a State – with the focus being upon whether the conduct is substantially the same." And further, it will be hard to envisage a "situation in which the Prosecutor and a State can be said to be investigating the same case in circumstances in which they are not investigating any of the same underlying incidents".[15] Even though there seems to be a significant degree of flexibility as a result of the Appeals Chamber's interpretation of 'substantially the same conduct' requirement, making the practical difference between 'same conduct' and 'substantially the same conduct' less obvious, commentators like Heller have criticised this approach and have come to the conclusion that the Appeals Chamber's interpretation unjustifiably imposes significant costs on both states and the ICC. We will not repeat Heller's whole argument here, but we briefly note his solution in the form of 'radical complementarity'; a notion that can potentially contribute to the conceptualisation of a more realistic division of labour between the ICC and national criminal justice systems.

When articulating the concept of 'radical complementarity', the point of departure is the ICC Appeals Chamber's acceptance of the meaning of complementarity to include the possibility that states can, at the national level, prosecute individuals for ordinary crimes (for instance murder, assault, or rape) instead of the applicable international crimes (for instance war crimes or crimes against

(2015) OUP 242; K. J. Heller 'Radical Complementarity' *Journal of International Criminal Justice* 14 (2016), 646–648.

13 Heller, *Radical Complementarity*, 647.

14 Heller, *Radical Complementarity*, 647.

15 *Saif al-Islam Gaddafi* Appeal Judgment par 72.

humanity).[16] It is the alleged conduct, and not so much the legal characterisation, that matters for purposes of admissibility in the context of complementarity. However, as Heller sees it, "there will be many situations in which a prosecution based on different conduct will be much more likely to succeed than one based on the same conduct." Thus, he argues that "the Appeals Chamber's mechanical insistence on using the [substantially same conduct] requirement to determine whether a state is 'active' is both counterproductive and indefensible."[17] How can radical complementarity help in this regard? At the heart of the matter is the quest to end impunity. Heller notes that, "as long as there is no reason to believe the state is trying to shield the suspect from criminal responsibility, the state should be permitted to investigate the different conduct without the case becoming admissible"[18] before the ICC. Importantly, in terms of the purview of our focus in this publication Heller's proposal may also lead to better capacity building and the strengthening of domestic institutions. In terms of Heller's proposal there would be a move away from the ICC-centric view of the admissibility of cases. The elimination of the 'substantially the same conduct' requirement, which is rather restrictive, would permit states to prosecute *different conduct* within the general scope of a situation that would otherwise fall within the purview of the ICC; the potential number of domestic investigations and cases will thereby be increased, thus strengthening the domestic investigative, prosecutorial, and judicial systems.[19] The end-result will be a more state-centric approach to complementarity. A critical question is, of course, the issue of resources and resource allocation, especially in post-conflict societies. While a state like post-conflict (PEV) Kenya may have been regarded as relatively capable of conducting domestic investigations and prosecutions of complex factual situations, the situation in countries like post-conflict Libya and South-Sudan clearly would have impacted negatively on the domestic criminal justice systems, such as they were. In terms of radical complementarity, with an emphasis on smaller investigations, even investigations focussing on 'ordinary' crimes and not necessarily the complex international crimes, the negative impact on domestic capacity would be minimised.[20] Heller's conclusion is intriguing – and relevant for our purposes: He assumes that Kenya might have been more cooperative with the ICC, if the

16 Decision on the admissibility of the case against Abdullah Al-Senussi, *Gadaffi and Al-Senussi* (ICC-0I/II-0I/II OA 6), Appeals Chamber, 24 July 2014 par 119.
17 Heller, *Radical Complementarity,* 650.
18 Heller, *Radical Complementarity*, 651.
19 Heller, *Radical Complementarity*, 657.
20 Heller, *Radical complementarity*, 658.

