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The International Criminal Court and Peace Processes

Côte d'Ivoire, Kenya and Uganda

Linus Nnabuike Malu

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palgrave
macmillan

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Palgrave Studies in Compromise after Conflict
ISBN 978-3-030-19904-3 ISBN 978-3-030-19905-0 (eBook)
https://doi.org/10.1007/978-3-030-19905-0

Cover credit: Alamy C6JFY6

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Preface

This book examines how the International Criminal Court (ICC) influences the peace processes in Côte d'Ivoire, Kenya and Uganda. It explores how the prosecution of those who bear the greatest responsibility for the gravest crimes committed, negatively or positively, influences the process of making peace after the violent conflicts in these counties. The deployment of international justice mechanisms, such as the ICC, may be justified on several grounds, including the argument that such involvement in conflict and post-conflict situations could assist in ending wars, and in promoting peace. But, this belief has not been properly studied to understand whether international justice actually contributes positively or negatively to the peace process. It is not yet clearly determined whether it is the retributive or restorative or the truth-telling functions of the Court that has most impact on the peace process. Drawing upon interviews with national experts in these three countries, this book provides evidence-based responses to these questions and reviews the controversies surrounding the involvement of international justice mechanisms in conflict and post-conflict situations. Relying on an analytical framework that is based on four variables: deterrence, victims' rights, reconciliation and accountability to the law, it argues that

the ICC's intervention has had multiple impacts on the situations across these countries, and that, despite some acknowledged arguments to the contrary, the ICC does promote peace processes through deterrence and the promotion of accountability to the law. However, there is minimal evidence that the ICC effectively contributes to peace processes in these countries through the promotion of reconciliation and victims' rights.

Armidale, Australia Linus Nnabuike Malu

Acknowledgements

This book is based on my Ph.D. thesis which was completed at the University of New England, Australia, in 2017. During my studies, and thereafter, I worked with several persons to complete the book. I am immensely grateful to all the experts and other individuals who agreed to be interviewed for this study. I highly appreciate their time, expertise and insights. Without these interviews, this study would not have been successfully carried out. Also, my special thanks go to my principal supervisor, at the University of New England, Australia, Professor Helen Ware for constructive and objective criticisms/suggestions and motivation. I am also very grateful to my second supervisor, Dr. Marty Branagan, for critical comments, encouragement, support and assistance in developing my thesis. My particular gratitude goes to the Staff of the School of Humanities for providing invaluable assistance, and being always willing to help, and making my study less stressful. I am thankful to Dr. Ray Nickson, who was at that time a Lecturer at the Department of Criminology, University of New England (UNE) for reviewing three chapters of my thesis and providing criminology perspective, and to Dr. John Adeleke of the School of Arts, UNE, for editing some chapters. It is important to acknowledge with profound gratitude the

research funding provided by the Australian government (International Post-Graduate Research Scholarship) and the University of New England (UNE Research Scholarship and the Keith and Dorothy Traveling Scholarship). Without those funds, it may have been almost impossible to have this book. Last, but not the least, I appreciate the inputs of experts at two research seminars at the University of New England in 2013 and 2014, at the UNE Peace Conference in Sydney in 2015, and at the African Studies Association of Australasia and the Pacific Conference in 2015 in Melbourne.

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Acronyms

ARLPI	Acholi Religious Leaders' Peace Initiative
AU	African Union
BBC	British Broadcasting Corporation
CAR	Central African Republic
CDVR	Commission Dialogue Vérité et Réconciliation
CIPEV	Commission of Inquiry on Post-election Violence
CNE	Commission Nationale d'Enquête
CONARIV	Commission Nationale pour la Reconciliation et l'Indemnisation des Victims
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
FN	Forces Nouvelles
FPA	Final Peace Agreement
FRCI	Forces Républicaines de Côte d'Ivoire
GDP	Gross Domestic Product
GoC	Government of Côte d'Ivoire
GoK	Government of Kenya
GoU	Government of Uganda
HSM	Holy Spirit Movement
ICC	International Criminal Court

