Contemporary Issues Facing the International Criminal Court

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CHAPTER 31

Why Africa?

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Summary

While the question, "Is the ICC targeting Africa inappropriately?" is a critical issue to investigate, to address it fully I propose we reframe the question. Instead of asking whether Africa's targeting is unfair or justified, I suggest we ask *Why Africa?* in the first place. To answer this question I want to bypass the assumption that the ICC is "targeting Africa" and instead examine the structural inequalities that have made it so that Africa and not the United States, Joseph Kony and not George Bush, crimes against humanity and not pre-emptive intervention form the basis for the Court's action.

To date, 122 countries have signed and ratified the ICC's Rome Statute. The United States, China, Japan, India, Pakistan, Israel, and Turkey have not ratified it and thus are not under the jurisdiction of the Court. Of the 122 countries that have signed the Rome Statute, close to one third comprise African states, and because of the current violence in some of Africa's key high-resource areas, the ICC is more likely to scrutinize Africa. By asking questions that push us to make sense of why African countries have submitted to the jurisdiction of the Court, we can make sense of why Africans and African-based cases are the only ones being tried.

African submission to ICC jurisdiction exists within political and "structural" inequalities in the global arena, meaning that the ICC's involvement in Africa is not simply a question of the ICC's targeting of Africa. Nor is it a matter of whether African states themselves participated in referring particular cases. Rather, it has to do with which crimes can be pursued, which agents can be held responsible, whether Africa's violence can be managed by African countries, and whether the crimes of the Rome Statute are sufficient to address the root causes of violence in Africa's political landscape.

Argument

Africa has suffered ten civil wars in the past twenty years alone. These conflicts, primarily over resources, have contributed to untold numbers of deaths, rapes, and destruction leading to the militarization of everyday life. This violence is traceable to the legacies of colonialism and the way that post-independence

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states attempted to control their capital cities and rural regions—with little success—through military coups and the autocratic suppression of opposition movements. The struggle to control government has always involved a struggle to control extractive resources. These dynamics hampered the development of state institutions and created a highly centralized federal body.

Over the past thirty years, as African states were increasingly incorporated into the international economy, these poorly functioning state institutions have been negotiating the terms of extraction and compensation with former colonial powers, international organizations helping to facilitate transitional governments, and corporations hoping to keep the extraction agreements they had negotiated already with former military governments. But these extractive activities unfolded in contexts in which armies and the police are underpaid, educational and health institutions are dismally underfunded, and courts and electoral politics are driven by economic opportunism. The result: cycles of underdevelopment in which the poor get poorer and the way to make a profit is through extractive industries such as oil, mining, or plantation agriculture, which often involve violent and exploitative labor conditions.

Given this context, it is not surprising that the race for political control in Africa has led to the unfolding of electoral violence and, in some cases, the development of rebel groups vying for political influence and the control of various extraction industries. The recent histories of the Democratic Republic of the Congo, Somalia, Liberia, Nigeria, Uganda, Sierra Leone, and Congo-Brazzaville all fit this trajectory; each has various international companies, rebel groups, and governments deeply embattled in controlling resource extraction in African landscapes. This geography is part of a larger set of global interconnections in which violence, war, arms, and mineral resource extraction are all part of the same cycle. With increasing struggles over the management of violence in Africa, the industry of militarization has grown in various sub-Saharan African states, leading to over ten civil wars over the past twenty years. The impact of such violence has produced the death and homelessness of hundreds of millions of people.

The making of law is a political process and the negotiations that went into the creation of the Rome Statute, eventually adopted by 120 states in 1998, were deeply shaped by international power relations. Yet, ignoring the highly political processes of selecting and vetting the crimes under the subject matter jurisdiction of the Rome Statute has led to a misrepresentation of the highly political fields in which the history of African violence is embedded. If we look at how the four crimes currently under the subject matter jurisdiction of the ICC came to occupy the basis upon which offenses were committed and cases were selected, we can see that these were politically motivated and chosen

based on the various interests of the States Parties involved in choosing them. But in many of the African post-war regions with decimated judiciaries and infrastructures, the political crimes of the Rome Statute are really not able to address the root causes of economic plunder that are key to the emergence of violence in the first place.