Pre-Trial Chamber "had bent over backwards (as it did in the Libya situation) to avoid finding the Kenya cases admissible".[21] Ultimately, according to Heller, the solution to the problems surrounding complementarity rests on two legs: first, the 'same person'[22] requirement needs to be relaxed, and secondly, the 'substantially the same conduct' requirement needs to be eliminated as a matter of law. The latter aspect will probably require an amendment of the Rome Statute. There also needs to be a policy shift – deference to national proceedings, where at all possible.[23]

While the debate about the perceived tension between the AU and the ICC has received a great deal of attention, both in academic circles and in popular media, there is a potentially important initiative that exists, albeit somewhat under the radar. In November 2013, a number of states party[24] to the Rome Statute of the ICC (including four African states) issued a statement on an International Initiative for Opening Negotiations on a Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes (crimes of genocide, crimes against humanity, and war crimes).[25] By November 2015, at the Fourteenth Session of the Assembly of States Parties of the ICC, held in The Hague, the number had grown to 48 states that supported this initiative. The initiative is primarily, but not exclusively, aimed at states party to the Rome Statute. The aim is to find ways to overcome some of the legal obstacles to practical interstate cooperation in national investigation and prosecution of the most serious crimes of international concern. Indeed, the underlying idea is to expand the legal and practical avenues at the interstate level to fight impunity for international crimes. It is premised on the commitment of states to provide

21 Heller, *Radical Complementarity*, 664.

22 It will be recalled that, in the Kenya cases, the Appeals Chamber held that for an admissibility challenge to succeed it has to be shown that the state is actively investigating the same individual suspect as the Prosecutor of the ICC. See Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11 OA), Appeals Chamber, 30 August 2011, par 40.

23 Heller, *Radical Complementarity*, 664–665.

24 Albania, Andorra, Argentina, Austria, Belgium, BiH, Bulgaria, Chile, Costa Rica, Cyprus, Czech Republic, Finland, Georgia, Greece, Hungary, Ireland, Liechtenstein, Lithuania, Luxemburg, the Netherlands, Malawi, Republic of Macedonia, Moldova, Mongolia, Norway, Panama, Paraguay, Peru, Samoa, Senegal, Serbia, Seychelles, Slovenia, Slovak Republic, South Africa, Suriname, Sweden, Trinidad and Tobago, Uruguay.

25 Assembly of States Parties to the Rome Statute, Twelfth session, 20–28 November 2013.

for the necessary laws and institutions at the domestic level in order to be able to investigate and prosecute atrocity crimes. If states are able to effectively cooperate in criminal investigations of atrocity crimes, and successfully extradite suspects for trial in domestic courts, it will supplement and even make redundant investigations and prosecutions by international tribunals, if, of course, the national efforts are genuine and in accordance with certain minimum standards. In this sense an initiative like the proposed multilateral treaty also builds on the legacy of international criminal tribunals, as noted by Justice Hassan Jallow, Prosecutor of the Mechanism for International Criminal Tribunals (MICT) and the ICTR. He noted that such a multilateral treaty, duly implemented, would "form an essential building block for a sustainable and truly global system of international criminal justice, ensuring that the legacy of the ICTR and ICTY and the hybrid tribunals extends far beyond what has been achieved by these ad hoc tribunals."[26]

There is one more development that we would like to briefly note in the context of ICTs and domestic institutional change. It was pointed out above that the apparent tensions between the AU and the ICC is real, but perhaps a bit overblown, especially if we look at the AU-ICC relationship beyond the rhetoric and also take into account developments at the national level, for instance the 2016 referral by Gabon to the ICC of a situation; a development that clearly postdates the perceived poor relationship between the AU and the ICC. One event that did occur in the midst of the growing tension between the AU and the ICC was the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, commonly known as the Malabo Protocol, in July 2014.[27] The aim of the Malabo Protocol is to vest the African Court on Human and Peoples' Rights with international criminal jurisdiction. It does not create a new court, but extends the jurisdiction of the regional Human Rights court to be able to try individuals (and corporations) for the atrocity crimes (war crimes, crimes against humanity, and genocide) as well

26 Remarks by Justice Hassan Jallow at the event organized by Argentina, Belgium, the Netherlands and Slovenia during the Fourteenth Session of the Assembly of States Parties of the International Criminal Court (ICC), held in The Hague from 18 to 26 November 2015 (available at www.unmict.org/en/news/prosecutor-jallow-delivers-keynote-speech-assembly-states-parties-icc).

27 Adopted at an AU meeting in Malabo, Equatorial Guinea. Text available at www.au.int/en/content/protocol-amendments-protocol-statute-african-court-justice-and-human-rights.

a number of other international and transnational crimes,[28] including the crime of aggression, terrorism, the crime of unconstitutional change of government, corruption, and money laundering.

