Global Constitutionalism (2015), 4:2, 227–253 © *Cambridge University Press, 2015*
doi:10.1017/S2045381715000064

The impact of international criminal law and the ICC on national constitutional arrangements

RUPERT ELDERKIN *

Email: rupert.elderkin@gmail.com

Abstract: International criminal law (ICL) developed in large part from international humanitarian law during the mid-to-late twentieth century. The International Criminal Court (ICC), a permanent institution to investigate and prosecute ICL cases finally was established in 2002. Although widely supported, certain states feared that the ICC would diminish national sovereignty. Yet, in formal legal terms, ICL and the ICC's Rome Statute are just like other branches of public international law in terms of their relationship with national constitutional arrangements. ICL does not challenge states' primary executive and judicial powers; it does not introduce any general rights for citizens or particularly onerous obligations for states that are already subject to the rule of law; and its intrusion on national sovereignty is only in evidence when a state's leaders either are responsible for atrocities or are incapable of protecting their citizens from such atrocities. ICL thus is very different from international human rights law (IHRL), which directly impacts national constitutional arrangements. When ICL does come into play, however, arguably it may perform quasi-constitutional functions, in particular offering the only means under public international law to remove state officials from office when they are believed responsible for the most harmful abuses of power.

Keywords: comparative constitutional law; International Criminal Court (ICC); international criminal law (ICL); international human rights law (IHRL); state sovereignty

I. Introduction

Two of the most significant themes in international law in the post-Second World War era have been the emergence of widely applied human rights protections and, more recently, the creation of a permanent regime to apply international criminal law (ICL) in an effort to end the impunity previously enjoyed by the perpetrators of acts of genocide, war crimes

* MA (Oxon); GDL (City University); MPP (Princeton).

and crimes against humanity. The International Criminal Court (ICC), established following the 2002 entry into force of the Rome Statute of the International Criminal Court (Rome Statute),[1] is the centrepiece of this permanent – albeit non-universal[2] – ICL regime.[3]

While the penetration of international human rights law (IHRL) into national constitutional affairs has been much studied,[4] the question of how ICL – 'the other side of the coin of human rights … the sharp edge of the sword which establishes individual responsibility and punishes violators'[5] – may perform a quasi-constitutional function in constraining power- and rights abuses by power holders has received much less attention.[6]

[1] Available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, accessed 11 May 2015.

[2] The ICC has jurisdiction over the most serious ICL crimes committed by nationals of, or on the territory of, states Parties to the Rome Statute or other states accepting the ICC's jurisdiction. It has jurisdiction also over cases referred by the UN Security Council. Currently, 123 states have ratified the Rome Statute – see *The States Parties to the Rome Statute*, available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>, accessed 11 May 2015.

[3] The ICC describes its primary mission as being, 'to help put an end to impunity' – see *Understanding the International Criminal Court*, available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>, accessed 11 May 2015.

[4] E.g., there is an extensive literature concerning the constitutional implications of European human rights law for states that are parties to the European Convention on Human Rights. For bibliographical references, see RCA White and C Ovey, *Jacobs, White, & Ovey – The European Convention on Human Rights* (5th edn, Oxford University Press, Oxford, 2010). For an overview going beyond the European experience, see G Halmai, *Perspectives on Global Constitutionalism: The Use of Foreign and International Law* (Eleven International Publishing, The Hague, 2014) (section on 'The Constitutionalization of International Law: International Human Rights before Domestic Courts').

[5] RK Woetzel, 'International Criminal Law and Human Rights: The Sharp Edge of the Sword' (1968) 62 *Proceedings of the American Society of International Law at Its Annual Meeting* 117–23.

[6] For extensive bibliographical references to ICL literature, see, e.g., MC Bassiouni (ed), *Introduction to International Criminal Law* (2nd edn, Transnational Publishers, Ardsley, NY, 2003) or A Cassese, *International Criminal Law* (3rd edn, Oxford University Press, Oxford, 2008). The literature concerning ICL and questions of constitutional law comes largely from around the time when the Rome Statute was being drafted and subsequently, when it was open to states for signature and ratification: see, e.g., H Duffy, 'National Constitutional Compatibility and the International Criminal Court' (2001) 11(5) *Duke Journal of Comparative and International Law* 5; C Kreß and F Lattanzi (eds), *The Rome Statute and Domestic Legal Orders* (Il Sirente, Ripa di Fagnano Alto, 2000); E Lambert-Abdelgawad, 'Cour pénale internationale et adaptations constitutionnelles comparées' (2003) 55(3) *Revue internationale de droit comparé* 539; P Tavernier, 'Comment surmonter les obstacles constitutionnels à la ratification du Statut de Rome de la Cour Pénale Internationale?' (2002) 51 *Revue trimestrielle des droits de l'homme* 545; European Commission for Democracy Through Law (Venice Commission), *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court* (2001), available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF%282001%29001-e>, accessed 11 May 2015, all presenting

In large part, this disparity in scholastic interest may be explained by the fact that IHRL shares obvious characteristics with constitutional law while ICL does not. Thus, just as national constitutions commonly incorporate rights provisions in order to protect individuals from the abuse of power by the state,[7] so IHRL serves a similar function.[8] By contrast, ICL more closely resembles a body of 'ordinary' or 'municipal' – i.e., non-constitutional – law. Like domestic criminal law, ICL prohibits certain conduct and contemplates a system to prosecute and punish individuals who breach its prohibitions. However, it is silent as to how states should order their affairs and it does not propound any rights.[9] Consequently, insofar as ICL has been subject to analysis from a constitutional perspective, scholars largely have concerned themselves with questions of technical conformity between

multi-country studies of constitutional compatibility. Most recently, the ICRC in 2010 published a retrospective account detailing the responses to constitutional concerns regarding the Rome Statute in 16 countries – see ICRC, *Issues raised regarding the Rome Statue of the ICC by national Constitutional Courts, Supreme Courts and Councils of State* (2010), available at <https://www.icrc.org/eng/resources/documents/legal-fact-sheet/issues-raised-regarding-rome-statute-factsheet-01-2010.htm>, accessed 11 May 2015. Others have focused on concerns relating to specific constitutions including, for example, the French (J Clerckx, 'Le Statut de la Cour pénale internationale et le droit constitutionnel français' (2000) 44 *Revue trimestrielle des droits de l'homme* 649), Russian (B Tuzmukhamedov, 'The ICC and Russian Constitutional Problems' (2005) 3(3) *Journal of International Criminal Justice* 621) and US (PD Marquart, 'Law Without Borders: The Constitutionality of an International Criminal Court' (1995) 33 *Columbia Journal of Transnational Law* 73; LA Casey, 'The Case Against the International Criminal Court' (2001) 25(3) *Fordham International Law Journal* 840) constitutions.

[7] The US and French constitutions being two notable examples, incorporating the Bill of Rights and the Declaration of the Rights of Man and of the Citizen, respectively.

[8] Compare, as one example, the fair trial rights provided by the US constitution's sixth amendment with equivalent provisions contained in the International Covenant on Civil and Political Rights (ICCPR) at art 14(3). See *Constitution of the United States of America as Amended*, available at <http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc50/pdf/CDOC-110hdoc50.pdf>, accessed 11 May 2015; *International Covenant on Civil and Political Rights* (United Nations, Treaty Series, vol 999, 171, 16 December 1966), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>, accessed 11 May 2015.