In 1981, the International Law Commission (ILC) resumed its work on the draft "Code of Offences against the Peace and Security of Mankind" (hereafter, Code), at the request of the United Nations (UN) General Assembly. By 1989, representatives from Trinidad and Tobago requested that the ILC resume the process of establishing an international criminal court to deal with major drug-trafficking and arms control issues in the Caribbean and Latin America, which also had grave significance in Africa. At the forty-third session of the ILC in 1991, the commission adopted a draft Code, which defined the following crimes: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, use, financing, and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and willful and severe damage to the environment.

The ILC used government reports in the drafting process to create the comprehensive Draft Statute for an International Court. In 1994, it presented a draft for the establishment of the ICC to the UN General Assembly, which convened the Preparatory Committee to advance the process to the next level. In 1995, the Special Rapporteur omitted six of the twelve crimes in the subsequent draft created at the forty-seventh session. The omitted crimes included colonial domination and other forms of alien domination; apartheid; recruitment, use, financing, and training of mercenaries; willful and severe damage to the environment; international terrorism; and illicit traffic in narcotic drugs. The Preparatory Committee met six times over the course of two years (1996–1998), during which time it gathered feedback from national delegates, government reports, NGOs, and intergovernmental organizations.

Over the next few decades, the ICC became the first permanent international body empowered to adjudicate on individuals for four categories of offenses: war crimes; the crime of genocide; crimes against humanity; and, most recently, the crime of aggression. However, the process of creating the ICC passed through several phases of negotiation and refinement to the exclusion of the crimes seen as central to the problem of violence in the Global South including the use, financing, and training of mercenaries, illicit traffic in narcotic drugs; and willful and severe damage to the environment.

The Special Rapporteur presented several justifications for the omission in a topical summary report to the UN General Assembly. If the Court were to

gain universal acceptance among nations, it would have to avoid crimes that were too controversial or widespread. A number of delegations expressed support for the Special Rapporteur's recommendation to limit the list of crimes against the peace and security of humanity to those that were difficult to challenge—namely, acts that were so egregious they would unquestionably fall into the category. In support, many expressed the view that the commission needed to strike a balance between legal idealism and political realism, and the Special Rapporteur's approach was commended as appropriately leaning toward the latter (political realism), as likely to facilitate the work of the committee and as justified given the lack of consensus on certain crimes in the draft Code, especially traffic in narcotic drugs, terrorism, and willful and severe damage to the environment.

They insisted that the aim of the Code was to make possible the prosecution and punishment of individuals who had perpetrated crimes of such gravity that they victimized humankind as a whole. Thus, it seemed sound to reduce the list to a "hard core" of crimes, making it easier for the draft Code to operate in the future. They indicated that this restrictive approach would avoid devaluing the concept of crimes against the peace and security of mankind, so crimes incapable of precise definition or which had political rather than legal implications should be left out. Ultimately, many of the Northern countries argued that including them would impede the preparation of a generally acceptable instrument. But what we can surmise that they were actually saying was that states were not willing to submit themselves to the broader range of crimes for which they might risk possible indictments of their own leaders.

Opponents of the omissions (mostly various states from the South) were dissatisfied with the outcome of the debate and suggested it should continue at greater length. They argued that these crimes "constituted serious offences against the human conscience and threats to the peace and security of mankind"; therefore, "there was no justification for excluding from the draft *Code* serious crimes such as: intervention, colonialism, apartheid, mercenarism and international terrorism." Later debates regarding terrorism and drug trafficking occurred during the Preparatory Committees. For example, India and the Russian Federation proposed the inclusion of acts of international terrorism based on the widespread and vast destruction that results in serious cases. Representatives from Austria, Sweden, Malaysia, the Republic of Korea, the Netherlands, and the United States argued that treaty-based crimes, such as terrorism, should be adjudicated at the national level.

