Selective morality in the pursuit of international criminal justice with particular reference to Article 13 of the Rome Statute

F TAMBE ENDOH



orcid.org 0000-0002-2813-3636

Thesis submitted in fulfilment of the requirements for the degree Doctor of Laws at the North-West University

Supervisor: Prof. MLM MBAO

Graduation: July 2019

Student number: 26485834

TABLE OF CONTENTS

DECLARATION BY CANDIDATE ..... **viii**

DECLARATION BY PROMOTER ..... **ix**

DEDICATION ..... **x**

ACKNOWLEDGMENTS ..... **xi**

LIST OF FIGURES ..... **xii**

LIST OF ABBREVIATIONS ..... **xiii**

TABLE OF STATUTES ..... **xxiv**

TABLE OF CASES ..... **xxv**

ABSTRACT ..... **xxxiv**

CHAPTER ONE **1**

INTRODUCTION **1**

1.1 BACKGROUND TO THE STUDY ***1***

1.2 STATEMENT OF THE PROBLEM ***11***

1.3 AIMS AND OBJECTIVES OF THE STUDY ***19***

1.4 DEFINITION OF KEY TERMS ***20***

1.4.1 Morality *20*

1.4.2 Jus cogens *21*

1.4.3 Serious crimes in international law *22*

1.4.4 Universal jurisdiction 23

1.5 THEORETICAL JUSTIFICATION AND THE DUTY TO PROSECUTE OR EXTRADITE 24

1.6 RATIONALE AND JUSTIFICATION OF THE STUDY 33

1.7 LITERATURE REVIEW 36

1.7.1 ICC and the concept of complementarity 37

1.7.2 ICC and the competing claims of peace v. justice 40

1.7.3 ICC and the concept of universal jurisdiction 44

1.8 DATA COLLECTION AND METHODOLOGY 48

1.8.1 Data collection and analysis 49

1.8.2 Triangulation 49

1.8.3 Reliability and trustworthiness 50

1.9 SCOPE AND LIMITATIONS OF THE STUDY 51

1.10 ETHICAL CONSIDERATIONS 54

1.11 SUMMARY 54

CHAPTER TWO 56

HISTORICAL EVOLUTION AND PROGRESSIVE DEVELOPMENT OF THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM 56

2.1 INTRODUCTION 56

2.2 THE DEVELOPMENT OF THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM 57

2.3 CODIFICATION OF INTERNATIONAL LAWS RELATING TO ARMED CONFLICTS 59

2.4 THE BIRTH OF THE UNITED NATIONS ORGANIZATION..... 63

2.4.1 Significance of the Yalta Conference and the veto power rhetoric 65

2.4.2 United Nations' contribution towards global peace and security 67

2.5 THE NUREMBERG TRIALS 70

2.5.1 Significance of the Nuremberg Tribunal 74

2.6 THE TOKYO TRIALS..... 75

2.7 EMERGENCE OF VICTOR'S JUSTICE 77

2.8 POST-NUREMBERG DEVELOPMENTS 81

2.8.1 The genesis of the law on Genocide 82

2.8.2 The Geneva Conventions of 1949 regulating the conduct of warfare 83

2.8.3 The work of the International Law Commission 87

2.8.4 Ad hoc tribunals 92

2.8.5 Hybrid Courts..... 99

2.9 SUMMARY 102

CHAPTER THREE 105

THE CREATION OF THE INTERNATIONAL CRIMINAL COURT 105

3.1 INTRODUCTION 105

3.2 TOWARDS THE DRAFTING OF THE ROME STATUTE 105

3.2.1 Challenges from the USA and Allies.....108

3.2.2 Post-Nuremberg developments and the United States hegemony 111

3.2.3 United States proposed model of an International Criminal Court.....113

3.2.4 The challenge of a 'Proprio Motu' prosecutor.....117

3.3 TOWARDS AN IDEAL INTERNATIONAL CRIMINAL TRIBUNAL..... 119

3.3.1 The principle of complementarity 120

3.4 COMMITMENT BY STATES PARTIES TO THE ROME STATUTE..... 122

3.4.1 States Parties Cooperation towards enforcement.....123

3.5 COOPERATION BY NON- STATES PARTIES 127

3.6 PRECONDITIONS TO THE EXERCISE OF JURISDICTION 129

3.7 TERRITORIAL AND CRIMINAL JURISDICTION OF THE ICC..... 131

3.7.1 Territorial jurisdiction 132

3.7.2 Criminal jurisdiction 135

3.7.2.1 The crime of genocide.....135

3.7.2.2 Crimes against humanity 137

3.7.2.3 War crimes.....140

3.7.2.4 The crime of aggression 143

3.8 DEGREE OF PARTICIPATION IN THE COMMISSION OF SERIOUS CRIMES 146

3.8.1 Planning 147

3.8.2 Instigating 149

3.8.3 Ordering 150

3.8.4 Committing 151

4.8.5 Aiding and abetting.....152

3.8.6 Joint criminal enterprise 154

3.9 SUMMARY 156

CHAPTER FOUR 159

THEORETICAL CONCEPTUALIZATION OF THE SOURCES AND PRINCIPLES OF LAW UNDERPINNING THE INTERNATIONAL CRIMINAL COURT 159

4.1 INTRODUCTION 159

4.2 THE MEANING OF INTERNATIONAL CRIMINAL LAW 160

4.3 SOURCES OF LAW RELEVANT TO INTERNATIONAL CRIMINAL JUSTICE 166

4.3.1 Customary international law 167

4.3.2 General principles of law recognized by civilized nations.....170

4.3.3 Subsidiary sources for determining international criminal law 171

4.3.3.1 Rome Statute, Elements of Crimes and the Rules of Procedure and Evidence 172

4.3.4 Subsidiary means other than the Rome Statute 175

4.4 PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 179

4.4.1 The principle of legality 180

4.4.2 Presumption of innocence 182

4.4.3 The actus reus and mens rea.....185

4.4.4 Individual criminal responsibility in international law 188

4.5 UNIVERSAL JURISDICTION AND THE DUTY TO PROSECUTE... 193

4.5.1 The duty to prosecute by the State of commission 198

4.5.2 The duty to prosecute by "Third States" 200

4.5.3 The purpose of punishment.....202

4.6 THE DUTY TO PROSECUTE BY THE ICC 205

4.7 SUMMARY 209

CHAPTER FIVE 211

ANALYZING THE POLITICAL DYNAMICS AFFECTING THE TRIGGER MECHANISMS OF ARTICLE 13 OF THE ROME STATUTE 211

5.1 INTRODUCTION 211

5.2 AN OVERVIEW OF CONFLICTS IN AFRICA 212

5.3 SYNOPSIS OF THE SITUATION IN UGANDA..... 217

5.3.1 The politics of the struggle to gain allies.....219

5.3.2 The friend-enemy dichotomy.....221

5.4 SYNOPSIS OF THE SITUATION IN SUDAN 226

5.4.1 The politics of the struggle to gain allies.....228

5.4.2 The friend-enemy dichotomy.....233

5.5 SYNOPSIS OF THE SITUATION IN KENYA..... 237

5.5.1 The politics of the referral 238

5.6 THE CHALLENGE OF SECURITY COUNCIL DEFERRALS: JUSTICE V PEACE..... 244

5.7 ICC AND THE DYNAMICS OF POLITICS AND JUSTICE IN AFRICA 247

5.8 SYNOPTIC ANALYSES OF THE ICC'S POLITICAL STRUGGLES IN AFRICA..... 251

5.9 RE-OCCURRENCE OF SELECTIVE PROSECUTIONS UNDER ARTICLE 13 OF THE ROME STATUTE..... 256

5.10 SUMMARY 258

CHAPTER SIX 260

CONCLUSIONS AND RECOMMENDATIONS 260

6.1 INTRODUCTION 260

6.2 RESEARCH SUMMARY 260

6.3 MAJOR FINDINGS 264

6.3.1 Summarizing the allegations of selectivity by the ICC.....265

6.3.2 Justifications for ICC's operations.....269

6.3.3 ICC investigations pursuant to UN Security Council referrals.....273

6.4 CONCLUSIONS 278

6.5 RECOMMENDATIONS 286

6.6 AREAS FOR FURTHER RESEARCH..... 292

BIBLIOGRAPHY..... 294

DECLARATION BY CANDIDATE

I, the undersigned, hereby declare that except for references indicated in the text, including related materials and assistance as acknowledged, the work contained in this thesis for the degree of Doctor of Laws at the North-West University is my own independent study that has not been previously submitted in part or in its entirety at any university for degree purposes or otherwise.

Signed on ……20 – December - 2018 …….



……..

F TAMBE ENDOH

DECLARATION BY PROMOTER

I, the undersigned, hereby declare that this thesis submitted by F TAMBE ENDOH for the purposes of the Doctor of Laws degree be accepted for examination.