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Persons
JPT	Juba Peace Talks
KNDR	Kenya National Dialogue and Reconciliation.
LRA	Lord's Resistance Army
NGO	Non-Governmental Organisation
NRA/M	National Resistance Army/Movement
OTP	Office of the Prosecutor
PEV	Post-Election Violence
PNCS	Program National de Cohesion Sociale
TFV	Trust Fund for Victims
TJRC	Truth, Justice and Reconciliation Commission of Kenya
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNOCI	United Nations Operation in Côte d'Ivoire
UNSC	United Nations Security Council
UPDA	Uganda People's Democratic Army

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Series Editor's Preface

General Editor's Introduction

Compromise is a much used but little understood term. There is a sense in which it describes a set of feelings (the so-called spirit of compromise) that involve reciprocity, representing the agreement to make mutual concessions towards each other from now on: no matter what we did to each other in the past, we will act towards each other in the future differently as set out in the agreement between us. The compromise settlement can be a spit and a handshake, much beloved in folk lore, or a legally binding statute with hundreds of clauses.

As such, it is clear that compromise enters into conflict transformation at two distinct phases. The first is during the conflict resolution process itself, where compromise represents a willingness among parties to negotiate a peace agreement that represents a second-best preference in which they give up their first preference (victory) in order to cut a deal. A great deal of literature has been produced in Peace Studies and International Relations on the dynamics of the negotiation process and the institutional and governance structures necessary to consolidate the agreement afterwards. Just as important, however, is compromise in the

second phase, when compromise is part of post-conflict reconstruction, in which protagonists come to learn to live together despite their former enmity and in face of the atrocities perpetrated during the conflict itself.

In the first phase, compromise describes reciprocal agreements between parties to the negotiations in order to make political concessions sufficient to end conflict, and in the second phase, compromise involves victims and perpetrators developing ways of living together in which concessions are made as part of shared social life. The first is about compromises between political groups and the state in the process of statebuilding (or re-building) after the political upheavals of communal conflict, and the second is about compromises between individuals and communities in the process of social healing after the cultural trauma provoked by the conflict.

This book series primarily concerns itself with the second process, the often messy and difficult job of reconciliation, restoration and repair in social and cultural relations following communal conflict. Communal conflicts and civil wars tend to suffer from the narcissism of minor differences, to coin Freud's phrase, leaving little to be split halfway and compromise on, and thus are usually especially bitter. The series therefore addresses itself to the meaning, manufacture and management of compromise in one of its most difficult settings. The book series is cross-national and cross-disciplinary, with attention paid to interpersonal reconciliation at the level of everyday life, as well as culturally between social groups, and the many sorts of institutional, interpersonal, psychological, sociological, anthropological and cultural factors that assist and inhibit societal healing in all post-conflict societies, historically and in the present. It focuses on what compromise means when people have to come to terms with past enmity and the memories of the conflict itself, and relate to former protagonists in ways that consolidate the wider political agreement.

This sort of focus has special resonance and significance for peace agreements are usually very fragile. Societies emerging out of conflict are subject to ongoing violence from spoiler groups who are reluctant to give up on first preferences, constant threats from the outbreak of renewed violence, institutional instability, weakened economies and a wealth of problems around transitional justice, memory, truth recovery

and victimhood, among others. Not surprisingly therefore, reconciliation and healing in social and cultural relations is difficult to achieve, not least because interpersonal compromise between erstwhile enemies is difficult.