[9] As regards the relationship between criminal law and human rights law, it should not be particularly controversial to propose that both share the potential to shape the exercise of power, given that in sanctioning seriously harmful conduct, much of criminal law serves as a negative 'stick' to enforce positive rights such as the right to life or the right to freedom from discrimination on the basis of race. For a commentary on the relationship between criminal law and human rights law, see F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9(3) *Journal of International Criminal Justice* 577.

international legal principles and instruments – notably, the ICC's Rome Statute – and national constitutions.[10]

While such technical questions of constitutional conformity were of particular salience during the years around the ICC's inception, in this article I argue that a more interesting question now is whether ICL – as understood in the context of its present-day regime, including the application of the principle of universal jurisdiction as well as the jurisdiction of the ICC – may have 'constitutional impact'. That is to say, whether it has the potential to perform quasi-constitutional functions by approximating the rights protections of IHRL, supported by the coercive character of criminal law. I suggest that this potential is most likely to be realized in circumstances where the applicable national constitutional framework and attendant protections afforded by the rule of law are weak, non-functioning, or entirely absent. In such conditions, ICL may present the sole means to prosecute the most egregious human rights violations (something that, ironically, the international human rights system does not have the power to do),[11] constrain officials in their exercise of power and thus, protect a limited set of fundamental rights.

Below, first I expand on what I mean by 'constitutional impact' and give an overview of the features of the present-day ICL regime that are relevant to my argument. Then, using hypothetical illustrations, I explain how ICL potentially can have such an impact. Finally, I provide practical examples

[10] See references at (n 6). Analyses have concerned such matters as extradition (prohibited under certain constitutions, e.g., Brazil, Costa Rica, Slovenia), immunity from prosecution (certain political figures – e.g., heads of state, parliamentarians – have been constitutionally immune from prosecution – see, e.g., Norway, Spain, Venezuela) and the imposition of life sentences (whole-life sentences were prohibited, e.g., by the constitutions of El Salvador, Honduras, Nicaragua, Venezuela). Such studies illustrate areas of potential incompatibility between the Rome Statute and various national constitutional arrangements, necessitating reconciliation either by means of amendment – thus, e.g., art 53-2 was inserted into the French Constitution by means of a constitutional amendment law passed in 1999: 'La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998' (see Loi constitutionnelle n° 99-568 du 8 juillet 1999 constitutionnelle insérant, au titre VI de la Constitution, un article 53-2 et relative à la Cour pénale internationale, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-revisions-constitutionnelles/loi-constitutionnelle-n-99-568-du-8-juillet-1999.138003.html>, accessed 11 May 2015) – or through consideration and resolution by the appropriate state body (e.g., a Council of State) – see, e.g., Duffy (n 6) 28, referring to both the Norwegian and Spanish authorities' consideration of the compatibility of the absolute immunity of their sovereigns with the Rome Statute. However, they do not answer the higher-order question of what it means for a sovereign, constitutionally-ordered state to be subject to ICL and the jurisdiction of the ICC.

[11] Atrocities can often be described simultaneously as violations of ICL and of IHRL – e.g., it is banal but correct to say that the killed victims of a genocide have suffered a violation of their right to life.

of ICL cases to illustrate points of both consistency and inconsistency with my argument.[12]

II. Definitions

'Constitutional impact'

AV Dicey provided a classical definition of the function of constitutional law as comprising, 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state'.[13] A common characteristic of states that are subject to constitutional governance is that their officials are constrained from acting against certain fundamental interests of citizens; their constituting rules therefore typically include rights conferred upon individuals against government action.[14]

While many states have codified these constitutional rules in a document identified as 'the Constitution', others rely instead on a wider range of legal sources to establish how power is distributed and how it may be used – the United Kingdom being perhaps the best-known example. Because the UK lacks a single constitutional document establishing the rules and boundaries of the exercise of power, British constitutional law always has been identifiable by its function rather than its appellation. Thus, '[i]t is possible to identify, in the abstract, certain functions that constitutions perform. In England, whatever laws actually perform those functions are considered part of "the constitution".'[15]

Such a functionalist approach can be followed in any constitutional inquiry, not only in relation to Britain. In the American context, Fallon states that, 'insofar as the Constitution gives rise to expectations about how officials can acceptably behave, and insofar as it creates or supports institutions capable of visiting adverse consequences on officials who do not comply with their perceived duties or otherwise depart from accepted patterns of behavior, the resulting constraints on official action ought

[12] Because the modern ICL regime (starting with the ad hoc international tribunals of the 1990s and now enshrined in the Rome Statute) has been in place for only a relatively short time, there is not a sufficient body of evidence to allow for rigorous empirical testing of this argument and such a survey is anyway beyond the ambitions of this article.

[13] AV Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan, London, 1939) 23.

[14] Indeed, not just 'typically'. Arguably, such a rights component is a 'constitutional essential' (FI Michelman, 'Constitutional Authorship' in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, Cambridge, 1998) 65).

[15] EA Young, 'The Constitution outside the Constitution' (2007) 117(3) *Yale Law Journal* 408, 411.

to count as "constitutional constraints"'.[16] This logic, while derived from a review of domestic constitutional constraints, applies equally to international-level constraints that similarly are external to national constitutional law.

Accordingly, the term 'constitutional impact' as used in this article should be understood functionally, as shorthand to capture how external constraints – in this case, the rules and applied practice of ICL – can both pierce the cloak of state sovereignty and perform specific functions normally attributable to constitutional laws. For the purposes of my argument, the relevant constitutional functions are protecting fundamental human rights; constraining officials from certain abuses of their constitutional powers; and offering a means for officials to be removed from office where they have committed such abuses. The performance of these functions may be indirect (e.g., rights protected indirectly via the prosecution of officials who are charged with crimes whose commission involves rights-infringing activity). Furthermore, the functional consequences of ICL enforcement may be more important than the formally intended consequences (e.g., if, as a result of ICL prosecution, a country's president or other senior official were practically impeded from continued public activity, this would be demonstrative of ICL having constitutional impact).

International criminal law – overview of relevant characteristics

'International criminal law is a body of international rules designed both to proscribe international crimes and to impose upon states the obligation to prosecute and punish at least some of those crimes.'[17] Notably, international crimes include genocide, crimes against humanity and war crimes. The present-day ICL regime developed in response to the worst excesses of violence such as were witnessed during the latter part of the nineteenth century and throughout the twentieth century,[18] though its roots can be traced back much further.[19] The original response to such violence and accompanying suffering was for states to enter into treaties that established rules of humanitarian conduct intended to lessen the suffering caused by armed conflict. These treaties are the basis of what is

[16] RH Fallon Jr, 'Constitutional Constraints' (2009) 97(4) *California Law Review* 975, 985.

[17] Cassese (n 6) 15.

[18] E.g., the Lieber Code (1863); First Geneva Convention (1864); Hague Conventions (1899, 1907).

[19] See Bassiouni (n 6), '[t]he writings of scholars for millennia have been positing rules for lawful and unlawful use of force' (62) … 'Aristotle, Cicero, St. Augustine and St. Thomas Aquinas set forth the philosophical premise of legitimacy of war' (313) … Meanwhile, '[p]iracy has been recognized as an international crime under customary international law since the 1600's' (83) – sea-borne piracy historically was the definitive international crime, touching upon all trading states' interests but beyond the traditional limits of territorial jurisdiction.

now called international humanitarian law (IHL). Most prominent are the provisions contained in the Hague Conventions, the Geneva Conventions and Additional Protocols, which restrict the methods that can be used in conflict and require certain standards of protection to be afforded both to military personnel and civilians. Present-day ICL is derived from IHL both by direct incorporation of the earlier treaty provisions into later treaties such as the Rome Statute[20] and by finding that formerly treaty-based prohibitions (such as the so-called 'grave breaches' that are contained in the Geneva Conventions) have become part of customary international law.[21] In addition to its incorporation of IHL treaty prohibitions and customary laws, ICL encompasses other crimes – notably including crimes against humanity and genocide – that are not considered part of IHL.[22]

ICL may be applied by domestic criminal courts within the scope of their ordinary jurisdiction (i.e., crimes committed on the state's territory or by its citizens), subject to the national rules governing the application of public international law. It may also be applied by domestic criminal courts in respect of ICL crimes committed anywhere, by anyone, in accordance with the principle of universal jurisdiction. Finally, the present-day ICL regime includes the possibility for the ICC to assert jurisdiction in certain circumstances. Each of these possibilities, together with their implications for national constitutional arrangements, is discussed below.