The Malabo Protocol is sometimes presented as Africa's answer to the ICC, meaning, Africa's alternative to, or substitute for, the ICC.[29] This is, textually at least, not correct. There is no mention of the ICC in the Malabo Protocol. Contextually, there is no doubt that many of the states that were at the forefront of the drive to draft and adopt the Malabo Protocol were also some of the most ardent critics of the ICC. Notable in this regard is Kenya, which was one of the first states to sign the Malabo Protocol.[30] Kenya went even one step further and also committed to financial support[31] for the criminal chamber and the inevitable expansion of staff, most notably, of course, the registry and an Office of the Prosecutor.

The Malabo Protocol, like the Rome Statute of the ICC, is based on the principle of complementarity. Article 46H (2) of the Protocol thus provides:

'The Court shall determine that a case is inadmissible where:

28 The list of crimes, to be found in Articles 28A – 28N, go beyond the substantive jurisdiction of any other international criminal tribunal. For a comprehensive commentary on the crimes and other aspects of the Malabo Protocol, see G. Werle and M. Vormbaum (eds) *The African Criminal Court – A commentary on the Malabo Protocol*, Den Haag 2017.

29 For further background, see C. Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', *Journal of International Criminal Justice* 9 / 2011, 1067–1088; A. Abass, 'The proposed criminal jurisdiction for the African Court: Some problematic aspects' *Netherlands International Law Review* 60 / 2013, 27–50.

30 The context and timeline here is important: In 2013, Kenya, an ICC situation state, acted in terms of the Rome Statute and requested the UN Security Council to support its request for the deferment of the proceedings against President Kenyatta and Deputy-President Ruto. The Security Council refused the request. It was not only Kenya that was deeply disappointed. The AU also expressed its disappointment, thus setting in train more urgent movement towards a regional African criminal jurisdiction. See Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.493 (XXII) paras 6 and 13.

31 'Malabo Protocol – Legal and institutional implications of the merged and expanded African Court' Amnesty International (2016) 11 (available at www.amnesty.org).

a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;
b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute;
c) The person concerned has already been tried for conduct which is the subject of the complaint;
d) The case is not of sufficient gravity to justify further action by the Court.'

Article 46H (3) then proceeds to list relevant factors that would determine whether a state is unwilling to investigate or prosecute in a particular case:

a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.'

Article 46H of the Malabo Protocol largely corresponds with Article 17 of the Rome Statute of the ICC, but there are important textual differences. The most remarkable difference is that the Malabo Protocol does not contain the equivalent of Article 17(3) of the Rome Statute, which provides for the factors relevant to determine a state's inability to investigate or prosecute a particular case. The Malabo Protocol is silent on this important aspect of the complementarity and admissibility framework that one finds in the Rome Statute. Nevertheless, it is clear that the overall design of the Malabo Protocol clearly intends the criminal jurisdiction of the African Court to be a court of last resort, with the emphasis on national and sub-regional criminal prosecutions.

Perhaps the most controversial aspect of the Malabo Protocol, and something that clearly sets it apart from the Rome Statute, is the inclusion of an immunity clause, thus providing that 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'[32]

32 Art 46A *bis* Malabo Protocol. For a comment, see Dire Tladi 'The immunity provision in the AU Amendment Protocol' 13 *Journal of International Criminal Justice* (2015) 3–17.

The AU decisions and posturing, resulting in a legal framework for an African criminal jurisdiction, against the backdrop of on-going African cases before the ICC, amidst proposals for a more radical form of complementarity and better multilateral cooperation in criminal matters to put the emphasis back on domestic prosecutions of atrocities, may yet lead to a very confusing and ultimately counterproductive proliferation of legal obligations and institutions. There is also a risk that the cacophony of political noise surrounding all these debates may mask, or worse, deter, real institutional change in line with the central rationale of international criminal justice: an end to impunity.