Signed on……

……

Prof. MLM MBAO

DEDICATION

I dedicate this work to my family, particularly my late father whose foresighted vision anticipated my professional career from childhood as an advocate of the law and so it has come to pass.

ACKNOWLEDGMENTS

To God be the glory for He is worthy of all honour and praise for in Him I can do all things. I sincerely thank the Almighty God for watching over me throughout my research and permitting that I have a resourceful and supportive supervisor Professor MLM MBAO who worked with me amidst unprecedented trials and potential setbacks.

Special thanks go to the North-West University for providing me with the necessary financial support through the NWU Post-Graduate Bursary Scheme and also the Institutional Research Support for postgraduate researchers. I remain grateful to the University for providing such funds that enabled me to complete my doctoral degree. I acknowledge the Council for the Development of Social Science Research in Africa (CODESRIA) for the mentorship and travel opportunities they provided me with in the course of my programme. Such opportunities enabled me to explore diverse perspectives from other parts of the continent and the world at large regarding my studies.

Special mention goes to my family at home and abroad for their relentless support and guidance throughout my academic career. My sincere gratitude to friends, sympathizers, well-wishers and loved ones, particularly in Johannesburg and Mafikeng for their love and kindness during the tough moments that almost forced me to adopt desperate measures. Once again, I thank you all.

LIST OF FIGURES

Figure 1 International Criminal Court: The status of prosecutions seeking justice for the powerless……215

Figure 2 Sample illustrations of International Criminal Court Cases in Africa….216

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Right
ACMM	African Conflict Monthly Monitor
AFRC	Armed Forces Revolutionary Council
AHRLJ	African Human Rights Law Journal
AI	Africa Insight
AI	Agenda International
AIR	Antony's International Review
AISA	Africa Institute of South Africa
AJHR	Australian Journal of Human Rights
AJHRL	African Journal of Human Rights Law
AJICJ	African Journal of International Criminal Justice
AJIL	American Journal of International Law
AJPIL	Austrian Journal of Public International Law
AJPS	Australian Journal of Peace Studies
AJRH	African Journal of Reproductive Health
ALR	Albany Law Review
AR	African Renaissance
ARR	Africa Research Review
AS	African Security
ASIL	American Society of International law
ASILP	American Society of International Law Proceedings

ASP	Assembly of States Parties
ASR	Africa Security Review
ASS	Africa Security Studies
AU	African Union
AUILR	American University International Law Review
AULR	American University Law Review
AUPD	African Union High-Level Panel on Darfur
AYIHL	African Yearbook of International Humanitarian Law
AZAPO	Azania Peoples' Organization
BBC	British Broadcasting Corporation
BCICLR	Boston College of International and Comparative Law Review
BJIL	Berkeley Journal of International Law
CAR	Central African Republic
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDF	Civil Defence Force
CEB	Chief Executive Board for Coordination
CH	Chatham House
CILJ	Cornell International Law Journal
CILSA	Comparative and International Law Journal of Southern Africa
CIPEV	Commission of Inquiry on Post-Election Violence
CJIL	Chicago Journal of International Law

CJTL	Columbia Journal of Transnational Law
CLF	Criminal Law Forum
CLR	California Law Review
CLO	Columbia Law Review
CRLR	Creighton Law Review
CRIA	Cambridge Review of International Affairs
CRS	Congressional Research Service
CSM	Christian Science Monitor
CWRJIL	Case Western Reserve Journal of International Law
DC	Development and Change
DISEC	Disarmament and International Security Committee
DJCIL	Duke Journal of Comparative and International Law
DJILP	Denver Journal of International Law and Policy
DLJ	Duke Law Journal
DLR	DePaul Law Review
DPMF	Development Policy Management Forum
DRC	Democratic Republic of the Congo
EAC	Extraordinary African Chamber
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOFIN	Economic and Financial Affairs Council

ECOSOC	Economic and Social Council
EIA	Ethics and International Affairs
EJC	European Journal of Criminology
EJCPS	European Journal of Cultural and Political Sociology
EJIL	European Journal of International Law
EJLT	European Journal of Law and Technology
EN	Ecquid Novi
ESJ	European Scientific Journal
EU	European Union
FAO	Food and Agricultural Organization
FEUI	Florence European University Institute
FIDH	International Federation for Human Rights
FILJ	Fordham International Law Journal
FJIL	Florida Journal of International Law
FRY	Federal Republic of Yugoslavia
GJIL	Goettingen Journal of International Law
GLJ	German Law Journal
GMEJ	Global Majority E-Journal
HHRJ	Harvard Human Rights Journal
HICLR	Hastings International and Comparative Law Review
HILJ	Harvard International Law Journal

HRB	Human Rights Brief
HRQ	Human Rights Quarterly
HSM	Holy Spirit Movement
IA	International Affairs
IACHR	Inter-American Court of Human Rights
IC	International Conciliation
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJS	International Criminal Justice System
ICL	International Criminal Law
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDPC	Internally Displaced Persons Camp
IHL	International Humanitarian Law
IICLR	Indian International and Comparative Law Review
IJCM	International Journal of Conflict Management

IJHR	International Journal of Human Rights
IJHSSE	International Journal of Humanities Social Science and Education
IJM	International Justice Monitor
IJPSS	International Journal of Peace and Security Studies
IJRPB	Institute for Justice and Reconciliation Policy Brief
ILC	International Law Commission
ILJ	Indiana Law Journal
ILR	Iowa Law Review
IMF	International Monetary Fund
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IPA	International Policy Analysis
IRRC	International Review of the Red Cross
ISP	Independent Study Project
ISS	Institute for Security Studies
JAC	Journal of American Culture
JAE	Journal of African Elections
JAL	Journal of Africa Law
JAS	Journal of African Studies
JCH	Journal of Comparative History
JCLC	Journal of Criminal Law and Criminology

JEAS	Journal of Eastern African Studies
JETEMS	Journal of Emerging Trends in Economics and Management Sciences
JETERPS	Journal of Emerging Trends in Educational Research and Policy Studies
JICJ	Journal of International Criminal Justice
JICL	Journal of International and Comparative Law
JMAS	Journal of Modern African Studies
JMLR	John Marshall Law Review
JPL	Journal of Politics and Law
JPR	Journal of Peace Research
JSAL	Journal of South African Law
LCP	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
LLR	Louisiana Law Review
LRA	Lord's Resistance Army
MJIL	Maryland Journal of International Law
MJSS	Mediterranean Journal of Social Sciences
MLR	Military Law Review
MSJIL	Michigan State Journal of International Law
NATO	North Atlantic Treaty Organisation
NBP	New Balkan Politics
NCCLR	North Carolina Central Law Review

NCLR	North Carolina Law Review
NDJICHRL	Notre Dame Journal of International, Comparative and Human Rights Law
NELR	New England Law Review
NGOs	Non-Governmental Organisations
NRA	National Resistance Army
NYIL	Netherlands Yearbook of International Law
NYULR	New York University Law Review
ODM	Orange Democratic Movement
OHCHR	Office of the High Commissioner for Human Rights
OTP	Office of the Prosecutor
P	Progressio
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PILR	Pace International Law Review
PLR	Pepperdine Law Review
PRC	Peoples Republic of China
PrepCom	Preparatory Committee
PSILR	Pennsylvania State International Law Review
RCN	Royal College of Nursing
RIDP	Revue International de Droit Penal
RJ	Rusi Journal

RPF	Rwandan Patriotic Front
RRP	Referral Review Panel
RUF	Revolutionary United Front
SADC	Southern African Development Community
SAFP	South African Family Practice
SAJCJ	South African Journal of Criminal Justice
SAJHE	South African Journal of Higher Education
SAJHR	South African Journal of Human Rights
SAPR	South African Psychiatry Review
SAYIL	South African Yearbook of International Law
SCJIL	Santa Clara Journal of International Law
SCLR	Santa Clara Law Review
SCSL	Special Court for Sierra Leone
SFOR	Stabilisation Force
SLJ	Strathmore Law Journal
SOCHUM	Social, Humanitarian and Cultural Committee
SOFA	Status of Force Agreements
SPECPOL	Special Political and Decolonisation Committee
T	Transcience
TLR	Texas Law Review
TWQ	Third World Quarterly

UBCLR	University of British Columbia Law Review
UDHR	Universal Declaration of Human Rights
UJIEL	Utrecht Journal of International and European Law
ULR	Utrecht Law Review
UMICLR	University of Miami International and Comparative Law Review
UN	United Nations Organisation
UND	University of Notre Dame
UNDP	United Nations Development Programme
UNDS	United Nations Development System
UNESC	United Nations Economic and Social Council
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHRC	United Nations Human Rights Committee
UNOSOM	United Nations Operation in Somalia
UNSC	United Nations Security Council
UNWCC	United Nations War Crimes Commission
UPDF	Ugandan People's Defence Force
USA	United States of America
UTFLR	University of Toronto Faculty of Law Review
VJIL	Virginia Journal of International Law
WA	World Affairs
WUGSR	Washington University Global Studies Review

WUJLP	Washington University Journal of Law and Policy
WW I	World War I
WW II	World War II
YJIA	Yale Journal of International Affairs
YLJ	Yale Law Journal

TABLE OF STATUTES

Ethiopia

Penal Code of Ethiopia, No. 158 of (1957).