ICL as public international law. Ignoring, for a moment, the novel aspects of the ICL enforcement regime (specifically, the ICC and the principle of universal jurisdiction, to be discussed below), our starting point in assessing ICL's capacity to have constitutional impact must be to consider it formally and simply as part of the greater corpus of public international law. As such, it has to be reconciled with national conceptions of sovereignty and constitutionally determined national legal orders just like every other kind

[20] See, e.g., Rome Statute, art 8: '(1). The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. (2). For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention.'

[21] See, e.g., *The Prosecutor v Duško Tadić aka 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Case No IT-94-1 (2 October 1995), para 117, available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>, accessed 11 May 2015: 'Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallized emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.'

[22] The full extent of the relationship between ICL and other branches of international law (i.e., IHL and IHRL) is more complex than as described here, however this simplified presentation suffices for present purposes.

of public international law – whether, e.g., the Law of the Sea, International Human Rights Law or International Environmental Law. Depending on whether a particular state is monist[23] or dualist[24] in its conception of international law, we can say that ICL may apply directly within the domestic legal system (monism),[25] otherwise national implementing legislation may be required in order for it to be effective (dualism).[26] In addition, national constitutional provisions will determine ICL's position in a nation's hierarchy of laws.

For a monist state to prosecute ICL crimes in its domestic criminal courts, it should be necessary simply to refer to the relevant international treaty provisions and apply them in the domestic court – indeed, military courts in the Democratic Republic of the Congo regularly apply the substantive articles of the Rome Statute in war crimes and crimes against humanity cases.[27] By contrast, a dualist state either

[23] Monist states view international law as part of the same continuum as the domestic legal order. Thus, '[i]nternational law has a primary place in this unitary legal system, such that domestic legal systems must always conform to the requirements of international law or find themselves in violation' – T Ginsburg, S Chernykh and Z Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) *University of Illinois Law Review* 201, 204.

[24] Dualist states view international law as distinct from domestic law and as something to which the state must consent in order for it to apply: 'International legal obligations would require transportation into the domestic order to take effect. Absent such transportation, there is the distinct possibility of an action being legal in national law but illegal in international law; in which case, a dualist would presume that courts should apply the rules of national law' – ibid.

[25] E.g., Germany has a monist conception of international law. Art 25 of its Basic Law states that, 'the general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory' (*Basic Law for the Federal Republic of Germany*, available at <http://www.bundestag.de/grundgesetz>, accessed 11 May 2015. English translation provided in MN Shaw, *International Law* (6th edn, Cambridge University Press, Cambridge, 2008) 171.

[26] E.g., Israel has a dualist conception of international law and thus, of IHL and ICL. Accordingly, in *A & B v State of Israel* (2007), the Israeli Supreme Court sitting as the Court of Criminal Appeals affirmed that, 'an explicit statutory provision enacted by the Knesset overrides the provisions of international law … However, according to the presumption of interpretive consistency, an Israeli act of legislation should be interpreted in a manner that is consistent, insofar as possible, with the norms of international law' – see *A & B vs State of Israel*, CrimA 1757/07, CrimA 8228/07, CrimA 3261/08 (5 March 2007), available at <http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf>, accessed 11 May 2015.

[27] See M Politi and F Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate, Aldershot, 2008) 94 at fn 7. From the author's own experience while working in support of Congolese armed forces prosecutors in 2014, the substantive articles of the Rome Statute are applied as directly applicable laws before military courts and tribunals presiding over war crimes and crimes against humanity cases.

would have to enact domestic implementing legislation to reflect the content of the particular Rome Statute provision to be applied or otherwise, its courts would have to find that the provision reflected a principle of customary international law such that it could be applied as part of domestic law.[28]

It appears that if ICL is viewed simply as public international law, with its attendant potential to be implemented by domestic courts as described above, there is little scope for it to have constitutional impact. We can reach some relatively banal conclusions, such as that ICL is not designed to play a special constitutional role, in contrast to IHRL.[29] Otherwise, ICL resembles public international law of the most ordinary kind. Furthermore, we may presume that in most countries it will be applied only very rarely, if at all. For example, in a stable European democracy,[30] the only ICL prosecutions that we might expect to observe most likely would be of (1) foreign citizens who have come as refugees to Europe after having committed crimes in their home country, or (2) (a topical example) citizens who have travelled abroad to fight for non-state armed groups.

Obviously, this is not the end of the inquiry because – unlike other bodies of public international law – ICL can be applied in novel ways that have the potential to intrude upon national constitutional arrangements. Thus, with respect to ICL crimes committed on the territory of one state, the crimes can be prosecuted either in another state in accordance with the principle of 'universal jurisdiction' (whereby any state may use its own domestic legal system to prosecute core ICL crimes committed anywhere in the world) or – subject to the principle of 'complementarity' – at the international level by the ICC. In addition, ICL inherently is different from other kinds of public international law, as well as from domestic criminal law, because it is used above all to prosecute political and

[28] The direct application of customary international law without specific legislative action is a monist-type characteristic of some dualist legal systems.

[29] Or, even more starkly, in contrast to the various iterations of the treaties establishing the European Union and its accompanying supranational, quasi-constitutional structures (e.g., the European Court of Justice, the European Parliament).

[30] At least, one not involved in long-running expeditionary wars, such as the United Kingdom – the ICC Prosecutor having launched (and subsequently reopened) a preliminary examination into certain actions of British troops during their operations in Iraq. See 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq' (13 May 2014), available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-iraq-13-05-2014.aspx>, accessed 11 May 2015.

military leaders[31] accused of having committed the most serious atrocities. Thus, whereas constitutional law and IHRL exhibit a degree of subject matter overlap insofar as they both concern rights provisions, constitutional law and ICL exhibit a kind of jurisdictional overlap in the sense that they both apply limits to individuals in positions of power who have the capacity to cause massive harm if they should abuse the trust and authority vested in them.[32] In circumstances such as civil war or the emergence of despotic rule where other mechanisms (e.g., national constitutional checks and balances, or international human rights obligations) are ineffective in constraining abuses of power, ICL uniquely should have the potential to shape national political landscapes albeit that such effects may be extremely difficult to tease out from the inevitably complex web of other causal factors.

ICL and universal jurisdiction. Universal jurisdiction is the principle that any state may prosecute certain international crimes, even absent any nexus between the prosecuting state and the circumstances of the crimes (i.e., their location or the nationality of the perpetrator(s) or victim(s)). While the range of crimes subject to universal jurisdiction has never been precisely defined, historically it has covered piracy and more recently, core ICL crimes.[33] There is no commonly agreed statement of the concept in international law, although the 'Princeton Principles on Universal

[31] The Nuremberg and Tokyo Tribunals famously focused their efforts on individuals at the highest levels of the German and Japanese political and military structures (though many more lower-level perpetrators were prosecuted by other post-war courts and tribunals). The International Criminal Tribunal for the former Yugoslavia (ICTY) – one of the two ad hoc tribunals (along with the International Criminal Tribunal for Rwanda (ICTR)) that were established in the 1990s by the UN Security Council to apply ICL to individuals accused of the most serious crimes during the conflicts in those countries – maintained a similar focus. See *About the ICTY: History*, available at <http://www.icty.org/sid/95>, accessed 11 May 2015: 'The Tribunal was created to concentrate on the most serious crimes and the people most responsible for them. Wherever possible, investigations have therefore focused on the leaders who could be regarded as most responsible for the crimes, because even heads of state are not above the law.'