When looking at the states of former Yugoslavia, we can observe two main differences compared to the African countries examined in this publication. First, the criminal cases regarding the states of former Yugoslavia were exclusively subject to the ad hoc International Criminal Tribunal for the former Yugoslavia (with two additional relevant cases in front of the International Court for Justice), while the International Criminal Court played no role. Hence the fact that all former Yugoslav states are signatories and have ratified the Rome Statute is not meaningful, or at least significantly less meaningful than for the African countries observed. As an additional consequence of this, the former Yugoslav countries had no need to use their acceptance of the Rome Statute for political calculations, as we observed it in the African cases, be it by withdrawing from the treaty or by obstructing the activity of the international court by other (legal) means.[33] On the other hand, the fact that the cases regarding the former Yugoslav states were under the jurisdiction of an ad hoc crime tribunal established by the UN-Security Council created a situation in which these states, frankly speaking, could not withdraw and were not even asked whether they agree or not to the jurisdiction of the Tribunal – it was an accomplished fact. Nevertheless, the states of former Yugoslavia did also have ways to obstruct the work of the ICTY, only that this occurred at a very high cost, mainly by hindering their own EU-integration process or by terminating substantial financial development aid. It was these high costs – which the states of former Yugoslavia at one point were not ready to pay anymore – that eventually led to the second difference we can observe when comparing the former Yugoslav and the African

33 As in the case when South Africa did not want to arrest the Sudanese president Omar Al Bashir on occasion of his visit to South Africa during the 2015 AU Summit. In the cases of the former Yugoslav states we also cannot observe any initiative for united action against the international court, as the African Union at one moment attempted to take.

countries examined in this publication: In the successor states of Yugoslavia, the impact of international courts – namely the ICTY – on domestic change was certainly more tangible and concrete, especially when it comes to the introduction of completely new institutions, be it special courts or laws. A great part of these domestic changes that have been identified in this publication can, as a matter of fact, only be defined as an indirect, rather than a direct impact of the Tribunal. However, indirect impact in this case does not mean that it also could and would have happened independently of the Tribunal and its work. On the contrary – what at first sight and formally speaking has to be defined as only a secondary, indirect impact of the Tribunal, was in fact a role without which the total impact would have very likely not occurred at all, or for sure not in the way it did. And it is this indirectness – through EU conditionality and the so-called Europeanization on the one hand, and the Completion Strategy of the Tribunal on the other – behind which the explanations for the most important influence of the Tribunal in the former Yugoslav states are to be found.

Out of these two factors, EU-conditionality was the one which was in place earlier.[34] At first, the Tribunal was established as a UN-institution and hence did not have any formal ties with the EU. This changed as soon as the former Yugoslav countries under ICTY jurisdiction were about to formally start their EU integration process, during which they had to – like other aspirant EU members from Central and Eastern European countries – comply with the so-called Copenhagen criteria, which were set out in 1993. These criteria, apart from envisioning functioning democratic institutions, a functioning market economy, the capacity to implement EU legal principles, and the protection of human and minority rights, had also proved to be crucial for the reconciliation and therefore for the overbridging of historical disputes among neighbouring states in Central and Eastern Europe. Based on this good practice, the EU therefore decided in 1999, when launching the first step of the EU integration process for the Western Balkan countries (the Stabilisation and Association Process), to

34 For EU-conditionality and the process of Europeanization see A. Elbasani (Ed.), *European Integration and Transformation in the Western Balkans – Europeanization or Business as Usual?*, London 2013; F. Bieber (ed), *EU conditionality in the Western Balkans*, London, 2013; with a focus on the judiciary: K. Bachmann, T. Sparrow-Botero, P. Lambertz, *When Justice Meet Politics – Independence and Autonomy of Ad Hoc International Criminal Tribunals*, Frankfurt/M. 2013; C. Dallara, *Democracy and Judicial Reforms in South-East Europe – Between the EU and the Legacies of the Past*, Cham/Heidelberg/New York/Dordrecht/London 2014; M. Kmezić, *EU Rule of Law Promotion – Judiciary Reform in the Western Balkans*, London 2017.

extend the criteria for the EU integration of the Western Balkan states by additional political conditions (the so-called "Copenhagen Plus criteria") consisting of the full cooperation with the ICTY, the refugee return and the regional cooperation and reconciliation.[35] Following this decision, the EU started to link its biannual evaluation of the integration process of the Western Balkan states with the assessment of the ICTY-Chief Prosecutor about the cooperation of these countries with the Tribunal. And since these states had a high economic and political interest to progress in their integration process, the assessment of the Chief Prosecutor of the ICTY started to play an important role for these states and societies, especially in Croatia and Serbia, and to indirectly impact domestic change. The motivations of the ICTY and the EU were however not the same in this arrangement. While the ICTY primarily had no ambition in spreading political messages, or in helping the EU integration or the reconciliation process, but was rather pragmatically interested in focusing on the trials, the intention of the EU by applying the conditionality was rather value driven. By setting up conditions, Brussels hoped that the new political elites in the given societies, mainly in Croatia and Serbia, would reshape the national goals by leaving the former politics of enmity behind and concentrating on achieving peace, stability, and prosperity.[36]