Rwanda

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 Adopted by Security Council resolution 955 (1994).

United State of America

Policy of the United States in Regard to the Apprehension and Punishment of War Criminals in the Far East (1945).

The American Service Member's Protection Act, 2002, Pub. L. No. 107-206. (2002).

Senegal

Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from (7 June 1982 to 1 December 1990).

Yugoslavia

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by UN Security Council Resolution 827 (1991).

Sierra Leone

Statute of the Special Court for Sierra Leone (2000).

TABLE OF CASES

Canada
Regina v. Finta, Canada, Ontario Court of Appeal judgment of 29 April (1992).

Ethiopia
Special Prosecutor v. Col. Mengistu Haile Mariam et al., File No. 1/87. (1985).

France
Advocate General v. Touvier, France, Cour d'Appel de Paris, judgment of 13 April (1992), 100 ILR (1995).

Allenet de Ribemont v. France, Series A, No. 308, (1995).

Federation National des Deportes etInternes Resistants et al. v. Barbie, France, Cour de Cassation, judgment of 6 October (1983).

France et al. v. Goering et al., 13 ILR 203, (1946).

France et al. v. Goering et al., 22 IMT 203, (1946).

The Prosecutor v. Klaus Barbie, 87-84240 (1988).

Germany
Judgment of the International Military Tribunal for Nuremberg, 1 October (1946).

Israel
Attorney-General of the Government of Israel v. Eichmann, Isreal, District Court of Jerusalem, 36 I.L.R. 5 (1961).

Japan
United States et al v. Araki Sadao et al, *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East, with an Authoritative Commentary and Comprehensive Guide, (*2002).

Malaysia
Chief Prosecutor of the Kuala Lumpur War Crimes Commission v. George Bush and Anthony L Blair, Criminal Proceeding No. 1-CP-2011.

Senegal
Hissène Habré v. Republic of Senegal, Case No. ECW/CCJ/JUD/06/10.

South Africa
Minister of Justice and Constitutional Development and Others v. The Southern Africa Litigation Centre, SA Law Report, ZAGPPHC 675 (2015).

The Azanian Peoples Organization (AZAPO) v. The President of the Republic of South Africa and others., Case CCT 17/96, (1996).

The Mister of Justice and Constitutional Development v. The Southern African Litigation Center 9867/15)[2016]ZASCA17, judgment of the Supreme Court of Appeal, Case No. 867/15 of 15 March (2016).

The State v. Wouter Basson 2005 SA 30/03 (CC).

Spain

Barbera`, Messegu´e and Jabardo v. Spain, Series A, No. 146 (1988).

Sudan

Amnesty International and Others v. Sudan (2000) AHRLR 296 (ACHPR).

Presbyterian Church of Sudan v. Talisman Energy Inc 244 F Supp 2d 289, 306 SDNY (2003).

Surinam

Baoboeram v. Surinam Comm 146/1983 and 148-154/1983, UN Doc A/40/40 (1985).

United Kingdom

Brend v. Wood, 175 L.T.R. 306, 307, (1946).

Harding v. Price, 1 All E.R. 283, 284, (1948).

Henderson v. Defence Housing Authority, HCA 36, 190 CLR 140 (1997).

R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte 3 WLR 1,456 (H.L. 1998).

United States of America

Petrovsky v. Demjanjuk, USA, Court of Appeals decision of 31 October (1983).

The United States of America v. Wilhelm von Leed et al. (The High Command Case) (1948).

USA v. Albert Mueller, Case No. 000-Nordhausen-2 of 1 December (1947).

USA v. Georg Finkenzeller, Case No. 000-Nordhausen-3 of 10 November, (1947).

United States of America et al. v. Goering et al., (1946).

United States v. Valentin Bersin et al, Case No. 000-006-0024, referred to as "The Malmedy Massacre Trial" (1944).

USA v. Erhard Milch also referred to as *The Milch Case* (1946).

USA v. Michail Grebinski, Case No. 000-Nordhausen-1 of 22-23 October, (1947).

USA v. Karl Brandt (Doctors Trial) also referred to as *The Medical Case* (1946).

USA v. Kurt Andrae et al. (and related cases) (April 27, 1945-June 11, 1958).

USA v. Philipp Klein, Case No. 000-Nordhausen-5 of 1 December (1947).

USA v. Stefan Palko, Case No. 000-Nordhausen-6 of 3-12 December (1947).

Uruguay

Bleir v. Uruguay Comm 107/1981, UN Doc A/38/40 (1983).

Dermit v. Uruguay, Comm 84/1981, UN Doc A/38/40 (1983).

Quinteros v. Uruguay Comm 107/1981, UN Doc A/38/40 (1983).

African Court of Human and People's Right

Commission Nationale des Droits de l'Homme et des Libertes v. Chad (2000) AHRLR 66 (ACHPR).

Malawi African Association and Others v. Mauritania (2000) AHRLR 149 (ACHPR 2000).

European Court of Human Rights

Bragiola v. Switzerland, European Court of Human Rights (1993).

Kokkinakis v. Greece, 3/1992/348/421 (1993).

Krause v. Switzerland (App. No. 7986/77), (1978).

ICJ Judgments

Belgium v. Spain, Case concerning the Barcelona Traction, Light and Power Company Limited, Second Phase, ICJ GL No 50 (1970).

Columbia v. Peru (Asylum Case), ICJ Rep 266, (1950).

Democratic Republic of the Congo v. Uganda, ICJ Rep 168. (2005).

Democratic Republic of the Congo v. Belgium, ICJ, judgment of 14 February (2002).

Judge *ad hoc Sir Robert Jennings dissenting opinion in Lockerbie Case (Preliminary Objections)* ICJ (1998).

Libyan Arab Jamahiriya v. United Kingdom, ICJ judgment of 14 April (1992).

Muteba v. Zaire Comm 124/1982, UN Doc A/39/40 (1984).

The North Sea Continental Shelf Case, Judgment of the International Court of Justice, ICJ Report (1969).

ICTR Judgments

The Prosecutor v. Akayesu, ICTR-96-4-T, T. Ch. I, (1998).

The Prosecutor v. Alfred Musema, ICTR-96-13-A, 18 (2000).

The Prosecutor v. Barayagwiza, ICTR-97-19-AR72, (1999).

The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana, ICTR-96-10-A and ICTR-96-17-A, App.Ch., (2004).

The Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura, IT-01-47-AR72.

The Prosecutor v. Gacumbitsi, ICTR-2001-64-A, App. Ch., (2006).

The Prosecutor v. Jean Kambanda, ICTR-97-23-S (1998).

The Prosecutor v. Jean Paul Akayesu, Trial Judgement, ICTR-96-24-T, (1998).

The Prosecutor v. Kambanda (Case No. ICTR-97-23-S), (1998).

The Prosecutor v. Kanyabashi, ICTR-96-15-T.

The Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-96-1-A (2001).

The Prosecutor v. Nahimana, Barayagwiza and Ngeze, ICTR-99-52-A, App. Ch., (2007).

The Prosecutor v. Rutanganda, Case No. ICTR-96-03-T (1999).

The Prosecutor v. Serashugo (Case No. ICTR-98-39-S), (1999).

The Prosecutor v. Sylvestre Gacumbitsi, ICTR-01-64-T, (2004).

ICTY Judgments

Judgment of the ICTY Appeal Chamber on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II (1997).

The Prosecutor v. Duško Tadić, ICTY, judgment, Case No. IT-94-1-A, (1999).

The Prosecutor v. Vasiljevic, IT-98-32-A, App. Ch., (2004).

The Prosecutor v. Aleksovski, IT-05-14/1-A, App. Ch., (2000).

The Prosecutor v. Aleksovski, IT-95-14/1-T, T. Ch. I, (1998).

The Prosecutor v. Anto Furundžija, IT-95-17/1-T, (1998).

The Prosecutor v. Blagojevic and Jokic, IT-02-60-A, App. Ch., (2007).

The Prosecutor v. Blaskic, IT-95-14-A, App. Ch., (2004).

The Prosecutor v. Brdanin, IT-99-36-T, T. Ch. II, (2004).

The Prosecutor v. Delalic et al, IT-96-21-A, App. Ch., (2001).

The Prosecutor v. Delalic et al. (Celebici case), IT-96-21-T, T. Ch. II, (1998).