[32] In addition, ICL provisions apply to those in the most prominent positions in non-state organizations (e.g., leaders of rebel movements such FARC (Colombia) or the Tamil Tigers (Sri Lanka)). Where rebel forces control territory and civilian populations, a state's constitutional protections are unlikely to have any purchase. The idea that ICL can provide a limited set of quasi-constitutional protections in the absence of any constitution appears worthy of further investigation.

[33] For an extensive commentary on this principle, see MC Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81; see also S Macedo (ed), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, Philadelphia, PA, 2004) and Halmai (n 4).

Jurisdiction' represent the efforts of a group of scholars to develop such an agreed position.[34]

According to this principle, a Spanish prosecutor could, for example, bring charges for the ICL crime of persecution committed in Syria by government forces against Syrian civilians without any need to show a connection with Spain.[35] In certain limited circumstances, states thus are endowed with the theoretical power to encroach upon each other's sovereignty. As Macedo puts it, '[u]niversal jurisdiction appears as a potent weapon: it would cast all the world's courts as a net to catch alleged perpetrators of serious crimes under international law. It holds the promise of a system of global accountability – justice without borders – administered by the competent courts of all nations on behalf of humankind.'[36]

However, if universal jurisdiction offers a route to justice in particular where domestic judicial institutions cannot function or where the ICC is unable to act,[37] it also empowers third states to act where to do so may not be in the best interests of the country of the crimes.[38] To give an example, let us imagine that there was a bloody civil war in state X, now ended. State X might undertake, as part of its peace-building efforts, to include a general amnesty provision in its new constitution. Regardless of whether state X had ever ratified the Hague Conventions or the Geneva Conventions, let alone the Rome Statute, any other state choosing to assert universal jurisdiction could bring criminal proceedings in relation to ICL crimes committed during the civil war. State X's power to determine how to rebuild its society is not simply out of its hands – it is at the mercy of all and any other states that might choose to act. In reality, the prospects for such third country interference in the face of a well-intentioned national amnesty are remote. However, universal jurisdiction – at least

[34] See Macedo (n 33).

[35] Although the attempts by Spanish investigative judge Baltazar Garzón to prosecute former Chilean President Augusto Pinochet frequently have been cast as the exercise of universal jurisdiction, note that Garzón's case involved acts committed against Spanish citizens and therefore there was a nexus between the crimes and the prosecuting state.

[36] Macedo (n 33) 4.

[37] E.g., because crimes have been committed on the territory of a non-state Party and the UN Security Council is unwilling to refer the situation to the ICC Prosecutor.

[38] Or indeed, in the interests of the wider international community. Bassiouni (n 6) 154 warned that, 'universal jurisdiction must not be allowed to become a wildfire, uncontrolled in its application and destructive of international legal processes. If that were the case, it would produce conflicts of jurisdiction between states that have the potential to threaten world order, subject individuals to abuses of judicial processes, human rights violations, politically motivated harassment, and work denials of justice.'

in theory[39] – has the potential for constitutional impact in countries where ICL crimes are committed, with the nature of their constitutional arrangements and their choice concerning whether or not to become a state Party to the Rome Statute having no bearing upon the possibility for the judicial authorities in a third state to prosecute the crimes committed there.

ICL, the ICC and complementarity. Upon entry into force of the Rome Statute in 2002, the ICC came into being as the first permanent, independent, international court with jurisdiction to hold accountable individuals who commit ICL crimes. The Statute is in fact a treaty, agreed upon by the participants at the 1998 United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) and subsequently ratified by 123 (and counting) states Parties. It incorporates mechanisms to establish the ICC and details the substantive criminal prohibitions that are subject to the court's jurisdiction. The sources of the substantive prohibitions are as mentioned above – previous treaty obligations under IHL, along with other sources including, most notably, customary international law.[40]

As regards constitutional law, questions of sovereignty as well as of constitutional compatibility were thoroughly discussed and by and large were resolved at the Rome Conference. It was understood that the ICC in general would respect state sovereignty because it would have jurisdiction to investigate and prosecute ICL cases only where national courts were unwilling or unable to proceed. This 'complementarity' principle provides the main safeguard for states reluctant to cede jurisdiction to the ICC based on fears of a loss of sovereignty to a supra-constitutional institution.[41]

[39] Universal jurisdiction as it has been used to date may be said to symbolize the potential rather than the actual reach of ICL. Langer's extensive study reveals that although over 1,000 universal jurisdiction complaints had been made worldwide (as of 2011), only 32 accused individuals were brought to trial. Langer describes the actual impact of universal jurisdiction as amounting mostly to, 'a project of well-developed democracies' (M Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105(1) *American Journal of International Law* 1, 47).

[40] Art 21 of the Rome Statute spells out that 'the principles and rules of international law' and 'general principles of law derived by the Court from national laws' are to be considered as sources of applicable law by the court.

[41] See Rome Statute, Preamble, para 10 ('Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'); Art 1 ('shall be complementary to national criminal jurisdictions'); Arts 17–19 (regarding the admissibility of cases before the ICC and setting out provisions such that the Court shall determine a case to be inadmissible if (per art 17(1)(a)) '[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'; or (per (b)) '[t]he 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 genuinely to prosecute').

The first ICC Prosecutor described complementarity as a 'positive' concept, such that, '[t]he effectiveness of the International Criminal Court should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.'[42]

Complementarity marks a fundamental difference between the ICC and the ad hoc tribunals (ICTY, ICTR), which as UN Security Council (UNSC) creations were endowed with primary jurisdiction over the crimes committed during the 1990s Yugoslav wars and the 1994 Rwandan genocide, respectively. By contrast, the ICC is the product of a multilateral treaty. In order to gain acceptance amongst a large group of states, the treaty had to address national concerns in a way that the 'imposed from above' ad hoc tribunals did not. Accordingly, the Official Records of the Rome Conference are replete with discussion about sovereignty as a concern and complementarity as the solution.[43]

As regards national constitutional arrangements, the complementarity principle means that there is a presumption in favour of domestic investigations and prosecutions. However, should those efforts not be genuine (or should the state in question simply lack the capacity to conduct meaningful investigations or prosecutions), the ICC can assert jurisdiction and can continue with proceedings at the international level. This means that there is always the potential for the ICC to intercede in circumstances in which national arrangements are found wanting.[44] In structural

[42] *Paper on some policy issues before the Office of the Prosecutor* (September 2003) 4, available at <http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf>, accessed 11 May 2015.

[43] Sovereignty concerns were expressed by national representatives from, inter alia, Bahrain, China, Côte d'Ivoire, Guinea, India, Indonesia, Iraq, Kazakhstan, Republic of Korea, Libya, Malaysia, Mexico, Mozambique, Pakistan, Sudan, Swaziland, Syria, Trinidad and Tobago and Vietnam – although progressive voices are also in evidence, for example, from the Croatian ('[E]stablishment of a permanent and universal court … meant abandoning the traditional concept of sovereignty of States'), Portuguese ('[T]he concept of sovereignty has evolved significantly') and Tanzanian ('[T]he Court must ensure that State sovereignty became a concept of responsibility and international cooperation rather than an obstacle to the enjoyment of universal human rights') representatives. (See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998. Official Records*. A/CONF.183/1.)

[44] For example, the ICC OTP argued that cases against leading members of the former Gaddafi regime in Libya should not be prosecuted domestically because Libya lacks the capacity to handle such proceedings – the ICC Pre-Trial Chamber concurred with this assessment. See, e.g., 'Summary of the Decision on the admissibility of the case against Mr Gaddafi' (2013), available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Documents/Summary-of-the-Decision-on-the-admissibility-of-the-case-against-Mr-Gaddafi.pdf>, accessed 11 May 2015.

terms, we may say that complementarity preserves national constitutional independence and sovereignty to the greatest degree possible, while maintaining the ICC as ultimate guarantor of international standards of justice and maintaining the possibility for the ICC's intervention to have constitutional impact depending on the circumstances of a given case.