Eventually, the policy of conditionality based on the cooperation with the ICTY brought results, not only in arresting the fugitive defendants, but also in introducing institutional changes, including new laws and new institutions in charge of leading, monitoring, and implementing this cooperation. However, not only were these particular reforms not directly required by the ICTY, but their introduction paradoxically also made it possible to legally justify limiting cooperation with the Tribunal and hindering its work by legal means. As shown in the example of the newly created National Council for Cooperation with the ICTY in Serbia, this institution, officially established to improve and enforce Serbia's cooperation with the Tribunal, often disabled the cooperation with the ICTY rather than enabling it. This happened when the Council found a legal way to not hand over transcripts from meetings of the Supreme Defence Council claiming that they were state secrets of national interest, although these documents would have been of high importance for both BiH against Serbia in

35 J. Batt, J. Obradović-Worchnik (ed), Conditionality and EU Integration in the Western Balkans, European Union Institute for Security Studies, Chaillot Paper Nr. 116, http://www.iss.europa.eu/uploads/media/cp116.pdf, 9.

36 Batt, Obradović-Worchnik, *Conditionality,* p. 9.

the case in front of the ICJ as well as for the Prosecution against Milošević in his case in front of the ICTY to prove Serbia's involvement in the genocide of Srebrenica. In a similar manner, the Croatian government refused to hand over artillery logbooks, upon which the Prosecution of the Tribunal had based its case against the Croatian general Gotovina. Therefore, these new institutions, while indirectly impacted by the ICTY, were in fact at the same time indirectly legally obstructing the ICTY and its purpose, and also the wider idea and aim of the EU to trigger a shift of values in the given societies. This shows that institutional changes and reforms, even if introduced, were often only formally adopted in order to show good will and to move on with the EU integration process, or in order to please donors, while there was less interest in a fruitful cooperation with the ICTY and a geniune attempt to disclose crucial information, face the past and work on reconciliation. So, once a further step in the integration process had been reached, the cooperation would usually slow down for some time, until the deadline for the next step would approach. In the case of Croatia, as very well pointed out in Vjeran Pavlaković's chapter, the readiness for additional judiciary reforms related to the procession of war crimes has even diminished after Croatia's accession to the EU.

The question which remains is, however, whether it was in the first place politically realistic to expect that the Tribunal and the EU could create conditions in which the states under their jurisdiction (or in the process of EU integration respectively) would wholeheartedly act and try war criminals as the Tribunal did, and would help the Tribunal to fully establish the truth about the past as a base for reconciliation in the region as the EU had projected. While it would certainly be desirable that state institutions and political elites participate in the uncovering of crimes committed in their state, as well as uncovering the (criminal) role and responsibility the state has played, it does not come as a surprise that in reality states, when in front of an international criminal court, usually behave as any other defendant who is trying to defend him/herself by all means. Confronted with the complexity of domestic and foreign policies, and with the dynamics that arise from it, political elites – independently of whether they played a crucial political role during the time when the crimes were committed or not – tend to be cautious when dealing with the past, especially when the past still is, like in the states of former Yugoslavia, disputed and – since no lustration took place – still strongly linked with the political power, but also to the question of national identity. That is one of the reasons why both in Serbia and in Croatia it was the opponents of the Milošević and the Tuđman regime, respectively, who, once in power after the regime change in 2000 in both countries, did not opt to disclose evidence that would have helped the Prosecution make the case against

Gotovina et. al and against Milošević in front of the ICTY, as well as it would have helped BiH against Serbia in the case in front of the ICJ. And not only did the governments not disclose this information, but they even formed legal teams and allocated significant funds from the state budget to legally protect information that would have helped to uncover the role their states had played during the war.[37]