The Prosecutor v. Deronjic, ICTY Tr. Ch. IT-02-61, (2004).

The Prosecutor v. Dragoljub Kunavac, Radomir Kovac, and Zoran Vukovic, IT-96-23, (2001).

The Prosecutor v. Fofana and Kondewa, SCSL-04-14-A, App. Ch., (2008).

The Prosecutor v. Erdemovic, IT-96-22-A.

The Prosecutor v. Furundzija, IT-95-17/1-T, T. Ch.II, (1998).

The Prosecutor v. Galic, IT-98-29-A, App. Ch., (2006).

The Prosecutor v. Galic, IT-98-29-T, T. Ch. I, (2003).

The Prosecutor v. Jelisic (Case No. IT-95-10-A), (2001).

The Prosecutor v. Kordic and Cerkez, ICTY Tr. Ch. (2001).

The Prosecutor v. Kordic and Cerkez, IT- 95-14/2-A, (2004).

The Prosecutor v. Kordic and Cerkez, IT- 95-14/2-A, App. Ch., (2004).

The Prosecutor v. Krnojelac, IT-97-25-A, (2003).

The Prosecutor v. Krnojelac, IT-97-25-A, App. Ch., (2003).

The Prosecutor v. Krstic, ICTY App. Ch. (2001).

The Prosecutor v. Krstic, IT-98-33-A, App. Ch., (2004).

The Prosecutor v. Krstic, IT-98-33-T, T. Ch. I, (2001).

The Prosecutor v. Kupreskic et al. IT-95-16-T. (2000).

The Prosecutor v. Kupreskic et al., IT-95-16-A, App. Ch., (2001).

The Prosecutor v. Martic, IT--95-11-A, Ap. Ch., (2008).

The Prosecutor v. Milosevic et al., IT-99-37-I, (1999).

The Prosecutor v. Milosevic et al., IT-99-37-PT, (2001).

The Prosecutor v. Miroslav Deronjić, D90- D91, IT-02-61-I (2002).

The Prosecutor v. Momir Talić, D709-D708, IT-99-36-I (1999).

The Prosecutor v. Mucic et al, ICTY App. Ch. (2001).

The Prosecutor v. Naletilic and Martinovic, IT-98-34-T, T. Ch. 1, (2003).

The Prosecutor v. Nikolic, ICTY Tr. Ch. (2003).

The Prosecutor v. Oric, IT-03-68-T, T. Ch. II, (2006).

The Prosecutor v. Slobodan Milosevic et al, IT-01-50-PT, 8 October (2001)

The Prosecutor v. Slobodan Milosevic et al, IT-01-51-PT, 22 November (2001).

The Prosecutor v. Slobodan Milosevic et al, IT-99-37-PT (1999).

The Prosecutor v. Slobodan Milosevic, decision on preliminary motions (2001).

The Prosecutor v. Stakic (Case No. IT-97-29-T), (2002).

The Prosecutor v. Stakic, IT-97-24-A, App. Ch., (2006).

The Prosecutor v. Stakic, IT-97-24-T, T, (2003).

The Prosecutor v. Tadic IT-94-1-T, (1997).

The Prosecutor v. Tadic, ICTY App. Ch. (1995).

The Prosecutor v. Tadic, IT-94-1-AR72.

The Prosecutor v. Tadic, Judgment, IT-94-1-A, (1999).

The Prosecutor v. Tihomir Blaskic, ICTY Judgement, IT-95-14-T. (2000).

The Prosecutor v. Zlatko Aleksovski, D1706-D1703, IT-95-14/I (1995).

The Prosecutor v. Furundzija, ICTY Tr. Ch. (1998).

The Prosecutor v. Naletilic and Martinovic, IT-98-34-T, T. Ch. I, (2003).

ICC Judgments

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges, ICC-01/04-01/07 Pre-Trial Chamber I, (2008).

Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, (2016).

The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-94.

The Prosecutor v. Bosco Ntanganda, ICC-01/04.02/06.

The Prosecutor v. Germain Katanga, ICC-01/04-01/07.

The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06.

The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi. ICC-01/11-01/11, (2013).

The Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) ICC-02/05-01/07.

The Prosecutor v. Abdel Raheem Muhammad Hussein, Pre-Trial Chamber II, ICC-02/05-01/12-20, (2013).

The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11.

The Prosecutor v. Joseph Kony, Vincent Otti, and Okot Odhiambo, ICC-02/04-01/05. (1999).

The Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, (2017).

The Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, ICC-02/05-01/09-159, (2013).

The Prosecutor v. Omar Hassan Ahmad Al Bashire, ICC-02/05-01/09.

The Prosecutor v. Raska Lukwiya, ICC-02/04-01/05055.

The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, (2007).

Inter-American Court of Human Right

Gary Hermosilla et al. case 10.843, Inter-Am Court of Human Rights (1988).

Juan Carlos Abella v. Argentina, Inter-American Commission of Human Rights case 11.137, Report No. 55/97.

Velasquez Rodriguez v. Hondurs, Inter-American Court of Human Rights, Serial C No. 4 (1988).

Special Court for Sierra Leone

Prosecutor v. Gbao, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Appeals Chamber, SCSL-04-15-PT-141.

The Prosecutor v. Brima Bazzy Kamara, et al., SCSL-04-16-T, (2007).

The Prosecutor v. Charles Taylor, SCSL-03-01-I (2003).

The Prosecutor v. Issa Hassan Sesay, et al., SCSL-03-05-I (2003).

ABSTRACT

The tribunals at Nuremberg and Tokyo were significant in establishing a moral legacy by invoking the principle of individual criminal responsibility in international law. However, the said moral legacy was tainted given that the tribunals were created by the victorious allies to try their captive enemies. While the Nuremberg tribunal targeted the Axis Powers for atrocities committed in Europe during World War II (WW II), the Tokyo tribunal selectively prosecuted Japanese soldiers for similar atrocities committed in the Far East during WW II. Such targeted prosecutions resulted in allegations of selective morality in the pursuit of international criminal justice.

From Nuremberg to Rome, the pursuit of international criminal justice have not complied with the rule of equality before the law. This argument is premised on the exercise of selectivity experienced at the Nuremberg, Tokyo, the Former Yugoslavia and Rwanda tribunals, including the Special Court for Sierra Leone (SCSL). Similarly, the continuous indictment and prosecution of African leaders before the International Criminal Court (ICC) merely support the allegations of selectivity. Such exercise of selectivity seems to be interpreted by many academics and professionals as bias compared to other developments that have occurred in different regions of the world. For instance, the ongoing unrest in Syria and portions of the Middle East ought to have qualified for referral by the UN Security Council as a threat to international peace and security, and set in motion the jurisdiction of the ICC in order to achieve the ultimate goal of the Court – eradicate impunity and replace it with accountability for serious crimes in international law.

The aim of this study is to assess the allegation of selective prosecutions by the ICC and how such selectivity impact on the trigger mechanisms under Article 13 of the Rome Statute. The main objective is to analyze the nature and scope of Article 13 referrals with the view to contribute to the existing body of knowledge regarding Article 13 in particular and the ICC in general. By utilizing a phenomenological methodological approach, the thesis generates the contention that whereas Article 13 of the Rome Statute triggers the jurisdiction of the ICC, it catalyses the process through which hegemonic states and senior state officials continue to evade justice by selectively prosecuting their targeted opponents. The study recommends, among other things, the

re-construction of Article 13 of the Rome Statute to provide for a more unified and comprehensive jurisprudence that addresses the allegation of selective prosecutions raised by African states. In this regard, the study proposes an amendment to the Rome Statute through the creation of an arm's length independent body called the Referral Review Panel (RRP) with the core mandate to critically assess and determine the merits of cases referred to the ICC for prosecution. The study further recommends that the Malabo Protocol should be repealed such that the shield of immunity granted to sitting Heads of States is lifted in the interest of Justice and as well, the complementarity clause stated under Article 46H of the Protocol should have a nexus with the ICC such that the Court is allowed to prosecute the perpetrators of serious crimes in circumstances where the African Court of Justice and Human Rights prove reluctant to do so.

CHAPTER ONE
INTRODUCTION

1.1 BACKGROUND TO THE STUDY

This study investigates the challenge of selective morality in the pursuit of international criminal justice and the perceived bias by the ICC against Africans. The debate concerning selective application of criminal sanctions has captured attention from the global political fora, including legal practitioners and academics.[1] It is generally argued that throughout history, the pursuit of international criminal justice has always been selective in favour of the powerful.[2] Also, it is further contended that, although the Nuremberg and Tokyo tribunals introduced the principle of individual criminal responsibility in international law, they also gave birth to victors' justice as the victors of WW II were never tried despite the atomic bombs dropped on Hiroshima and Nagasaki, including related atrocities committed elsewhere by the Allied forces.[3] Therefore, the tribunals were criticized for being selective in the pursuit of international criminal justice in favour of the strong.[4] The culture of selectivity became the rule rather than the exception as subsequent international tribunals exhibited glaring examples of selectivity as discussed below.