III. ICL as an informal route to constitutional protection in extremis

Having provided a working definition of 'constitutional impact' and highlighted the most important characteristics of the present-day ICL regime, I now explore how this regime potentially can perform certain quasi-constitutional functions as a last resort in states in which the rule of law is not well-functioning. It may do so by restraining powerful state actors (i.e., political and military leaders) in the commission of the worst abuses of power both against citizens of other states and against their own people.

To be clear, the ICC is not designed to and never will offer a forum in which to challenge national constitutional arrangements by conducting some form of judicial review, even if those arrangements are bound to result in the kinds of harm that ICL is intended to protect – it is not some kind of supranational constitutional court. Thus, even had the ICC been in existence at the time, it could not have served as a forum in which to challenge discriminatory laws enacted in Nazi Germany in the 1930s and 1940s.[45] The basic reason for this is that ICL in terms of its subject matter jurisdiction and personal jurisdiction is no different from a domestic criminal law regime whose scope extends only to prosecuting individuals. Therefore, just as a domestic trial court cannot entertain a case in which there is no accused, but merely a point of law to be challenged because it might entail future criminal conduct, similarly the ICL regime provides neither a framework nor a forum for such laws to be challenged.

By contrast, IHRL (again, if it had existed during the Nazi era) should have offered protection to victims of German persecution from the kinds of laws passed by that regime. Under IHRL provisions, challenges to those laws could have been raised without the need to hold a criminal trial. However, no human rights system – whether domestic or international – could have imposed its will over the discriminatory and murderous desires of the Nazi leadership without the benefit of a powerful and enduring enforcement mechanism. Yet, such a mechanism is lacking even today, let

[45] Although it could have exercised its powers to prosecute individuals undertaking particular acts pursuant to those laws, provided that those acts amounted to crimes within the scope of the Rome Statute's prohibitions.

alone in 1930s Germany. To emphasize this key difference, ICL on the one hand offers a means to prosecute and sanction those who have committed the worst kinds of atrocities, but most likely only will be used when the domestic legal and political order already has been seriously compromised. Meanwhile, IHRL offers a means to protect rights long before ICL crimes have been committed, but when the worst happens, the IHRL system lacks any means to penetrate into domestic affairs if there is no working rule of law system. Accordingly, while former ICC President Kirsch is correct in stating that, 'although obviously the ICC deals with the most serious violations of human rights, it is not a human rights court in the traditional sense. It is a criminal court.'[46] In extremis the ICC *can* exercise powers in relation to 'the most serious violations of human rights' precisely because it is a criminal court, endowed at least to some degree with the 'teeth' to act.

Let us consider more carefully how ICL can constrain national constitutional arrangements indirectly – and admittedly, rather crudely – given that it does not propose any mechanism for judicial review. In a well-functioning constitutional democracy, there are various means to restrain the executive branch of government and state organs from abusing their powers. Usually, the constitution will spell out limits on power, notably by prescribing the terms upon which a country's president and other officers of state can hold power (duration of presidential mandate, possibility for re-election, etc), by establishing a system of checks and balances on the exercise of power (e.g., dividing responsibility for law-making between the executive and legislature, with provision for a constitutional court to review laws and executive or legislative actions) and by enshrining rights of citizens that must not be infringed. For states subject to the well-functioning rule of law, criminal law does not serve a constitutional function in terms of being designed specifically to constrain the exercise of power by executive officers or state agents or to provide the ultimate means to protect citizens' rights.[47] Indeed, it is relatively common for constitutions to provide certain figures of state (notably, presidents and parliamentarians) with immunity from domestic criminal prosecution precisely because of the risk that criminal law might be used not to uphold but rather to subvert the constitution (e.g., if an activist, anti-government prosecuting magistrate in a civil law system or a prosecutor in a common law system sought to bring frivolous charges against the president or a parliamentarian in order to advance a political agenda).

[46] P Kirsch, 'The Role of the International Criminal Court in Enforcing International Criminal Law' (2007) 22(4) *American University International Law Review* 539, 543.

[47] Notwithstanding that every state will establish a system of criminal justice, the purpose of that system is not primarily to restrain the abuse of power by the state and its agents, but to protect and maintain order amongst the general population.

Now consider a state that nominally is a constitutional democracy, however, where the institutions of state are not well-functioning. The president has chosen to repress a national minority using the state's security apparatus. Attempts to constrain this abuse of power by seeking to enforce the rights of the minority are unsuccessful because the president has subverted the constitutional court, replacing independent judges with his allies. His political party enjoys a parliamentary supermajority and there is thus no means within the domestic system for the victims of the abuse of power to protect themselves by asserting their rights without recourse to civil disobedience or violence.

In these circumstances, IHRL may be a source of moral comfort, confirming that the minority's rights have been infringed, but it does not provide any mechanism by which to sanction the president. ICL, however, does offer the possibility to act. Provided that the rights abuses in question are sufficiently serious such that they amount to infringements of ICL (e.g., they result in death or serious physical or mental harm to members of the minority group, as would be the case for the infringement of the right to life and as might be the case for the infringement of the right to freedom from discrimination), the president at least in theory can be prosecuted – either by the ICC or in another state exercising universal jurisdiction. This possibility for ICL prosecution to serve as a proxy for IHRL enforcement accords with the view expressed by Ssenyonjo, who states: 'Given that there is currently no international court of human rights, the ICC can play an essential role by holding individuals responsible for international crimes within its jurisdiction without any distinction based on official capacity.'[48]

While prosecuting a country's president for ICL crimes is far more blunt a weapon than removing him from office in accordance with the provisions of the national constitution following a ruling by the national constitutional court, this example is intended to highlight that where the rule of law is

[48] Ssenyonjo further notes that the African Union has considered empowering the African Court of Justice and Human Rights to hold ICL trials: 'If this does indeed occur, the African Court will be the first regional human rights body to have criminal jurisdiction to pronounce itself on what has hitherto fallen within the purview of international criminal tribunals' (MA Baderin and M Ssenyonjo (eds), *International Human Rights Law – Six Decades after the UDHR and Beyond* (Ashgate, Aldershot, 2010) 472). As yet, this proposal has not been adopted, although the creation by the African Union and the Senegalese government of so-called 'Extraordinary African Chambers' of the Senegalese courts to try the former Chadian dictator Hissène Habré indicates a willingness to pursue ICL cases in Africa, even across national borders (see Human Rights Watch, 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal' (27 April 2015), available at <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal>, accessed 4 May 2015).

ineffective, ICL can provide de facto 'backstop' protection for a limited set of fundamental rights (namely the rights to life, freedom from torture, etc of those affected by the abuse) and thus, have constitutional impact. Importantly, ICL at least in theory cannot be circumvented by a power-abusing president such as the one depicted above, whereas national constitutional law (and indeed, national criminal law) can be circumvented if domestic political circumstances are such that power trumps the domestic rule of law.

IV. Case examples

To help decide whether in practice ICL is capable – let alone, uniquely capable – of having such indirect constitutional impact as described, let us consider some examples. The first, concerning the 1992–95 Bosnian war, contrasts IHRL and ICL in terms of their respective capacity for constitutional impact absent the rule of law. The second and third, concerning, respectively, the ICC's response to the violence witnessed during and after the 2010 elections in Côte D'Ivoire and the 2007 elections in Kenya, examine how the ICC's involvement in fragile political environments can bolster national constitutional protections. The fourth, concerning the ICC's response to the long-running campaign of atrocities in Darfur, Sudan, suggests, however, that there are definite limits to the reach of ICL in terms of fundamental rights protection and the constraint of state officials.