After decades of debate, the crimes of the Rome Statute were reduced from the twelve previously defined in the 1991 draft to four classified as the "most serious" to peace and security. Those involved mass death and widespread

killing of such gravity that they were seen as threats to the international community. The revisions resulted in the Rome Statute of the ICC, and in 1998 they were presented and adopted in the Rome Conference. Between 1999 and 2002, the UN Preparatory Commissions met ten times to review and refine the Rome Statute and to develop its Rules of Procedure and Evidence, as well as the Elements of Crimes.

The Statute came into force in July 2002, and in the end the crimes that came to occupy the moral and legal concerns of the Court were those that involved explicit forms of mass violence—akin to the forms of violence being perpetrated in sub-Saharan Africa and Latin America at the time. In Africa, the vast majority of that violence occurred in struggles over resources—oil, diamonds, and coltan. And today, with the end of both European colonialism and the Cold War and at the height of neoliberal capitalism, a new scramble for Africa has begun in which local, national, regional, and international interests are competing for regulatory control of Africa's vast mineral resources. By asking *Why Africa*? It's important to reflect on how particular historical conditions such as the political vacuum created in African countries after the collapse of the Soviet Union affected these states and has contributed to the conditions for violence in the Middle East and in West, Central, and East Africa.

From the mining of various key resources in Africa that are in demand in the West to the illegal dumping of waste along Africa's coasts each year, these activities are not unrelated to our markets in the Global North. And the involvement of a range of competitors for these resources fuels the regional conflicts often perceived outside of Africa as endemic to the region. However, the reality is that these conflicts provoke other illegal activities, including the sale of arms to rebel groups.

Considering these realities, the responsibility of contemporary violence goes well beyond that of an individual commander and cannot be addressed through a strategy that limits its practice to law alone. In fact, assigning criminal responsibility to a few representative persons—commanders, heads of state, leaders of rebel groups—obscures the link between Africa's resource crises and contemporary violence. This is especially the case in states that do not have the capacity to hold reliable secondary and tertiary trials with lower-ranking perpetrators of violence. Despite this, it is the individualization of criminal responsibility, and the political process behind it, that frames the ICC's prosecution of African leaders.

As Article 25(2) of the Rome Statute indicates, "a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this *Statute*." Section 3(a) stipulates that this is the case, "whether [committed] as an individual, jointly with

another or through another person." In articulating the commission of crime through another person, the writers were especially concerned with addressing those who are responsible for ordering, soliciting, or inducing a crime that occurs or is attempted (Article 25(3)(b)). Also included is a person who "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission" (Article 25(3)(c)). Military commanders are then specifically included, with provisions, in Article 28.

These Articles of the Rome Statute, and how they came to be, are critical to answering the question of *Why Africa*? What we see is that the processes of reassigning criminal responsibility in political terms, without looking at the economic fields within which violence has festered, has led to the focus on high-ranking leaders and their roles in aiding and abetting, or not preventing, violence. Yet, despite this reality, African states continued to submit themselves to the jurisdiction of the ICC for reasons that go well beyond instrumental motivations, while various northern states both refused the expansion of the crimes and refused to submit to the jurisdiction of the Court. Given this, we might ask why any state would subject itself to the international management of crime? In answering this question for Africa, it is important to consider the African states' psychological-moral as well as external political influences for participating in the International Criminal Court regime.

The psychological-moral context begins with understanding what happened before and after the Rwandan genocide, in which leaders of many African states agreed "never again will such atrocities happen." And the external political influences begin shortly after African independence movements in the 1960s and 1970s in which African economies became deeply enmeshed in debt-ridden obligations and dependence on International Monetary Fund lending. In Rwanda, the fallout from the former Soviet Union led to the post-1989 circulation of large stockpiles of M16s in key sites of violence. The machetes used to kill were imported from Belgium. And the ethnic contests between the Hutus and Tutsis were fueled by colonial France's solidification of ethnic categories by rendering one group more privileged than the other (Mamdani, 2002). The realities of both the endemic and external contributions to that crisis led to a realization of the magnitude of the past in shaping contemporary violence and the realization that credible judiciary mechanisms had been decimated. Thus, both the pragmatic and moral commitments to prevent genocide led to the search for new and effective solutions for dealing with such heinous crimes with the result of African states actively supporting the development of the ICC.