Owing to systematic attacks and targeted killings by Serbian forces against the Federal Republic of Yugoslavia (FRY), particularly the ethnic Albanian population in Kosovo, NATO forces engaged in what was code-named "Operation Allied Forces".[5] The bombing campaign which was aimed at targeting Serbian forces ended up killing approximately 500 innocent civilians in the FRY and injured approximately 800 others.[6]

---

1 Odero Politics of International Criminal Justice C. Murungu and J. Biegon (eds.) 145
2 Odero Politics of International Criminal Justice C. Murungu and J. Biegon (eds.) 145
3 Odero Politics of International Criminal Justice C. Murungu and J. Biegon (eds.) 145
4 Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 3
5 Haulman 2015. Available at: https://media.defense.gov/2016/Mar/17/2001481638/-1/-1/0/PAGES%20FROM%20AIR_POWER_HISTORY_SUMMER-2015.PDF [Accessed 18 July 2018]
6 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, paras. 53, 90, Available at http://www.un.org/icty/pressreal/nato06l300.htm. *See also* HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN: THE CRISIS IN Kosovo para. 26 (2000), Available at http://www.hrw.org/reports/2000/nato/Natbm200-01.htm (estimating that between 489 and 528 civilians were killed during NATO's bombing campaign)

These events were followed by questions from the international community as to whether the NATO offensive constituted instances of war crimes for which criminal responsibility could be invoked before the ICTY.[7] In the opinion of many, the manner in which the operation was conducted violated the Geneva Conventions, given that military targets were not differentiated from actual civilian populations, including the fact that sufficient measures were not implemented to minimize civilian casualties.[8] Article 48 of Additional Protocol I to the Geneva Conventions provides that a war is waged only against the armed forces of the enemy and thus requires distinctions to be drawn between civilians and combatants and between civilian property and military objectives. Consequently, "the civilian population as such, as well as individual civilians, shall not be the object of attack".[9] The fact that the principle of distinction was not observed by NATO forces during attacks that resulted in the deaths of 500 civilians supports the argument that the incidents were sufficiently serious to attract investigations and subsequent prosecutions by the ICTY.

Contrary to the opinions above, the ICTY prosecutor, Carla del Ponte, after assessing the conduct of NATO forces, concluded on June 2, 2000 "that there [was] no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign".[10] Although the prosecutor admitted that some mistakes were made by NATO forces, she ended up announcing that she was "satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign".[11] The prosecutor's decision received strong criticisms from scholars who question her impartiality and expressed their suspicions that political rather than legal considerations had influenced her decision.[12] Such selective application of criminal sanctions illustrates the potential abuse posed by prosecutorial discretion at the ICTY.

---

[7] Haulman 2015. Available at: https://media.defense.gov/2016/Mar/17/2001481638/-1/-1/0/PAGES%20FROM%20AIR_POWER_HISTORY_SUMMER-2015.PDF [Accessed 18 July 2018]

[8] International Committee of the Red Cross, *The Balkan Conflict and Respect for International Humanitarian Law*, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/9946AD4CBB6F813FC I 256B66005CB83B. [Access 25 July, 2018]

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51(2), Dec. 12, 1977, 1125 U.N.T.S**.** 3, 26

[10] Press Release, 2000 www.un.org/icty/pressreal/p5I0-e.htm. [Access 25 July, 2018]

[11] Press Release, 2000 www.un.org/icty/pressreal/p5I0-e.htm. [Access 25 July, 2018]

[12] Anne-Sophie 2006 *BJIL*

The morality of the prosecutor's decision not to investigate NATO forces was questioned based on the killings of hundreds of civilians as a result of NATO air strikes.

Similarly, the ICTR focused on prosecuting members of a particular ethnic group - Hutu. In *The Prosecutor v. Josep Nzirorera*, the applicant challenged the merits of the case on the basis of selective criminalization.[13] His application was supported by the fact that 77 out of 78 persons prosecuted at the ICTR were Hutus and the applicant was a Hutu by ethnicity.[14] Such an overwhelming majority of Hutu defendants on trial strengthened the argument that the Hutus were selectively prosecuted despite targeted killings that were carried out by some Tutsi leaders. The applicant further questioned the rationale of the ICTR's decision not to prosecute members of the Rwandan Patriotic Front (RPF) despite the fact that some of its leaders were accused of being the masterminds of the assassination of two Hutu presidents and their entourage, the event which perhaps was listed among the main causes of the subsequent massacre.[15] Despite evidence of such atrocities, the accused persons were not prosecuted before the ICTR.[16] Such selective applications of criminal sanctions build on existing arguments that the ICTR was not different from its predecessors in terms of selectivity in the pursuit and application of justice.

The aspects of selectivity also feature at the Special Court for Sierra Leone (SCSL). Despite outstanding security challenges posed by post-conflict societies in Sierra Leone, the SCSL successfully charged eight individuals and continued their prosecution in what became known as the Armed Forces Revolutionary Council (AFRC) case,[17] the Revolutionary United Front (RUF) case,[18] and the Civil Defense Force (CDF) case.[19]

---

[13] *The Prosecutor v. Josep Nzirorera* , CASE NO. ICTR-98-44-T. para. 3

[14] *The Prosecutor v. Ndindiliyimana*, No. ICTR-2000-56-I , Decision on urgent oral motion for a stay of the indictment or in the alternative a reference to the Security Council.

[15] *The Prosecutor v. Josep Nzirorera* , CASE NO. ICTR-98-44-T. para. 1a

[16] *The Prosecutor v. Josep Nzirorera* , CASE NO. ICTR-98-44-T

[17] See *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-A, Judgment (February 22, 2008); *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Judgment (June 20, 2007)

[18] *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Judgment (March 2, 2009). See also *Prosecutor v. Sesay, Kallon and Gbao,* Case No. SCSL-04-15-A, Judgment (October 26, 2009)

[19] *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgment, I 1 (Aug. 2, 2007). See also *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Judgment (May 28, 2008)

Scholars have argued that the prosecutor at the SCSL might have faced immense difficulties in selecting persons to prosecute before the tribunal owing to the widespread nature of the crimes, their brutality and the large number of persons involved in the commission.[20] Besides the difficulty of selecting defendants, the prosecutor had a wide margin of discretion to decide whom to indict.[21] Given that the prosecutor had prosecutorial authority, he chose to prosecute political and military leaders from each of the combatants: the rebel RUF; the governments backed CDF militias and elements of the Sierra Leone Army that formed the AFRC.[22] Going by the Prosecutor's categorization, the Former President of Liberia Charles Taylor became the highest profile official to face criminal charges before the SCSL.[23]

In an exclusive interview with Charles Cobb, prosecutor Crane explained that he was bound to charge high profile leaders with greatest responsibility "who caused, sustained, aided and abetted the tragedy".[24] In this thesis, it is argued that in addition to the group of eight individuals prosecuted at the tribunal, many others may have shared greatest responsibility for the serious crimes committed in the Sierra Leone war yet were exempted from criminal prosecution due to their low ranking positions in the categorization of high profile leaders.[25] Prosecutor Crane reported that the greatest responsibility formula narrowed his list of suspects from 30,000 individuals to approximately twenty.[26] He further explained that there was a possibility to prosecute all combatants who participated in the Sierra Leonean war, but, the greatest responsibility formula narrowed the list of suspects to specifically include high profile leaders.[27] Similarly, Ralph Zacklin, the legal counsel to the UN and negotiator of the SCSL Agreement applied the greatest responsibility formula and reported in September

---

[20] Knowles 2006 *ICLR.* He explained that the meaning of the complexity of Article 1 of the Statute of the SCSL remains unresolved both in theory and practice.

[21] See Statute of the Special Court for Sierra Leone, January 16, 2002, 2178 U.N.T.S. 145. Art. 1 and 1 1. The Statute was established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000.

[22] See Jalloh 2011 *MJIL*

[23] Crane 2006 *AUILR*. Crane discussed the challenges and security difficulties of setting up the Prosecutor's office and entire court from scratch. He noted particularly that the Court could only be successful if Charles Taylor was turned over.

[24] See Cobb C, 2003 http://allafrica.com/stories/200309250972.html. [Accessed 24 July 2018]

[25] Jalloh 2011 *MJIL*

[26] Crane 2006 *AUILR.* For proper clarification, see pages 508, 509, 511 and 512.

[27] Cobb C, 2003 http://allafrica.com/stories/200309250972.html. [Accessed 24 July 2018].