Lay discourse picks up on the ambivalent nature of compromise after conflict. It is talked about in common sense in one of two ways, in which compromise is either a virtue or a vice, taking its place among the angels or in Hades. One form of lay discourse likens concessions to former protagonists with the idea of restoration of broken relationships and societal and cultural reconciliation, in which there is a sense of becoming (or returning) to wholeness and completeness. The other form of lay discourse invokes ideas of appeasement, of being *compromised* by the concessions, which constitute a form of surrender and reproduce (or disguise) continued brokenness and division. People feel they continue to be beaten by the sticks which the concessions have allowed others to keep; with restoration, however, weapons are turned truly in ploughshares. Lay discourse suggests, therefore, that these are issues that the Palgrave Studies in Compromise after Conflict Series must begin to problematize, so that the process of societal healing is better understood and can be assisted and facilitated by public policy and intervention.

One of the features of this Series is its commitment to publish the work of early career researchers (ECRs) who often find it difficult to persuade commercial publishers of their marketability. This allows them to appear alongside the international renowned names who have also contributed to the Series. Some of these ECRs are practitioners or academic independents, who offer a refreshing perspective from outside universities. One such is the current author, Linus Nnabuike Malu, a Nigerian legal practitioner working in international human rights law in Australia.

The role of law in reconciliation is widely disputed. Purists believe the law is free from emotion; indeed, the law designed deliberately to keep emotion out of retributive punishment. Pragmatists recognise the law is infused, even infected, with emotion and is deeply political. The law can serve reconciliation in several ways, the most important of which is to support truth and justice. So important to reconciliation is peace and justice that one of the world's foremost conflict

transformation experts, John Paul Lederach, uses a single noun "just-peace" to replace justice and peace as separate terms, signifying their indivisibility in reconciliation. Justice is itself also served in several ways after conflict, such as inquests, truth recovery mechanisms, symbolic reparations, like apologies and criminal prosecutions in domestic and international courts. One of the latter is through the work of the International Criminal Court (ICC). This is the subject of Malu's book.

It poses the supra-legal question of the contribution of the ICC to peace processes through reconciliation. Its focus is upon Africa, a continent ravaged by colonial expropriation and succumbing to significant post-colonial inter-communal violence, specifically addressing the role of the ICC in three case studies of Kenya, Uganda and the Ivory Coast. Based on in-depth qualitative analysis of interview data, Malu offers a damning critique of the ICC that highlights its limitations in contributing to the peace process in the case countries. The failure to assist in reconciliation is linked to its failure to deliver justice, with the lack of criminal prosecutions its most serious fault. Its main contribution has been through its general deterrence effect in preventing even more violence; positive effects on reconciliation are harder to find. The study ends with several policy recommendations to assist the ICC to improve its contribution to reconciliation, such as improving its prosecution rate, increasing the speed of its operations, linking up with political bodies like the African Union and linking its outcomes more closely to transitional justice mechanisms.

Great expectations of the ICC have resulted in little delivery. Legal purists would say this is because the law cannot deal with supra-legal and emotive issues like peace and reconciliation; the law is being asked to do too much and the expectations were wrong. Legal pragmatists would say that its application needs to improve so that justice is delivered; the law has a role in peace, but its practices have been wrong. In charting a course through this debate, Linus's volume is a very welcome addition to the Series.

Belfast, UK
April 2019

John D. Brewer

1

Introduction

> Much early writing on the field of international criminal law focused on its growing body of jurisprudence and its institutional developments, yet less attention has been paid to the effects that international judicial interventions have had upon the communities and state structures where grave crimes have occurred (Introduction to "*Contested Justice: The Politics and Practice of International Criminal Court Interventions*")[1]

This book explores the impacts of the International Criminal Court (ICC or the "Court") on peace processes in Côte d'Ivoire, Kenya and Uganda. It comparatively examines how prosecution of those who bear the greatest responsibility for crimes committed in these countries may have negatively or positively influenced the process of making peace after conflicts. It is concerned with *how* international accountability affects post-conflict countries, and on *what* the ICC brings to the table in a peace process. The central questions are: Does justice spur peace in post-conflict societies? Does justice complicate the peace process? How?

[1]De Vos, Christian, Kendall, Sara and Stahn, Carten. 2015. "Introduction". In *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, edited by Christian de Vos, Sara Kendall, and Carsten Stahn, 1–20. Cambridge: Cambridge University Press.