Such behaviour of states is considered pragmatic in the world of *realpolitik*, while advocates of transitional justice believe that it is an immoral act, since the political elites are de facto averting the full disclosure of the truth about the crime in which their state participated. And certainly the moral aspect is an important point to be made and it would be more than desirable that more attention is paid to it. However, it is rather unlikely that in international politics a state would, without being forced to, admit that it is guilty and disclose all possible evidence in support of its guilt. On the contrary, states have at their disposal a number of legal instruments accepted in the framework of international law, which help them to legally evade a complete disclosure of facts about the role of the state in potential crimes[38], and hence legally limit the space for the reconstruction of the truth. Consequently, it seems less realistic that states and political elites, which are pragmatically doing everything to evade the disclosure of facts about certain crimes the state was involved in, could at the same time be credible in calling for a moral responsibility for the crimes committed and the disclosure of all facts. Which of course does not mean at all that it is not necessary to go on insisting on it, but only that states – when it comes to their own involvement in crimes – tend to comply with pragmatic principles, being at the same time to some extent even covered by international law in doing so, and that hence conditionality as applied in the case of the EU, and by using the ICTY, had from the beginning limited potential for creating long-lasting (value) changes.

In conclusion, while some institutional reforms coming indirectly from the ICTY were triggered by the EU policy of conditionality, this policy did have

37 As an illustration, the legal team of the government of Serbia (until 2003 of the Federal Republic of Yugoslavia, between 2003 and 2006 the State Union of Serbia and Montenegro) was made of lawyers and legal experts who were doubtless opponents of Milošević, being before and after 2000 politically active against him and internationally well-known lawyers working in the field of Human Rights protection.

38 There are numerous examples in cases in front of the ICTY and the ICJ showing that also leading western democracies (among others USA) claimed that certain information about assumed involvements of these states in conflicts are to be kept undisclosed due to being state secrets of national interest.

certain limitations and so did the institutional changes evolving from it.[39] On the one hand, these reforms often consisted of only a formal adoption of new laws and institutions for opportunistic reasons in order to please the EU, the Chief Prosecutor or external donors. Consequently, in the long run they were not serving the purpose they were established for. And on the other hand, the policy of conditionality envisaged a model of institutional reforms based on values, which did not seem feasible to be implemented and internalized in the given societies and states in the given time frame.

When it comes to the second channel of influence of the ICTY on institutional change – the process, which followed the announcement of the Completion Strategy – the means were less political and hence the impact more sustainable. Here as well there is rather an indirect and to some extent even unintentional impact to be observed, which, however, would not have occurred without the action of the Tribunal, namely the announcement of the Completion Strategy in 2002. The Strategy's main objective was to complete all trials in the first instance by 2008, and to start transferring cases to domestic courts in the former Yugoslav countries. And since until 2002 the domestic judiciaries in the region had shown varying degrees of intent to process war crime cases[40], and at that point none of them, for different reasons, was determined on it, the Completion Strategy triggered a process which eventually led to substantial institutional reforms throughout the region in order to enable local courts to carry out cases according to international standards. This included reforms reaching from completely new institutions and courts, to the amendment of existing laws and the drafting of new laws. The impact, however, was not the same in all countries. While in BiH the announcement of the Completion Strategy led to the establishment of a War Crimes Chamber based on the initiative of the international administration in BiH, in Serbia and Croatia it had a smaller but nevertheless significant impact in regard to improving the capacities and competences of existing institutions. On the other hand, given that the transfer of cases required quite standardized legislation and clearly defined criteria, the impact on laws throughout the region was comparable so that the notions of war crimes, crimes against humanity, command responsibility, witness protection, and sexual violence have been adjusted to the standards used by the ICTY in all former Yugoslav countries.

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39 The greatest impact of the EU policy of conditionality, the arrest and extradition of fugitive defendants, remains outside the sphere of institutional reforms.

40 United Nations – International Criminal Tribunal for the Former Yugoslavia, Completion Strategy, http://www.icty.org/sid/10016

However, when taking a deeper look, all these reforms cannot be exclusively attributed to the ICTY. The Tribunal did trigger them by announcing the transfer of cases, but eventually it was on the local actors to comply with the criteria set out, and as shown in this publication, not only did they have different motivations, but none of the local actors seemed to have been driven by the aim of openly and with no strings attached confronting war crimes in domestic trials. In BiH it would have certainly been difficult for the local elites to find a consensus on sensitive issues such as the conditions for war crimes trials in front of domestic courts, and hence the OHR did to some extent simply impose these new institutions and reforms. Croatia at that time went through an important stage of its EU integration and that was an additional, if not the most crucial, motivation and reason to introduce judiciary reforms, among which were also these required for war crimes cases. Therefore, there was most probably also some opportunistic behaviour rather than a genuine need to address war crimes. Finally, in Serbia the reforms turned out to be part of a wider battle against organized crime. Eventually, the US government through USAID, linked its financial support for the establishment of a special court for organized crime with the creation of a war crimes section within this court and therefore it was more the result of opportunism and an attempt to please the donor than the need to create institutional conditions for processing war crimes.