2002 that between twenty-five and thirty persons were expected to be prosecuted before the Court.[28] Another proposition pertaining to the greatest responsibility formula came from the Former British High Commissioner in Sierra Leone who supported the Kabbah government during the rebel invasion of Freetown in January 1999, and his estimate recorded between fifteen and thirty persons.[29] All three reports revealed that a significant number of suspects were exempted from criminal prosecution before the SCSL.

The big question "why some and not all" provoked allegations of selective prosecutions at the SCSL.[30] Such allegations featured as a consequence of the phrase "greatest responsibility" which was mentioned for the first time in international criminal law.[31] During the process of organizing the context of trials before the tribunal, the drafters of the Statute of the SCSL (The UN and the Government of Sierra Leone) narrowed the scope of defendants to stand trial before the Court. They introduced the phrase "greatest responsibility" to target a select few, probably high profile leaders who bore greatest responsibility for the Sierra Leone tragedy.[32] The greatest responsibility formula therefore became the legal machinery through which the exercise of selective prosecution featured at the SCSL. Basically, the greatest responsibility formula exposes one or two persons at the apex of the pyramid who are considered to have caused, sustained, aided and abetted the tragedy. This explains why the initial figure of 30,000 suspects was reduced to eight defendants before the Court.[33]

The cases discussed above illustrate the fact that the practice of selective criminalization has been recurrent in the history of international criminal justice. The pattern of criminal prosecutions applied at Nuremberg, Tokyo, Yugoslavia, Rwanda and the SCSL merely support the argument of selective morality in the pursuit of international criminal justice.[34] On their part, African leaders, including the AU, have argued that, the fact that only African cases have come before the ICC since it was

---

[28] Human Rights Watch, 2004 https://www.hrw.org/report/2004/09/08/bringing-justice-special-court-sierra-leone/accomplishments-shortcomings-and [Accessed 24 July 2018]
[29] See Jalloh 2011 *MJIL*
[30] Jalloh 2011 *MJIL*
[31] Jalloh 2011 *MJIL*
[32] Statute of the Special Court for Sierra Leone, January 16, 2002, 2178 U.N.T.S. 145. Art. 1.
[33] Jalloh 2011 *MJIL*
[34] Jalloh 2011 *MJIL*

created simply justifies the re-occurrence of selective prosecutions in the pursuit of international criminal justice.[35] The evidences of selectivity as detailed in subsequent sections of this thesis perhaps inform the AU's recent position against the ICC.[36]

It is important to point out that African countries contributed significantly towards the creation of the ICC and still, they continue to play important roles in the day-to-day running of the Court. The creation of the ICC resulted from a complex multilateral process of negotiations, which culminated in an international conference organized under the auspices of the UN in Rome from 16 June to 18 July 1998.[37] Among other things, two regional conferences that discussed the future of the ICC were held in Pretoria by the Southern African Development Community (SADC) in September 1997 and June 1999 respectively.[38] During the month of February 1998, the West African State, Senegal, also hosted an African Conference in Dakar where a declaration was adopted in which African States affirmed their commitment to the creation of the ICC and underscored the importance of the Court to both Africa and the world at large.[39]

Africa's representation at the Rome Conference was marked by high calibre officials, including the Ministers of Justice, Ministers of Foreign Affairs and Attorneys General.[40] Of the 31 Vice Presidents who participated in the conference, 8 came from Africa, namely Algeria, Burkina Faso, Egypt, Gabon, Kenya, Malawi, Nigeria and Sudan.[41] Also, the Drafting Committee was chaired by Egypt. African delegates at the Rome Conference advocated for a permanent, impartial and strong International Criminal Court to cater for serious crimes under international law and also help with strengthening national justice systems.[42] Speaking on behalf of the SADC states, the head of the SADC delegation, the then Minister of Justice, Abdula Mohamed Omar of South Africa stated:

---

35 DeGuzman 2012 *MJIL*
36 Batohi Africa and the International Criminal Court. Werle et al (eds.) 49,
37 Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 14
38 Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 14
39 Dakar Declaration for the establishment of the International Criminal Court in 1998. Available at http://www.iccnow.org/documents/DakarDeclarationFeb98Eng.pdf (accessed on 25 March 2018)
40 Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 14
41 Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 14
42 Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 15

> The establishment of an international criminal court would not only strengthen the arsenal of measures to combat gross human rights violations, but would ultimately contribute to the attainment of international peace. In view of the crimes committed under the apartheid system, the International Criminal Court should send a clear message that the international community was resolved that the perpetrators of such gross human rights violations would not go unpunished.[43]

The historic timeline illustrates Africa's active participation towards the adoption of the Rome Statute, including their joint efforts and determination to put an end to impunity for the most serious crimes of concern to the international community. Senegal, an African state, was the first to ratify the Rome Statute and of course supported its coming into force on 1 July 2002.[44] Africa constitutes the biggest regional group (34 countries) in the Assembly of States Parties, the oversight and legislative body of the ICC.[45] These and many more points as discussed in subsequent sections of this thesis speak to the fact that Africa's relationship with the ICC has always been cooperative. This position, however, changed when the African Union (AU) alleged that the ICC was promoting the culture of biased prosecutions by selectively targeting African Leaders.[46] Admittedly, only Africans have come before the Court since it was created in 2002.[47] Therefore, the AU has argued that the Court is indeed selective in its pursuit of justice. The Union has referred to instances in which Africans were treated as victims of the ICC and not necessarily partners in the fight against impunity.[48]

The indictment of the Sudanese President Omar Al Bashir in 2008 became the bone of contention between the AU and the ICC.[49] While the ICC justified the warrant of arrest issued against Omar Al Bashir on the grounds of crimes against humanity committed in Darfur, the AU contended that such actions by the Court jeopardized the peace process

---

[43] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998 Official Records, Volume II, United Nations, New York, 2002, p. 65.

[44] See Press release L/2905, Senegal became the first State to ratify the Rome Statute of International Criminal Court.

[45] Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 15

[46] DeGuzman 2012 *MJIL*

[47] Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 15

[48] Cole 2014 *MJIL*

[49] See Doc. Assembly/AU/Dec 243-267 (XIII) (2009), 13th Assembly of the Ufrican Union Summit in July 2009 where the Union voted by a large majority not to cooperate with the ICC over the indictment of the Sudanese President.

initiated by the Sudanese government.[50] The Union also expressed concerns over the warrant of arrest issued against the late Muammar Gadaffi of Libya by stating that such actions compromised government's efforts aimed at stabilizing the country and created the political atmosphere in which the Gadaffi regime was subsequently overthrown.[51] This defeat created more problems rather than solutions for the Libyans. Besides the Libyan and Sudanese debacle, the AU questions the attitude of the UN Security Council in dealing with the issue of deferrals stipulated under Article 16 of the Rome Statute.[52] While the Union contends that the warrant of arrest issued against Omar Al Bashir undermined the international practice of sovereign immunity, it further argued that the prosecution of the President of Kenya and his deputy undermined the country's sovereignty and compromised its ability to champion the fight against terrorism in East Africa.[53] These accusations substantiated by the ICC's prosecution of African officials became a pointer to the allegation of an ICC bias against Africans.[54]

Due to the allegations of selective prosecutions in the pursuit of international criminal justice, the AU called on African States to exit the ICC.[55] The Union encouraged its members to find African solutions to African problems.[56] Even though a pre-1998 development, the Ethiopian courts were hailed as a blueprint across the continent ensuring that perpetrators of serious crimes in international law are tried by competent national/domestic courts.[57] The trial of Mengistu Haile Mariam, a former Head of State of Ethiopia, including other members of the former regime is instructive in this regard.[58] The Courts enforced the jurisprudence on genocide at the domestic level by including a "political group" as a protected group.[59] However, the trials were largely criticized for lack of fairness, disregard of the rights of accused persons, the inherent problems

---

50 See Murithi 2008 *AR*
51 See Murithi 2008 *AR*
52 Rome Statute of the International Criminal Court 1998. Art. 16
53 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49
54 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49
55 See, AU Doc. No. Assembly/AU/Dec.529 (XXIII) (2014)
56 AU Doc. No. Assembly/AU/Dec.529 (XXIII) (2014)
57 See Tiba 2007 *JICJ*
58 See *Special Prosecutor v. Col. Mengistu Haile Mariam* et al., File No. 1/87, Ethiopian Federal High Court
59 See the Penal Code of Ethiopia, No. 158 of 1957

associated with trials in absentia, and above all, the promotion of victor's justice.[60] As a result, the important question "whose justice" came to the spotlight.[61] "Whose justice" was it at the Ethiopian Courts? Was it justice to advance the interest of the victims or to protect the politics of the strong? These are some of the questions that challenged the jurisdiction of the Courts in Ethiopia.[62]