L. N. Malu, *The International Criminal Court and Peace Processes*,
Palgrave Studies in Compromise after Conflict,
https://doi.org/10.1007/978-3-030-19905-0_1

The intervention of the ICC in post-conflict countries is primarily aimed at holding those who played key roles in the conflicts accountable for their crimes. The process of investigating such crimes and prosecuting those who are deemed to have committed international crimes may have affects which could impact on the peace process in the affected countries, and even beyond the borders of such countries (Sikkink 2011). However, the impact of these interventions is not yet well defined or well known (Kersten 2014; Clark 2011). Clearly, the belief that international justice mechanisms contribute to peace processes, though not unfounded, is not fully established or well-settled (Schabas 2011; Nouwen 2012; Wegner 2015). It is still a moot point if and how international accountability contributes to peace (Clark 2011). Thus, this book will contribute to knowledge in this area by, among other things, developing a framework for determining how the ICC contributes to peace processes.

1.1 Rationale for the Study

The Nuremberg and Tokyo trials were defining moments in the history of international accountability (Schabas 2012). With these trials, the world took a firm stand that those who commit atrocities that threaten international peace must be punished. The lull that followed these trials at the international level came to an end after the Cold War with the establishment of the two ad hoc international tribunals for Yugoslavia (1993) and Rwanda (1994), signalling a resurgence in the use of international justice mechanisms to sanction perpetrators of atrocities.

In the last twenty-five years, there has been an increasing reliance on the use of international justice mechanisms, climaxing with the establishment of the ICC (Wegner 2015). This use is justified on several grounds, but mainly on the argument that deployment of international justice mechanisms in conflict and post-conflict situations could assist in ending the wars and in promoting peace. But this belief has not been properly studied to understand whether international justice mechanisms actually contribute positively to the peace process, and if they do, how. There are also few studies on which aspects of the work

of international justice mechanisms promote which aspects of the peace process, and how. For instance, it is not certain whether it is the retributive or restorative or the truth-telling functions of the Court that have more impact on a peace process. It is also not certain which aspects of the peace process are influenced by any of these functions of the Court. There are several texts on the impact of international justice mechanisms on conflict and post-conflict situations (Schabas 2012), but there are few on *how* they actually impact on these situations (Kersten 2014; Clark 2011). The central aim of this study is to provide evidence-based answers to some of these questions and to stimulate more discussions that could provide answers to some of the controversies surrounding the involvement of international justice mechanisms in conflict and post-conflict situations.

Since the establishment of the ICC in 2002, the Court has intervened in eight countries in Africa. The involvement of the ICC in Africa will be important in shaping the extent and scope of peace processes in the continent as presently being witnessed in the eight countries where it has intervened. The involvement of the ICC may positively influence peace processes by speeding-up and deepening the judicial process, which may lead to sustainable peace, or alternatively may impede, complicate or stall peace processes. This study hopes to provide a clearer perspective on the impact of the interventions of the ICC on peace processes in three countries in Africa and the circumstances under which it has negative or positive impacts. The researcher hopes that this study will be of value for policymakers working on international accountability and conflict transformation since this study provides valuable insights into how the ICC is impacting on peace and security in Côte d'Ivoire, Kenya and Uganda.

The overarching research question this book will address is whether the interventions of the ICC in Côte d'Ivoire, Kenya and Uganda are contributing positively to the peace processes in the three countries? Drawn from this overarching question are four principal research questions which will also provide answers to the overarching research question. These questions are whether the involvement of the ICC in Côte d'Ivoire, Kenya and Uganda promotes accountability to the law in these countries; whether the involvement of the ICC in Côte d'Ivoire,

Kenya and Uganda promotes reconciliation in these countries; whether the involvement of the ICC in Côte d'Ivoire, Kenya and Uganda promotes respect for victims' rights in these countries; and whether the ICC involvement deters future atrocities in Côte d'Ivoire, Kenya and Uganda.