And there is yet another reality that contributed to the perceived zealousness of African participation in ICC jurisdiction: the expressive will to demonstrate a

commitment to international membership through the signing of successive treaties. By the end of the Cold War, the shift to democratization and rule of law took shape alongside discourses related to international membership, good governance, and accountability. The related political questions that shaped African participation are connected to how, shortly following African independence movements in the 1960s and 1970s, African economies became deeply enmeshed in debt-ridden obligations and dependence on International Monetary Fund lending and raw material exports. And by the end of the Cold War as new economic liberalization agreements were signed, the impact of international competition on local economies became increasingly difficult. But this restructuring took place alongside expectations of democratization and adherence to new internationalisms in which discourses related to the rule of law, good governance, and membership of a world system constituted what was described as "the new world order." In relation to this reordering, new index metrics for measuring the viability of state democracies developed. The signing of international treaties provided relevant index increases for measuring state commitments to good governance and compliance.

These measures are not inconsequential. These measures contributed to the boosting of indexes by which trade, measures for economic viability, and the renewal of IMF loans provided the basis for state support and economic viability. Signing the Rome Statute and related African participation in ICC treaty membership provided the terms for concretizing African commitment to good governance.

These two points—the neoliberal underpinnings that provided incentives for participation and the moral pragmatics that drove the search for solutions through the aspiration for an international body with the power to deter future violence—have resulted in calls on us to expand the way we think about law through the expansion of the way we understand the "space of the political." For when law is delinked from the conditions of its making and the relations in which it is embedded, it has the potential of misrepresenting key issues as simply about personal agency (i.e. the ICC targeting Africa) and not allowing us to understand the complexities of history that bring certain conditions into question.

The question of this forum is related because it asks us to consider whether the ICC is targeting Africa inappropriately or whether are there sound reasons and justifications for why all of the situations currently under investigation or prosecution happen to be in Africa? In answering the question through a revised interrogation into *Why Africa*?, we need to consider the processes that led to the conditions that have put African countries—exclusively—under the scrutiny of the ICC. The more useful analytical direction then becomes what directions are *not* being pursued as a result of the current subject matter jurisdiction of the Rome Statute?

CHAPTER 32

Is the ICC Targeting Africa Inappropriately? A Moral, Legal, and Sociological Assessment

Margaret M. deGuzman

Summary

In its first ten years, the ICC's investigations and prosecutions have all concerned situations in Africa. The Court has issued arrest warrants for two African heads of state, and has opposed efforts by African governments to avoid ICC involvement in several situations. Moreover, the Court has declined to investigate crimes allegedly committed in Venezuela and by British soldiers in Iraq. These actions among others have led to charges, particularly among African political leaders, that the ICC is targeting Africa inappropriately.

To assess the validity of such charges, it is necessary to deconstruct the term "inappropriate." Following Richard Fallon's useful tripartite understanding of the term "legitimacy,"[1] I will consider the appropriateness of the ICC's focus on Africa along three interrelated dimensions: moral, legal, and sociological. I will argue that the ICC's focus on Africa is neither legally nor morally inappropriate, but nonetheless threatens to undermine perceptions of the Court's fairness.

Critics of the ICC's actions in Africa assert claims based in morality, legality, and sociological legitimacy (understood as perceptions of fairness). First, critics accuse the ICC of acting immorally by discriminating against Africa and Africans in deciding which situations to investigate and prosecute. The evidentiary basis for such claims is weak. The ICC has invoked its own jurisdiction in only one situation. The other situations have all come to the Court through referrals from the states concerned and the Security Council. Moreover, the ICC has declined to investigate only two situations outside of Africa. This small number of decisions provides an insufficient basis to conclude that the ICC is discriminating in its selection practices. Moreover, the ICC has credibly asserted that its decisions have been based on the gravity of the situations.