In the light of contemporary international criminal law discourse, the *Hissène Habré* trial by the Extraordinary African Chamber (EAC) has been considered a turning point in the development of regional and international criminal justice.[63] The trial enforced the principle of universal jurisdiction, passive personality and the duty to prosecute and punish individuals responsible for serious crimes in international law despite the principle of non-retroactivity of punishment and law.[64] However, just like previous national and international efforts, it has been criticized on many counts.[65] The EAC was established pursuant to a joint agreement between the AU and the government of Senegal to try the former Chadian President for the crimes committed during the period 1982-1990 when he was the president of Chad.[66] After the trial of *Hissène Habré*, the EAC's mandate came to an end. Therefore, the Chamber could not cater for subsequent international criminal prosecutions.[67] Even more problematic, Article 21(4)(d) of the Statute of the EAC raised the question of procedural inefficiency.[68] The Article provides that accused persons must be present at the time of the trial. During the *Habré* trial some accused persons were absent, the consequence of which, they could not be tried in absentia due to the requirement under Article 21(4)(d) of the Statute of the EAC.[69]

---

60 Tiba 2011, *The Trial of Mengistu* 163-184
61 Tiba 2011, *The Trial of Mengistu* 163-184
62 Tiba 2011, *The Trial of Mengistu* 163-184
63 Christoph 2017 *IJHR*
64 See *Hissène Habré v. Republic of Senegal*, Case No. ECW/CCJ/JUD/06/10
65 Christoph 2017 *IJHR*
66 See AU Doc, Assembly/AU/Dec.111-133(VII), Assembly of the African Union Seventh Ordinary Session, July 2006, Agreement Between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System ('EAC Agreement'). See also Decision of the African Union on the Hissène Habré Case and the African Union, AU Doc. Assembly/AU/Dec.103 (VI)
67 For a proper analysis of the EAC see Williams 2013 *JICJ*
68 See Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990. Art. 21(4)(d)
69 Accused persons who never appeared before the Extraordinary African Chamber include,

The judges of the Chamber were actually frustrated by this procedural defect emanating from the EAC's Statute and consequently, the cases against such defendants had to be discharged.[70]

The problem posed by Article 21(4)(d) is that, the said defendants before the EAC were not acquitted. Charges brought against them had to be discharged as non-suit due to a fundamental defect arising from the Statute.[71] Therefore, it can be argued that Article 21(4)(d) of the Statute of the EAC is self-inhibiting as it provides for a clause that partially defeats the purpose for which the Chamber was created. In that particular instance, the victims were left without legal recourse as the perpetrators were not brought to account.[72] Given that the proceedings against specific accused persons were not pursued, the question "whose justice" continues to feature in the criminal law debate. These are some of the questions that continue to justify the practice of selectivity at African regional justice agencies linked to domestic systems.

Nonetheless, the AU continued to favour African solutions to African problems by adopting the Malabo Protocol during its 2014 summit held in Equatorial Guinea.[73] Article 46A *bis* of the Protocol provides for immunity for sitting heads of state.[74] This provision directly conflicts with Article 27 of the Rome Statute which provides for equality before the law irrespective of official capacity or nationality.[75] By implication Article 46A *bis* of

---

Saleh Younous, Guihini Korei, Abakar Torbo, Mahamat Djibrine and Zakaria Berdei. For details, see Human Rights Watch, The Case of Hissène Habré before the Extraordinary African Chambers in Senegal, Questions and Answers. Available at: https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal [Accessed 31 March 2018]. See also Hissène Habré trial. Available at https://trialinternational.org/latest-post/saleh-younous/ [Accessed 20 March 2018]

70 Extraordinary African Chamber drop charges against specific accused persons due to the impossibility of having them transferred from Chad to stand trial before the Chamber. See Hissène Habré trial. Available at https://trialinternational.org/latest-post/saleh-younous/ [Accessed 20 March 2018].

71 Even though the suspects were convicted under the Chadian criminal justice system, the African Chamber was left without a legal recourse as its jurisdiction was punctured by the flawed construction of Art. 21(4)(h) of the Statute

72 See Angela Mudukuti, Available at https://www.iol.co.za/mercury/the-arduous-road-to-global-justice-1893131 [Accessed 20 March 2018]

73 Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU Doc. No. STC/Legal/Min. 7(1) Rev.1 (14 May 2014) [hereinafter 'Malabo Protocol']

74 See Malabo Protocol, Art. 21(4)(d)

75 Rome Statute of the International Criminal Court 1998. Art. 27

the Malabo Protocol gives prominence to immunity by shielding heads of states and top government officials from prosecution. Once again the question arises, "whose justice" is the law design to protect? Is it justice to protect the interest of the victims or to advance the politics of the strong? The logic is if heads of states, top government officials and powerful nations are still determined to stay away from justice, then the objective of international criminal law has not been achieved.[76] In his opening statement at the Nuremberg tribunal in 1945, the United States (USA) led prosecutor for Nuremberg, Robert Jackson, highlighted:[77]

> ….The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which. leave no home in the world untouched. It is a cause of that magnitude that the United Nations will lay before Your Honor.

Despite the prosecutor's statements at Nuremberg, including the tribunal's commitment to bring an end to a culture of impunity for serious crimes in international law, the question of selective prosecutions continued to challenge the credibility of international criminal jurisprudence as evident by post-Nuremberg tribunals discussed above. The debates concerning the AU's allegation of selective prosecution by the ICC is explored in subsequent chapters, but before delving into such details, it is important to reflect on the problem against which the research is conducted.

1.2 STATEMENT OF THE PROBLEM

Article 13 of the Rome Statute provides that cases shall be referred to the ICC either by the state on whose territory the crime has been committed, the UNSC, acting in accordance with Chapter VII of the UN Charter and/or an investigation initiated by the Prosecutor of the Court by virtue of his/her *pro prio motu* authority. From its inception in 2002, the Court has been operating under this mandate even though the outcomes

---

[76] See Netsanet Belay 2015, Available at: https://www.amnesty.org/en/latest/news/2015/06/impunity-vs-immunity-africa-and-the-icc/ [Accessed 22 March 2018]

[77] See Opening statement by Justice Robert Jackson, the US led prosecutor for Nuremberg, The Department of State Bulletin. Dir. of publ. Department of State. 25.11.1945, n° 335; vol. XIII; publication 2432. Washington: US Government Printing Office. "International Military Tribunal", 850-860

in most instances have proved to be unsatisfactory.[78] As the recognition of the ICC and the relevance of the Rome Statute grow within the international scene, so do challenges exert pressure on the Prosecutor's ability to function smoothly. So far, more than 25 individuals are subject to proceedings before the Court and arrest warrants remain outstanding for 11 suspects.[79] The reasons for such delayed justice are linked to the allegations of selectivity as contextualized in the problem statement and subsequent sections of this thesis.[80]

To begin with, the situation in Uganda was referred to the ICC by President Museveni in accordance with Article 13(a) of the Rome Statute.[81] The referral was geared towards conducting investigations against the LRA war-lords and accordingly, five warrants of arrest were issued in July 2005.[82] It is unfortunate that one of the suspects, Raska Lukwiya, who was charged with nine criminal charges passed away even before justice took its full course.[83] However, his counterparts still have charges to answer before the Court. In the case of *The Prosecutor v. Joseph Kony, Vincent Otti, and Okot Odhiambo,* the accused are charged with war crimes and the case has been outstanding since 2005.[84]

In the *Prosecutor v. Thomas Lubanga*,[85] the ICC finalized its first judgment and sentenced the accused to 14 years imprisonment, but in the *Prosecutor v. Bosco Ntanganda*[86] and the *Prosecutor v. Germain Katango*,[87] the accused are still under the custody of the ICC while *Sylvestre Mudacumura* is still on the run from the arm of justice since 2006.[88] Overall, seven warrants issued during the period 2005 to 2009 with

---

78 Barnes 2011 *FILJ*
79 UN Doc. A/66/309 of 19/08/2011
80 Barnes 2011 *FILJ*
81 Monageng Africa and the International Criminal Court: then and now Werle at al (eds.) 17 See also Moy 2006 *HILJ*
82 Press Release, International Criminal Court, Warrant of Arrest Unleashed Against Five LRA Commanders http://www.icc-cpi.int/press/pressreleased/114.html.
83 *The Prosecutor v. Raska Lukwiya* ICC-02/04-01/05055
84 *The Prosecutor v. Joseph Kony, Vincent Otti, and Okot Odhiambo* ICC-02/04-01/05. See also, Phooko 2011 NDJICHRL
85 *The Prosecutor v. Thomas Lubanga Dyilo* 2006 ICC-01/04-01/06
86 *The Prosecutor v. Bosco Ntanganda* 2006 ICC-01/04.02/06
87 The Prosecutor v. Germain Katanga 2007 ICC-01/04-01/07
88 Mattioli and Woudenberg Global Catalyst for National Prosecutions? 55

respect to events in the Democratic Republic of the Congo (DRC) are still pending.[89] Judging from the foregoing, the principle of equality stipulated under Article 27 of the Rome Statute has arguably been compromised in the situations of these two countries. The Presidents in both the DRC and Uganda referred the situations to the ICC Prosecutor and investigations were selectively conducted against rebel leaders, warlords and opposition leaders in order of their rankings. It seems as if the government in the DRC never took part in any of these atrocities for which some government officials could also be held accountable.[90] By implication, the investigations conducted in both countries ignored the part played by the government and concentrated only on the part played by the rebels, predictably, because the government are the officials in power and as such, they would not want to jeopardize their interests. Such targeted investigations and prosecutions promoted the practice of selective application of sanctions in the pursuit of international criminal justice.