First example (pre-ICC): Comparing the constitutional impact of IHRL v ICL in Bosnia

The 1992–95 Bosnian war saw many thousands of civilians killed, forced from their homes or otherwise persecuted based on their ethno-religious identity. The United Nations was sensitive to these abuses of fundamental international rights[49] and appointed a Special Rapporteur of the Commission on Human Rights to monitor the situation throughout the former Yugoslavia, including in Bosnia. When over 7,000 Bosniak[50] males disappeared following the armed takeover of the enclave of Srebrenica by Bosnian Serb forces in July 1995, the Special Rapporteur investigated and duly submitted

[49] Which were also in breach of the previously applicable 1963 Yugoslav constitution (e.g., per art 47, 'Life and the freedom of man shall be inviolable') – see *Constitution of the Socialist Federal Republic of Yugoslavia* (1963), English translation available at <www.worldstatesmen.org/Yugoslavia_1963.doc>, accessed 11 May 2015.

[50] Also commonly referred to as Bosnian Muslims.

a report to the UN Commission on Human Rights, detailing what information he had about the fate of the disappeared but also giving notice of his resignation based on his frustration with the UN's impotence in the face of such massive human rights violations. He wrote: '[I] … cannot continue to participate in the pretence of the protection of human rights.'[51] As he recognized with regret, a mandate to monitor IHRL violations in a conflict situation where the rule of law did not apply provided no inherent means to protect individuals whose rights were being abused or were likely to be abused.

Concurrently, the ICTY Office of the Prosecutor began to investigate the same events. It would be fanciful to suggest that the ICTY's efforts had any visible impact on the enforcement of the rights of Bosnian citizens during the remainder of the conflict. However, an indictment charging Bosnian Serb president Radovan Karadžić and his army commander, General Ratko Mladić, for the crimes committed following the fall of Srebrenica was issued on 14 November 1995,[52] a week before the signature of the Dayton Peace Accords signalled the end of the war. Interestingly, the peace accords incorporated a new constitution for the country, pursuant to which any persons who had been indicted by the ICTY but who had not surrendered to that tribunal were barred from holding office.[53] The provisions of this new constitution were to be backed up not only by Bosnia's severely weakened rule of law institutions, but also by an international High Representative and a large international military contingent. What can we conclude as regards the relative impact of IHRL and ICL on Bosnian constitutional affairs? Arguably, the Special Rapporteur's experience typifies the practical limitations of IHRL in circumstances in which there is a rule of law vacuum. By contrast, ICL did have an impact

[51] 'Situation of human rights in the territory of the former Yugoslavia. Final periodic report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 42 of the Commission resolution 1995/89' (22 August 1995) E/CN.4/1996/9, available at <http://www1.umn.edu/humanrts/commission/country52/9-yug.htm>, accessed 11 May 2015.

[52] *The Prosecutor v Radovan Karadžić and Ratko Mladić*, Indictment, ICTY Case No IT-95-18-I (14 November 1995), available at <http://www.icty.org/x/cases/mladic/ind/en/kar-ii951116e.pdf>, accessed 11 May 2015.

[53] Annex 4 of the General Framework Agreement (the formal title of the Dayton Accords) set out a new Constitution for Bosnia and Herzegovina – see <http://www.ohr.int/dpa/default.asp?content_id=372>, accessed 11 May 2015. Art IX(1) of that new Constitution reads, 'No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.'

on post-war constitutional arrangements, notably by precluding those implicated in the commission of mass atrocities from participating in political life – not only by dint of the new constitution's prohibition and attendant international supervision, but also because ICTY indictees – seeking to avoid trial in The Hague – were compelled to withdraw from public life and go into hiding.[54]

Second example (ICC, non-state Party): ICC's response to post-election violence in Côte D'Ivoire

Côte d'Ivoire exhibited significant political tensions following a brief civil war in 2002 that left the country divided between government-controlled and rebel-controlled areas. In 2010, president Laurent Gbagbo, having overstayed his constitutionally mandated term of office by five years, finally called elections and was defeated. Gbagbo challenged the result by means of an appeal to the Ivorian Constitutional Council, which was empowered pursuant to Article 94 of the constitution to make final rulings on the outcome of such elections.[55] The council, in a decision that was 'widely viewed internationally and by the Ivorian opposition as having been motivated by partisan bias',[56] annulled a large portion of the election results (for regions in which the opposition had overwhelming support) and declared Gbagbo the winner.

The country descended into violence until Gbagbo finally was ousted in April 2011, following intervention by French and UN troops. Although Côte d'Ivoire was not a state Party to the Rome Statute,[57] the new Ivorian administration requested the ICC to investigate the post-election violence.[58]

[54] In one case, however, an ICTY indictment was linked directly to the indictee's political resignation. Ramush Haradinaj – formerly a commander in the Kosovo Liberation Army and later, prime minister of Kosovo – resigned from political office upon being indicted by the tribunal – see BBC News, 'Profile: Ramush Haradinaj' (9 March 2005), available at <http://news.bbc.co.uk/1/hi/world/europe/4329091.stm>, accessed 11 May 2015.

[55] Loi No. 2000-513 du 1er Août 2000 pourtant Constitution de la Côte D'Ivoire, Art. 94, available at <http://www.presidence.ci/presentation/13/constitution-ivoirienne>, accessed 11 May 2015: 'Le Conseil constitutionnel contrôle la régularité des opérations de référendum et en proclame les résultats. Le Conseil statue sur: – L'éligibilité des candidats aux élections présidentielle et législative; – Les contestations relatives à l'élection du Président de la République et des députés. Le Conseil constitutionnel proclame les résultats définitifs des élections présidentielles.'

[56] N Cook, *Côte d'Ivoire Post-Gbagbo: Crisis Recovery* (Congressional Research Service, Washington, DC, 2011) 13.

[57] Côte d'Ivoire finally ratified the Rome Statute 15 February 2013.

[58] See Human Rights Watch, 'Côte d'Ivoire: ICC Judges OK Investigation' (3 October 2011), available at <http://www.hrw.org/news/2011/10/03/c-te-d-ivoire-icc-judges-ok-investigation>, accessed 11 May 2015.

The ICC opened an investigation and issued an arrest warrant for Gbagbo, pursuant to which the ex-president was transferred to The Hague in November 2011.[59] The ICC was able to exercise jurisdiction on the basis that Gbagbo's government had previously accepted the court's jurisdiction in 2003 (in relation to the violence that had occurred in 2002),[60] which the ICC Prosecutor considered a sufficient mandate for its investigation some eight years later.

The ICC's involvement in Côte d'Ivoire came at a stage when the election crisis had been resolved by means of international military intervention. It would therefore be an overstatement to say that it was the decisive factor in preventing the country from descending further into violence. However, the process of re-establishing accountable democratic government following the post-election violence arguably was significantly aided by the fact that Gbagbo was no longer subverting constitutionality and the rule of law in pursuit his own ambitions.[61] (We may imagine that the application of IHRL might also have been appropriate in the Ivorian situation. However, it could not have achieved the direct result of removing the former president – who manifested a key barrier to peace and stability in the country – given the lack of any international human rights court with jurisdiction to pursue individuals accused of rights abuses.)

Third example (ICC, state Party): ICC's response to post-election violence in Kenya

National political candidates Uhuru Kenyatta and William Ruto allegedly were among those responsible for crimes committed during post-election ethnic violence in Kenya in 2007–08, when thousands were killed, injured, or forced to flee their homes. Neither Kenyatta nor Ruto held government office at the time the crimes were committed. Allegedly, however, they had influence or control via political and tribal structures over the mobs and criminal gangs that perpetrated many of the attacks. Peace was re-established in the country only after several months of violence. Following African Union-mediated negotiations, a national unity coalition was formed to serve as an interim government. In 2010, a new Kenyan constitution was

[59] See generally 'Situation in Côte d'Ivoire', available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>, accessed 11 May 2015.