When it comes to the domestic changes triggered by international criminal courts in Kosovo, the situation is different for a number of reasons. First, until 2008, Kosovo was exclusively led by a UN-administration, which was rather randomly than systematically introducing a number of new institutions. After 2008, when Kosovo became independent, the local actors continued to be supported by an EU-mission, which had similar features as the previous UN-mission and continued adjusting the judiciary of Kosovo to international criminal law standards and conventions related to human and minority rights. The second reason for a rather low impact of the ICTY is that the Completion Strategy and the process of finalizing the mission of the Tribunal took place when there were no further defendants from Kosovo and hence there was less pressure to prepare the local courts for the transfer of cases. A third reason for a less intense impact of the ICTY is, as Vjollca Krasniqi points out in the chapter dealing with Kosovo in this volume, that there was resistance towards these kinds of reforms, both within the UNMIK until 2008, and within the local political elite once Kosovo became independent. The reasons for this are again different than those observed in Croatia, BiH or Serbia, and go back to the commonly accepted understanding that the struggle for independence was just in itself and therefore can be neither illegal nor immoral. This also explains why the reaction in Kosovo

to the 2016 "Kosovo Relocated Specialist Judicial Institution", a special criminal tribunal set up for potential trials related to crimes committed in Kosovo, was very reserved. While this court is by law not an international court but a genuine court of Kosovo, it was conceived, established and financed by the EU, located in The Hague and staffed by international judges only. Consequently, there is no path that would lead to a direct impact of the ICTY in Kosovo either. It cannot, however, be said that the numerous judiciary reforms in Kosovo carried out alone by the local actors or jointly by them and the international missions were not impacted by the ICTY, given the expertise that already existed in the region once the Completions Strategy was introduced. The same can be said for the special criminal court for Kosovo, which had no direct link to the ICTY, but was conceived and is now run by lawyers and experts who are endorsing the standards set by the ICTY.

Concluding, it can be said that international courts, in particular the ICTY, certainly did trigger a number of changes and judiciary reforms. In the successor states of Yugoslavia, this process was, however, enforced not only by the usage of different political instruments based on conditionality, but it was also driven by different political motivations in the given states and societies. Hence the impact was closely, if not exclusively, linked to political factors and a political will rather than on legal or other reasons. This should certainly not come as a surprise and it only confirms the initial hypothesis of this publication that international criminal courts are actors and subjects of international relations who deal with crimes arising from political conflicts and are consequently as such more exposed to political criticism and pressure, but at the same time also leave more imprints on states and their political and judiciary systems than ordinary courts do.

However, the findings in this volume are far from corroborating the theoretical assumptions in the introduction and provide a multitude of suprising conclusions, which show a variance of influences and different mechanisms, which are at work behind influences triggering domestic change in countries under ICC jurisdiction. The impact of EU conditionality bolstered the influence of the ICTY more than any other factor in Serbia, Croatia, and BiH, but it totally failed with regard to Kosovo. The Completion Strategy, the next important factor, had some significance in Croatia and BiH, but not much in Serbia (to which only one ICTY accused was transferred) and none in Kosovo. But a similar kind of domestic change, as took place in Serbia and Croatia, could also be observed in Rwanda, where no external influence comparable to EU conditionality was at play. In Rwanda, it was the Completion Strategy and its promise to transfer cases back to Rwanda and pressure from foreign countries that had apprehended genocide suspects, but refused to extradite them without

legal reform in Rwanda, was paramount. However, the Rwandan case also shows the limits of domestic change under external influence: Rwanda created a two-tier system, under which extradited genocide fugitives were treated differently (and better) than suspects who had been apprehended by the Rwandan judiciary. One might therefore argue that Rwanda's readiness for reform was not so much driven by Human Rights and rule of law considerations, but by the wish to have the country's institutions (especially the judiciary and the penitentiary) recognized as full-fledged partners of the outside world and to bolster the state's internal sovereignty and its monopoly on violence.