Second, critics claim that the ICC has failed to respect the sovereignty of African states. This is essentially a legal claim. Critics charge the ICC with failing to respect the international law governing head of state immunity, which they claim prohibits prosecution of heads of state, even for international crimes. They also charge the Court

1 Richard H. Fallon, Jr, "Legitimacy and The Constitution," 118 *Harvard Law Review* (2005) 1787, at p. 1794.

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with violating the Rome Statute's provisions regarding the admissibility of situations. In particular, they assert that the ICC is not respecting the principle of complementarity, which prohibits the Court from investigating or prosecuting cases when a state with jurisdiction is doing so in good faith. Again, there is insufficient evidence to support either of these claims. Although the legal requirements of admissibility and the law of immunity for nonparties remain unclear, the ICC has interpreted and applied them in a plausible fashion.

The strongest argument that the ICC's exclusive focus on Africa is inappropriate is a sociological one. Substantial evidence suggests that perceptions of the ICC's fairness have suffered in at least some African audiences as a result of the focus on Africa. However, it remains unclear whether such perceptions are located primarily at the governmental level or are shared widely among African populations. While some African governments, as well as the African Union, have voiced concerns about the ICC's fairness, the available evidence suggests that African civil society continues substantially to support the work of the ICC.

Argument

Since the ICC began operations in 2003, it has investigated situations and prosecuted cases in six countries, all on the African continent. Four of these situations were referred to the Court by the states in question—the situations in Uganda, Democratic Republic of Congo, Central African Republic, and Côte D'Ivoire. The situations in Sudan and Libya, nonparty states, were referred to the ICC by the UN Security Council acting under its Chapter 7 powers to maintain and restore peace and security. The ICC Prosecutor has "triggered" the Court's jurisdiction (with Pre-Trial Chamber authorization) in only one situation: that of post-election violence in Kenya. The government of Kenya challenged the admissibility of that situation, stating that Kenya intends to conduct the necessary investigations and prosecutions itself. The government of Libya has likewise challenged the admissibility of ICC cases stemming from its 2011 civil war.

In recent years, a significant number of African political leaders and commentators have charged that the ICC is targeting Africa inappropriately.[2] Critics have gone so far as to accuse the Court of neo-colonialism and acting as

2 Similar criticisms have been made of the UN Security Council. See, for example, Max du Plessis, "The International Criminal Court that Africa Wants," monograph 172, Institute For Security Studies (2010), at pp. 67–76. Such arguments are omitted from this discussion since they are outside the scope of the question presented.

a tool of powerful states.[3] They point to the exclusive focus on African situations, but also to the ICC's decisions to issue arrest warrants for African heads of state. In particular, the Africa Union reacted negatively to the decision to issue an arrest warrant for Sudan's current president Omar al-Bashir, going so far as to urge member states not to cooperate with the Court.[4] Some commentators have also criticized the ICC's decision to proceed with prosecutions in the Kenya situation despite the objections of the Kenyan government.[5] Some Kenyan politicians have urged that Kenya withdraw from the ICC regime.[6]

The claim that the ICC is discriminating against Africa and Africans in deciding which situations to investigate and prosecute is a claim of moral inappropriateness. The argument is that the ICC is employing discriminatory procedures, yielding unfair outcomes. The argument is rooted in notions of procedural justice, elaborated by philosophers such as John Rawls.[7] Procedural justice requires that decision-making processes be structured in a manner consistent with the production of equitable outcomes. If such processes include systematic discrimination based on invidious distinctions such as race or class, they violate principles of procedural justice.

The most frequent charge of procedural injustice is that the ICC is targeting situations in politically weak states while ignoring situations involving more powerful states. Some of these criticisms are based on misunderstandings about the extent of the ICC's jurisdiction. Contrary to the assumptions implicit in some of the criticisms, the ICC does not have universal jurisdiction. The Court can only investigate situations in non-party states when the Security Council refers the situations. The blame for the ICC's failure to investigate serious situations in non-party states therefore lies not with the ICC but with the Security Council. Thus, for instance, it is the Security Council that is currently blocking international investigation of the massive crimes being committed in Syria.

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3 For examples of such criticisms see Charles C. Jalloh, "Regionalizing International Criminal Law," 9 *International Criminal Law Review* (2009) 445, at pp. 462–3, and Kai Ambos, "Expanding the Focus of the 'African Criminal Court'" in Y. McDermott, N. Hayes, W.A. Schabas (eds), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Burlington, VT: Ashgate, 2012), at p. 6.