[60] See République de Côte d'Ivoire, *Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale* (18 April 2003), available at <http://www.icc-cpi.int/NR/rdonlyres/FF9939C2-8E97-4463-934C-BC8F351BA013/279779/ICDE1.pdf>, accessed 11 May 2015. See also République de Côte d'Ivoire, *Confirmation de la Déclaration de reconnaissance* (14 December 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>, accessed 11 May 2015.

[61] Akin to the withdrawal/removal of various of the ICTY's indictees from the political scene in their respective countries.

introduced after having been approved in a referendum[62] and in 2013, general elections were held in which Kenyatta and Ruto were elected as President and Vice-President, respectively.

Initially, it appeared that the 2008 unity government was committed to bringing the perpetrators of the violence to justice. A Commission of Inquiry was set up, which recommended the establishment of a special tribunal in Kenya with 'the mandate to prosecute crimes committed'.[63] However, the political will to create such a tribunal was lacking and instead, the names of those believed to bear the greatest responsibility for the violence were passed to the ICC Prosecutor in July 2009.[64] The Prosecutor, who had been monitoring the Kenyan situation, formally opened an investigation *proprio motu* (i.e., on his own initiative, rather than at the request of the Kenyan authorities).[65] In 2011, charges were confirmed inter alia against Kenyatta and Ruto. Since then, the ICC's Office of the Prosecutor has endeavoured to bring the cases to trial, however the Kenyan authorities and allies of the accused individuals are blamed for frustrating these efforts.[66] As a consequence,

[62] Both Kenya's 1969 Constitution and its 2010 Constitution contain fundamental rights provisions, although those in the 2010 Constitution are more extensive. In addition, the 2010 Constitution establishes the Kenya National Human Rights and Equality Commission. (*Constitution of Kenya* (1969), available at <http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Kenya_2_1969_Constitution.pdf>, accessed 11 May 2015. *Constitution of Kenya* (2010), available at <https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>, accessed 11 May 2015.)

[63] See *Report of the Commission of Inquiry into Post-Election Violence* (15 October 2008) ix, available at <http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf>, accessed 11 May 2015.

[64] See G Lynch and M Zgonec-Rožej, *The ICC Intervention in Kenya* (Chatham House, London, 2013) 4–5, available at <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0213pp_icc_kenya.pdf>, accessed 11 May 2015.

[65] See The American Non-Governmental Organizations Coalition for the International Criminal Court, 'The ICC Prosecutor's Application for Authorization to Open an Investigation in the Situation of Kenya' (5 April 2010), available at <http://amicc.org/docs/Kenya_Application.pdf>, accessed 11 May 2015.

[66] See Human Rights Watch, 'Kenya: Q&A on the ICC Trial of Kenya's Deputy President' (2 September 2013), available at <http://www.hrw.org/news/2013/09/01/kenya-qa-icc-trial-kenya-s-deputy-president#13>, accessed 11 May 2015: 'The ICC prosecutor has characterized the scale of interference with witnesses in the Kenya cases as "unprecedented," referring to pressure on witnesses and their families.' See also Global Post, 'How Kenya took on the International Criminal Court' (25 March 2014), available at <http://www.globalpost.com/dispatch/news/regions/africa/kenya/140325/how-kenya-beat-the-international-criminal-court>, accessed 11 May 2015, describing how the Kenyan government's obstruction included not only alleged witness tampering, but, 'as comprehensive a process of undermining as you can imagine', involving obstruction, diplomacy and the 2013 'anti-ICC' election strategy (former political rivals Kenyatta's and Ruto's joint platform being understood as in effect offering a national referendum on the ICC); and see Human Rights Watch, 'ICC hopes of justice set back' (5 December 2014), available at <http://www.hrw.org/news/2014/12/05/icc-hopes-justice-set-back>, accessed 11 May 2015.

the Prosecution withdrew the charges against Kenyatta on 5 December 2014[67] and, while the trial against Ruto is ongoing, the Prosecution's position in that case also appears to have been weakened. In parallel to these stalled proceedings in The Hague, domestic prosecutions that were contemplated against lower-level accused also have stalled. According to Kenya's Director of Public Prosecutions, none of the 4,576 cases opened in the aftermath of the post-election violence were deemed 'prosecutable' due to lack of evidence.[68]

In terms of the constitutional impact of ICL, it is hard to see Kenya as a positive example. Rather than the ICC standing up against abuses of constitutional powers, arguably the Kenyan government under Kenyatta's and Ruto's leadership has in fact outmanoeuvred the court.[69] Nonetheless, the ICC's involvement in Kenya seems to have precipitated some change. For one thing, the adoption of a new constitution in 2010 appears to have been motivated in no small measure by the unity government's desire to establish a credible domestic system capable of protecting rights and prosecuting the post-election violence in order to persuade the ICC to transfer its investigations back from The Hague to Nairobi. This is not simply conjecture – the Kenyan government presented exactly these arguments in submissions to the ICC in March 2011.[70] For another, the facts that the 2013 elections were dominated by the 'ICC question' and that former political opponents Kenyatta and Ruto ran together on a joint platform demonstrates the impact that the ICC's investigations were having at the highest levels of Kenyan politics; the ICC proceedings presented at that time a credible risk to Kenyatta and Ruto that they would be transferred to The Hague for trial and as a practical if not legal consequence, removed from national political life.

Fourth example (ICC, non-state Party): ICC's response to atrocities in Sudan

Upon referral by the UN Security Council, in 2005 the ICC opened an investigation into atrocities including the allegation that genocide was being committed in Darfur, Sudan, by the Sudanese military and by proxy

[67] See *The Prosecutor v Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr. Kenyatta, Case No ICC-01/09-02/11 (13 March 2015), available at <http://www.icc-cpi.int/iccdocs/doc/doc1936247.pdf#search=withdrawal%20of%20charges%20kenyatta>, accessed 11 May 2015.

[68] See Global Post (n 66).

[69] Ibid.

[70] See *The Prosecutor v Ruto, Kosgey and Sang* and *The Prosecutor v Muthaura, Kenyatta and Ali*, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, Case Nos ICC-01/09-01/11 and ICC-01/09-02/11 (31 March 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>, accessed 11 May 2015.

forces including Janjaweed militias.[71] In relation to this violence, the Court has issued warrants for the arrest of six individuals, four of whom were members of or aligned with the Sudanese government including most notably, president Omar al-Bashir. The lack of progress in the ICC's prosecution of these men has been a source of much comment and criticism and the Darfur situation tragically highlights – to an even greater degree than the travails of the Kenyatta case – the limits of the reach and power of the ICC Prosecutor. Indeed, in her December 2014 address to the UN Security Council, the Prosecutor – after detailing the current state of the Darfur investigation and of procedural work being done at the court – told the Security Council that *it* was the body that had the power to act against Sudan's leadership, if it chose to do so. Her report concluded with the following stark statement: 'Without stronger action by the Security Council and State Parties, the situation in Sudan is unlikely to improve and the alleged perpetrators of serious crimes against the civilian population will not be brought to justice.'[72]

The clearest demonstration of the ICC's impotence in the al-Bashir case has been provided by the court's inability to secure the president's arrest even during his travels outside Sudan (a non-ICC state Party) to the territories of ICC states Parties. Pursuant to the Rome Statute, their authorities are obliged to enforce the ICC's arrest warrant but so far, none of the states Parties visited by al-Bashir have complied with this obligation.[73] The only recourse the ICC has in the face of such non-cooperation by its states Parties[74] is to refer the matter to the ICC Assembly of states Parties or to the UNSC.[75] The ICC has indeed followed this procedure and made referrals to the UNSC, however – as

[71] Information on all cases related to the Darfur situation is available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>, accessed 11 May 2015.