1.2 Establishment of the International Criminal Court

The 1998 Rome Statute established the ICC. A Diplomatic Conference of Plenipotentiaries of the ICC was held in Rome, Italy, in June/July 1998 to discuss the draft ICC Statute that was prepared by the International Law Commission. The international community, on 17 July 1998, "reached an historic milestone when 120 states adopted the Rome Statute, the legal basis for establishing the ICC" (Williams 2012). Four years later, the Statute obtained the requisite sixty ratifications for its entry into force on 1 July, 2002 (Williams 2012). In October 2018, 123 countries had ratified the Rome Statute of the ICC. Out of these 123 member states, 33 are African states, 19 are Asia-Pacific states, 18 are from Eastern Europe, 28 are from Latin America and Caribbean, and 25 are from Western Europe and other states.[2]

The ICC is the first permanent international criminal Court that was established to help fight impunity for the perpetrators of some international crimes. The ICC is an independent international organisation and is not part of the United Nations system. Although the ICC's expenses are funded primarily by state parties, it also receives voluntary contributions from governments, international organisations, individuals, corporations and other entities. The establishment of the ICC came more than fifty years after the adoption of the Universal Declaration of Human Rights on 10 December 1948 and the 9 December 1948 resolution of the United Nations General Assembly mandating the International Law Commission to commence work on developing a

[2]https://treaties.un.org/Pages/ViewDetails. Accessed 18 October 2018.

draft statute of an International Criminal Court. After many years of work, marked by stoppages due to the Cold War, the final version of the draft statute prepared by the International Law Commission was adopted in 1998 (Schabas 2007). The main objective of the Rome Statute is to establish a permanent international court, complementary to national courts that will prosecute those who commit international crimes (Nouwen 2013).

1.3 The Globalisation of Accountability: The Establishment of the ICC and the Missing Points

The campaign to promote accountability by the international community through international justice mechanisms has a fairly long and tortuous history, stretching back to 1919 after the First World War (Schabas 2012) and taking root in 1945 during the Nuremberg and Tokyo trials. The establishment of international criminal tribunals for Rwanda and the former Yugoslavia in the 1990s and "internationalised" or hybrid Courts in Sierra Leone, Lebanon, East Timor and Cambodia confirmed the global acceptance of international accountability.

The ICC, according to article 1 of the Rome Statute, was established as a permanent institution with power "to exercise its jurisdiction over persons for the most serious crimes of international concern". One of the motivations for establishing the Court is to put an end to impunity for the perpetrators of international crimes and thus to contribute to the prevention of such crimes. Apart from being the first permanent international Court, the Rome Statute also created some features that make the ICC unique. First, the Statute established an independent prosecutor, who is elected for a nine-year term by member states with the freedom to select situations for investigation (Schabas 2012). Secondly, the Statute created the principle of complementarity as a compromise between the legal duty to prosecute international crimes and the principle of state sovereignty (Jurdi 2011). Thirdly, the ICC is a treaty-based international criminal Court, not established as a victor's

Court or by the United Nations Security Council. Fourth, the ICC attempts to focus not just on retributive justice but also adds some elements of restorative justice through its victims' rights protection provisions within the Court and through the Trust Fund for Victims (TFV). Fifth, the ICC is expected to prosecute any person who commits international crimes as defined by the Rome Statute, notwithstanding the person's official status, thus sidetracking the well-established concept of immunity from prosecution for sitting heads of government.

Therefore, by design, the ICC is expected to tackle issues never before undertaken in international criminal law, which has seen the Court entering unchartered murky waters. For instance, the ICC is expected to intervene in both ongoing and terminated conflicts. It has intervened in ongoing conflicts in Libya, Sudan and Northern Uganda. Such interventions pose great challenges with respect to the investigation and arrest of culprits and may also have direct impact, which may raise the peace and justice issue to greater significance (Kersten 2014). Also, the ICC has a much wider jurisdiction than any other international criminal court/tribunal. It has jurisdiction to try any person who commits international crimes in any of the current 123 member states. The United Nations Security Council can also refer to any situation that poses threats to international peace and security to the ICC, whether the situation arose in a member state or not. These new features and innovations inherently provide both prospects and challenges for the new Court. The positive prospect lies in the establishment of a permanent, international, treaty-based, independent Court with powers to fight impunity. The challenges are numerous and have dogged the Court since its inception.