4 For further discussion see Ambos, above note 3, and Tim Murithi, "Africa's Relations with the ICC: A Need for Reorientation," 1.12 *Perspectives: Political Analysis, and Commentary from Africa* (2012), at p. 9.

5 Id., at pp. 463–5, 485; Alexis Arieff et al., "International Criminal Court Cases in Africa: Statutes and Policy Issues," Congressional Research Service (2011), at pp. 16–17, 26–9.

6 "Kenya MPs vote to leave ICC over poll violence claims," BBC News, December 23, 2010, available at http://www.bbc.co.uk/news/world-africa-12066667, accessed February 5, 2014.

7 John Rawls, *A Theory of Justice*, ed. T.M. Scanlon (Cambridge: Belknap Press, 2005).

The evidence most relevant to charges of discriminatory situation selection is that the ICC has declined to open investigations in two situations outside the African continent: one involving allegations of crimes against humanity in Venezuela and another concerning alleged British war crimes in Iraq. This sample size is far too small to support the claim that the ICC's decision making is based on invidious distinctions. Indeed, a number of other situations outside of Africa remain under preliminary examination and may ultimately result in investigations. Moreover, the ICC's assertion that the African situations were selected based on their gravity and that the situations in Venezuela and Iraq were rejected on the same basis is credible. Although the concept of "gravity" remains under-theorized, many people consider the number of victims an important indicator of gravity. The African situations under investigation all involve large numbers of victims.

The second claim—that the ICC is insufficiently respectful of African sovereignty—is predominantly a legal one. Critics allege that the ICC is violating its own Statute by failing properly to apply the principle of complementarity in admitting situations, and that the Court is violating the international law of immunity by seeking to prosecute a sitting head of state. The Rome Statute strikes a balance between the rights of sovereign states to address crimes within their territories and the desire of the international community to end impunity for international crimes. This balance is most clearly reflected in the Court's admissibility regime, which makes the Court's jurisdiction complementary to that of national courts. The ICC is not permitted to investigate situations or prosecute cases when national courts with jurisdiction are doing so in good faith. Moreover, the Court must deem inadmissible cases of insufficient gravity.

As one would expect at this early stage in the Court's work, these important provisions require further judicial elaboration. Nonetheless, all of the Court's actions to date have been based on plausible interpretations of the relevant law. With regard to complementarity, the Court has ruled that it will defer only to prosecutions involving the same persons and conduct as are before the ICC.[8] With the exception of Libya, where admissibility remains under consideration, none of the governments that have objected to the ICC's actions in their states have initiated national prosecutions of the cases before the ICC.

Similarly, the ICC adopted a plausible interpretation of international law in determining that it could issue an arrest warrant against a sitting head of state.

8 *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, "Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58," at paras.37–9 (February 10, 2006).

The relationship of the ICC regime to the pre-existing international law regarding immunity remains contested. However, the ICC's view that Security Council referral renders head of state immunity inapplicable even with regard to non-party states is not an unreasonable one. The claims of legal inappropriateness, like those of moral inappropriateness, are thus largely unsupported.

However, the claim that the ICC's exclusive focus on Africa is damaging perceptions of the Court's fairness is more difficult to dismiss. This is an empirical claim that requires further exploration. In particular, it is not clear whether negative perceptions of the Court's work are largely limited to government actors or have become more pervasive in African populations. As other commentators have noted, there is evidence that the ICC continues to enjoy considerable support in African civil society.[9] Nonetheless, African governments are an important constituency of the Court and there is reason to be concerned that perceptions that the ICC is acting unfairly have spread well beyond government actors.

The ICC should therefore continue and perhaps increase its efforts to combat such perceptions. Appointing an African prosecutor was an important step in this direction. Others should include widespread dissemination of information regarding the situations under preliminary investigation that are outside of the African continent. Indeed, to the extent possible within the confines of law and morality, the ICC should consider including such situations in the Court's docket in the near future.

9 See Ambos, above note 3, at 10; Jalloh, above note 3, at 451.