This volume also comes with some other surprising findings. The cases of BiH and Kosovo contradict the assumption according to which domestic change is more likely and likely to be deeper and far-reaching in cases where the international community has more leverage and a direct grip on the domestic institutions. This hypothesis is confirmed in BiH, where the international community created and partly ran judicial institutions and domestic change in line with ICTY requirements took place (although much more on the state level than on the entity level); it is disconfirmed with regard to Kosovo, which remained immune against EU conditionality and ICTY pressure despite the leverage the UN administration had over the country. But whereas in Serbia, Croatia and BiH, the UN, the ICTY and the EU mostly spoke with one voice, the interests and preferences of the UN administration and the UN tribunal were often contradictory and allowed the Kosovo judiciary to defy ICTY decisions.

On this list, Sudan is certainly the most intriguing and astonoshing case. Despite the total absence of any regional factor, which could be compared to EU compliance, without anything similar to the ICTY's and the ICTR's Completion Strategy, some limited domestic change, which survived even the conflict with the ICC, took place in this war-tormented, desintegrating country. Some of these changes constituted lip service, paid in the attempt to prove the inadmissibility of the UNSC-referral of the Darfur cases (although Sudan never formally lodged any inadmissibility challenge) and to delegitimize the ICC's intervention in the eyes of the Sudanese public and the international community. This was far from successful, making the abolition of the newly created institutions and legal reforms more likely. However, some of them proved sustainable. More research is needed to explain this, but for the moment, it seems that this phenomen can best be explained as a case of transnational norm proliferation. As has been described in Latin America, sometimes authoritarian governments pay lip service to Human Rights in order to satisfy expectations from other countries during international negotiations. But this lip service, which often comes in the form of declarations or laws those governments never intend to implement,

is then taken over by civic actors on the ground, who use it for strategic (and often transnational) litigation. If the judiciary enjoys at least some leeway and autonomy (or prosecutors and judges lack clear guidance from the government in these cases), there is a chance for some of these novelties to become legally binding and practically applicable.

This did not happen in Kenya and Libya. In post-Gaddafi Libya, there were hardly any functioning state institutions, which could have implemented declarations and/or legal novelties from abroad. As we have seen, the entire institutional landscape of the country had to be built from scratch after the revolution, including a quite sustainable constitutional basis. As the case of Sudan shows, this is in itself not an argument against the view according to which even UNSC-referrals may lead to sustainable (though limited) domestic change, even in countries with authoritarian governments. The more puzzling is the case of Kenya, a country with a vibrant civil society and a responsible government, which completely and successfully defied the ICC in a way which very much resembles the strategy followed by Kosovo. One might argue that the ICC so far lacks all the instruments, which the ICTY had at its disposal to further compliance: there is no Completion Strategy, neither is there a strong regional organization like the EU bolstering its influence. In Libya and Sudan, even the UNSC abdicated as an actor of potential change. Transnational norm proliferation did not work either, despite favourable conditions on the ground.

Our volume also shows some need for further research. As the case of Russia and Ukraine shows, our initial assumption about the intrinsic inability of self-referrals to trigger domestic change is only partly correct. Self-referrals may not lead to domestic reform in the countries, whose government lodged them, but they may well lead to adaptation in countries, which are collaterally affected by an ICC intervention, when the ICC's personal jurisdiction extends to citizens of a state other than the self-referring one, or when its territorial jurisdiction extends to territory, which is claimed or occupied by a third party. All in all, the analyses in this publication show a very diverse picture of how and under which circumstandes ICTs can trigger domestic change in countries affected by their jurisdiction. It shows a rather somber outlook for the ICC, a court of last resort, deprived of the ICTY's most effective tools to achieve compliance (EU conditionality and completion), which is highly controversial in many of the states it has intervened in and lacks the unambiguous support by its founders and the UN, which would be needed in order to achieve the results the ICTY achieved in Serbia and Croatia. It is no wonder the ICC is also less ambitious. As the case of Libya has shown, domestic change is not a priority for the judges. Out of necessity (and out of the obvious), the ICC has made a virtue…