1.4 The Challenges for the ICC

After the negotiation and the finalising of the Rome Statute in July 1998, expectations were high that the new permanent international Court would end impunity, deter future grave human rights abusers, promote and protect victims' rights and generally promote international accountability. There were also hopes that the ICC could change the dynamics of international relations by being a global body that

transcends state interests to enforce an *erga omnes* duty to prosecute international crimes (Jurdi 2011). However, contrary to these expectations the ICC has struggled to deliver. The ICC continues to face significant obstacles in its quest to contribute to an international system premised on respect for human rights, the rule of law and accountability for international crimes (Jurdi 2011). The facts are disturbing: the ICC has only completed few trials after sixteen years of existence; it is also accused of botching some of the investigations and prosecutions; the pace of justice is too slow and trials have been unduly complex; it has been unable to deliver in cases involving sitting presidents and senior government officials; and it has failed in several instances to ensure that those accused of crimes by the Court are brought to The Hague for prosecution. Also, the allegation that a staff member sexually assaulted four witnesses in the ICC protection programme in the Democratic Republic of Congo (DRC) has not helped its image (Independent Review Team Public Report 2014).

Article 25 provides that the Court shall have jurisdiction over natural persons who commit a crime within the jurisdiction of the Court, and such persons shall be individually responsible and liable for punishment. In article 27, it further provides that the 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.

It further provides that "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". These provisions make it possible for the Office of the Prosecutor (OTP) to prosecute such state officials (Ladan 2010). The rationale for these provisions is to tackle impunity for heads of state or presidents or any other government officials who hitherto have enjoyed immunity from prosecution when in service. It makes such officials individually responsible for crimes and subject to prosecution even when they are still in office.

In practice, prosecution of sitting heads of state or presidents and even state officials has proved extremely difficult for the ICC. So far, the ICC has failed to execute this aspect of its mandate. In Sudan, Kenya, Uganda and Côte d'Ivoire, the ICC has failed to either prosecute those who are in government or are closely associated with those in government. The failure of the ICC, so far, to successfully prosecute these classes of persons, as originally conceived, gravely undermines the Court, because curbing impunity of those in government is one of the central aims of the ICC. In Sudan, the ICC has been unable to arrest and prosecute Omar Hassan Ahmad al-Bashir (President of Sudan) accused of war crimes, genocides and crimes against humanity and other state officials and those close to the government. Several years after their indictments, these men are still at large. Omar Hassan Ahmad al-Bashir has remained the President of Sudan and has travelled to several African countries, including some that ratified the Rome Statute. In Kenya, the attempt by the ICC to prosecute Uhuru Kenyatta (current president of Kenya), William Samoei Ruto (the current vice-president of Kenya) and Francis Muthaura (former head of civil service/secretary to the cabinet and a close ally of former President Mwai Kibaki) failed. In Uganda and Côte d'Ivoire, the ICC has failed to indict top political and security officers associated with the present governments while there is evidence that they might have committed atrocities. On 5 December 2014, in a press statement, after she dropped charges against Uhuru Kenyatta, Mrs. Fatou Bensouda, the chief prosecutor summarised her frustration with the case thus:

> [today] is a dark day for international criminal justice. Be that as it may, it is my firm belief that today's decision is not the last word on justice and accountability for the crimes that were inflicted on the people of Kenya in 2007 and 2008; crimes that are still crying out for justice.[3]

[3]Statement of the chief prosecutor of the International Criminal Court issued on 5 December 2014, https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2&ln=en. Accessed 18 October 2018.