[72] *Twentieth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)* (15 December 2014), para 31, available at <http://www.icc-cpi.int/iccdocs/otp/20th-UNSC-Darfur-report-ENG.PDF>, accessed 11 May 2015.

[73] See, e.g., BBC News, 'Sudan's Omar al-Bashir in Malawi: ICC wants answers' (20 October 2011), available at <http://www.bbc.com/news/world-africa-15384163>, accessed 11 May 2015 (re: travel to Chad, Kenya and Malawi) and ICC Now, 'ICC Suspect Al-Bashir Travels to Djibouti: Related News and Opinions' (9 May 2011), available at <http://www.iccnow.org/?mod=newsdetail&news=4505>, accessed 11 May 2015 (re: travel to Djibouti).

[74] Rome Statute arts 59(1) and 89(1) require a state Party, at the ICC's request, to take steps to arrest a wanted person. (Rome Statute Pt 9 governs international cooperation, including a general obligation (art 86) for member states to 'cooperate fully with the Court in its investigation and prosecution of crimes'.)

[75] Rome Statute, art 87(7).

noted by the Prosecutor in her address quoted above – no sufficient action has been taken as a result.[76]

What is the implication of these clear limitations on the ICC's reach for the argument sketched in this article regarding the potential for ICL to have constitutional impact? Most simply, that the application of ICL is not immune from the tides of realpolitik. In the case of Darfur, the lack of will from the international community, whether at the level of the African Union or within the Security Council, is a definite obstacle to the arrest and prosecution (and attendant removal from political life) of president al-Bashir and his allies. Similarly, the ability of the Kenyan authorities to impede the ICC's pursuit of the sitting president and vice-president reflects the limits of international concern with those legal proceedings. This is likely, at least in part, to be a consequence of the renewed strategic importance of Kenya following increased Islamist terrorist activity in east Africa and particularly, the Nairobi shopping mall attack in September 2013. While these realities need not be fatal to my argument, they do highlight that ICL's constitutional impact may often be overwhelmed by more powerful forces and the argument, for the moment anyway, is still quite fragile when tested against real-world conditions rather than in a hypothetical world where the ICL regime functions in accordance with the highest aspirations of international justice.

V. Conclusions

For any well-functioning constitutional democracy with strong rule of law institutions, it is hard to conceive of a turn of events at any point in the future when such massive violence will have occurred that there would be reason to launch ICL investigations and prosecutions. Absent such events, ICL, the Rome Statute and the ICC will have no impact on national life.

Yet, for countries suffering the misfortune of abusive or impotent state institutions, where there is no rule of law and therefore no capacity to enforce citizens' rights or to sanction officials' constitutional abuses, the present-day ICL regime has the theoretical potential to offer some protection for the most fundamental human rights,[77] to restrain the most

[76] For non-member states, even though failure to arrest an ICC wanted person may amount to non-compliance with a UNSC resolution, the prospect of further action being taken is even more remote – see, e.g., UNSC Resolution 1593, requiring the Government of Sudan to cooperate fully with the ICC (United Nations Security Council Resolution 1593 (31 March 2005) S/RES/1593, available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=42bc16434>, accessed 11 May 2015).

[77] Albeit, only after serious violations already have occurred.

egregious abuses of power and – via the ICC or otherwise, via the application of the universal jurisdiction principle – offers a means to work around the problems caused by the lack of functioning rule of law institutions at the domestic level. Other than the direct application of coercive force, there is no means by which the international community can sanction and remove the worst kinds of leaders except by way of applying ICL.

In such adverse circumstances ICL may offer the only hope for a law-based response, while the supposed protections of IHRL treaties are reduced to no more than fine words of intent. These circumstances may be few and far between but when they do pertain, there is little else that international law can offer as means to protect the unfortunate inhabitants of such a country. As was the case during the Bosnian war, IHRL neither offered any protection nor provided any means to impose any sanction in respect of the terrible violations of human rights that had occurred. The only law that was enforced with respect to those violations of rights, albeit ex post facto and only in conjunction with the deployment of international peacekeeping forces to give real effect on the ground, was ICL.

However, while there appears to be a reasonable theoretical basis upon which to argue that ICL has the potential to provide quasi-constitutional protections through criminal sanctions in some circumstances, a review of ICL cases to date provides only a limited degree of empirical support. Thus, while the ICC has initiated criminal investigations in relation to the acts of four current or former heads of state,[78] the charges against Kenyatta were dropped in late 2014 and we may not expect much from the al-Bashir case, given the ICC's inability to arrest him in the face of resistance in Sudan and a lack of cooperation elsewhere – notably, from other African Union members.

Nevertheless, if we are hopeful, we may consider that this is just the beginning of the ICC era. Within a decade of its establishment, the court has initiated proceedings against heads of state as well as lower-ranking officials accused of massive crimes against their own citizens. With the support of the wider international community, it may be hoped that the Court will continue to act against such individuals when circumstances require – in other words, where constitutionalism is still not strong enough to ensure the rule of law, the protection of fundamental rights and the application of proper limits on the power of leaders.

[78] In addition to Gbagbo, Kenyatta and al-Bashir, the ICC also investigated and issued an arrest warrant for Muammar Gaddafi of Libya before his death.

Even more hopefully, we may consider this to be the beginning of the era of universal jurisdiction, when fundamental constitutional rights may be enforced not only by the ICC but in addition, by concerned third states. No sitting head of state has yet faced an indictment in a foreign court on this basis, although the recently commenced proceedings in Senegal against former Chadian president Hissène Habré are a first step in this direction.[79] Should that day come, it will take unprecedented political will as well as coercive power to effect a successful prosecution of a sitting president. Nevertheless, the attempt in itself would amount to a big step forwards in the globalization of constitutional protections for citizens of all states.

For all the suffering that continues to be inflicted upon the innocent around the world in breach of fundamental rights, we should recall with pride how humanity emerged from the shadows of the Second World War to establish a remarkably resilient body of human rights at the international level – and how states in all regions of the world have embraced those rights as being crucial to their constitutional arrangements. IHRL encompasses a broad and rich range of rights that serve to protect individuals from abuses of state power, whether the abuse consists, for example, of a denial of fair trial rights, discrimination on the grounds of race or religion, or a denial of life or of personal liberty.

ICL – a far narrower body of law relating to the worst abuses that the powerful can inflict upon the weak – also emerged from the shadows at the end of the Second World War, notably with the Nuremberg and Tokyo International Military Tribunals that condemned as criminals the architects of the murderous Nazi German and Imperial Japanese regimes. Unlike IHRL, ICL's impact on national constitutional arrangements can never be expected to be as far-reaching. Nevertheless, it has the potential – in circumstances such as are sketched out in this article – to serve as a proxy for some of the most basic constitutional protections, offering the means to put an end to the abuse of power and giving recognition to the rights of the victims of the abuse. If we regretfully accept that there will always be gaps in the global coverage of the rule of law, the international community should embrace and support this limited, ad hoc approximation of constitutional protection that can flow from the practical application of ICL, the creation of the ICC system and the emergence of the international legal norm of universal jurisdiction.

[79] See (n 48). See also (n 35) commenting on the Spanish efforts to prosecute former Chilean President Pinochet.

VI. Acknowledgements

The initial work for this article was undertaken during a year spent at Princeton University in 2013–14, where I studied comparative constitutional law under the kind and illuminating supervision of Gàbor Halmai. I am also grateful to two anonymous reviewers of the original paper, whose comments helped me further to develop my ideas. All views expressed herein, as well as any errors, are my own.