Therefore, as long as it is clear that such referrals are aimed at targeting particular individuals in these two countries, it will be difficult to execute warrants of arrest and bring alleged perpetrators to justice regardless of their official capacities. This brings out the important question "whose justice"? Going back to Nuremberg, Tokyo, Yugoslavia, Rwanda and Sierra Leone, whose justice? Charles Taylor, for example, did not cross the border and personally involve himself in the atrocities in Sierra Leone; yet, he was arrested on the basis of the "greatest responsibility" clause stated under the Statute of the SCSL. In like manner, ICC's critics had expected the Court to investigate Presidents Joseph Kabila and Yoweri Museveni, including their military officials in accordance with the doctrine of command responsibility.[91]

With regards to the cases referred to the Court by the UN Security Council, President Al Bashir is still a free man since he walks freely in and outside the continent of Africa. Also, he enjoys the most lenient treatment by the AU to the extent of attending its

---

89 Report of the International Criminal Court to the United Nations General Assembly; Sixty-sixth session, Item 75 of the provisional agenda, 19 August 2011. Doc. A/66/309

90 See Art 27 of the Rome Statute Doc. A/CONF.183/9

91 See for example the decision of the Appeals Chamber of the ICTY *The Prosecutor v. adzihasanovic* 2003 IT-01-47-AR72 interlocutory appeal, challenging jurisdiction in relation to command responsibility.

summits.[92] It is unfortunate that this is one of the cases before the ICC where leaders and organizations shield alleged perpetrators regardless of the crimes committed.[93] One of the reasons for the reluctance on the part of States to fully cooperate with the Court is concerned with the credibility of some of the permanent members of the Security Council USA, Russian Federation and the Peoples' Republic of China. They spearhead the referrals of situations obtaining in other countries to the ICC, yet, they are neither party to the Rome Statute nor are they subjected to the jurisdiction of the ICC.[94]

Despite available legal framework mandating the Security Council to ensure global peace and security, it has continued to ignore conflicts that threaten international peace. Article 24 of the UN Charter authorises the Council to maintain international peace and security on behalf of all UN Member states.[95] By virtue of Article 25 of the UN Charter, all UN Member states are bound by the Council's decision when it acts on their behalf.[96] Article 39 of the Charter confers upon the Council the mandate to determine threats to international peace and decide what measures should be taken in accordance with Articles 41 and 42 of the Charter.[97] Given that such legal obligations exist within the Council's primary responsibility as provided for by the UN Charter, Article 13(b) of the Rome Statute provides the basis upon which the Council can make determinations in accordance with its Chapter VII mandate and refer such situations to the ICC for prosecution.[98] So far the Council has referred two cases from Africa (Sudan and Libya) to the ICC and ignored situations in countries like Iraq and Afghanistan involving the use of drones to launch airstrikes which actually resulted in massive deaths.

---

92 See Decision concerning Malawi's failure to comply with Article 87(7) of the Rome Statute regarding the arrest and surrender of *Omar Hassan Ahmad Al-Bashir,* ICC-02/05-01/09-139

93 *Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) 2015. The government of South Africa failed to enforce its legal obligations arising from the Rome Statute as it refused to yield to the call for Al Bashir arrest. The government argued that such calls violates the international practice of diplomatic immunity and as well undermines the AU's call for political settlement of disputes emanating from Africa.

94 Barnes 2011 *FILJ*

95 See Charter of the United Nations and Statute of the International Court of Justice 1945

96 Charter of the United Nations and Statute of the International Court of Justice 1945

97 Charter of the United Nations and Statute of the International Court of Justice 1945

98 See Rome Statute of the International Criminal Court 1998

In March 2003, the USA invaded Iraq with massive air strikes from drones and related sophisticated military weapons.[99] The military attack was conducted despite large scale anti-war protest from around the world.[100] Hence, international law experts and politicians questioned the legality and occupation of Iraq by the USA forces.[101] For more than a decade, the question remains whether the invasion of Iraq and Afghanistan by the USA and British forces under the Bush and Blair administrations constituted instances of war crimes for which criminal responsibility could be invoked under international law?[102] Whether the individual architects could be held accountable for violating international treaties by orchestrating the torture and killing of hundreds of thousands of civilians in these countries.[103] It is common cause that the regime of Saddam Hussein in Iraq was overthrown on the pretext that Iraq had weapons of mass destruction on the basis of faulty intelligence.[104] To date no one has been held accountable.

In the absence of an effective response from either the Security Council or the ICC, a Malaysian War Crimes Tribunal based in Kuala Lumpur brought war crimes charges against ex-President George Bush and Former Prime Minister Tony Blair in line with the war crimes criteria listed under Article 8 of the Rome Statute.[105] The War Crimes Commission found that both Bush and Blair had participated in the adoption of executive orders and directives to exclude the 1949 Geneva Conventions, the Convention Against Torture, the Universal Declaration of Human Rights and the United Nations Charter in relation to the wars launched by the USA and Britain in Iraq and

---

99 Heinrich 2015 http://www.e-ir.info/2015/03/09/one-war-many-reasons-the-us-invasion-of-iraq/ [Accessed 14 March 2018]

100 Blight G *et al*, 2011 Available at: http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline [Accessed 14 March 2018]

101 Gompert *et al,* Available at: www.newsweek.com/iraq-war-bushs-biggest-blunder-294411 [Accessed 14 March 2018]

102 Heinrich http://www.e-ir.info/2015/03/09/one-war-many-reasons-the-us-invasion-of-iraq/ [Accessed 14 March 2018]

103 Heinric http://www.e-ir.info/2015/03/09/one-war-many-reasons-the-us-invasion-of-iraq/ [Accessed 14 March 2018]

104 Heinric http://www.e-ir.info/2015/03/09/one-war-many-reasons-the-us-invasion-of-iraq/ [Accessed 14 March 2018]

105 Chief Prosecutor of the Kuala Lumpur War Crimes Commission v. George Bush and Anthony L Blair, criminal proceeding No. 1-CP-2011

Afghanistan.[106] So far, the Tribunal remains the first war crimes commission to make judicial pronouncements based on the facts and evidence gathered from the situation that obtained in Iraq and Afghanistan.[107] In accordance with the Tribunal's decision, the acts of inhumanity perpetrated against Iraqi people and Afghanistan's by the USA and British forces under the Bush and Blair administrations could be compared to what the Nuremberg Tribunal referred to as the waging of war against peace or crimes against peace in short.[108]

Whereas, the Security Council and the ICC took no action against the situations obtained in Iraq and Afghanistan, including the situation obtaining in Syria, both organs responded without delay to the Libya and Sudanese conflicts. The promptness of the Security Council in responding to the Libyan and Sudanese conflicts, including the unity of purpose between NATO, the Security Council and the ICC suggested the Court was motivated by political rather than legal considerations.[109] By focusing on Libya and not Syria or Afghanistan, the Court demonstrated its willingness to engage in politically motivated indictments masterminded by the Security Council. With regards to the allegation of selectivity, the question is not whether or not, the Security Council is vested with the authority to make determinations and refer a situation to the ICC for subsequent prosecution, for such issues had been settled by the Councils' authority arising from Chapter VII of the UN Charter. What seems to pose a challenge is the fact that such legitimate authority was invoked against the late Muammar Gadaffi of Libya and still, it is being invoked against Omar Al Bashir of Sudan but the same authority is not applicable against Bashar al-Assad of Syria, George Bush of the USA and/or Tony Blair of Britain.

---

106 Chief Prosecutor of the Kuala Lumpur War Crimes Commission v. George Bush and Anthony L Blair, criminal proceeding No. 1-CP-2011

107 See Ramakrishnan http://www.globalresearch.ca/war-crimes-tribunal-finds-bush-and-blair-guilty/5478367[Accessed 14 March 2018]

108 In Afghanistan, the USA claimed it war was in "self-defence", in Iraq, it claimed the authority of the Security Council of the United Nations. Likewise, In Kosovo, the US claimed its war was a "humanitarian intervention", Yet each of these wars was illegal according to established rules of international law. See Mandel *How* America gets away with murder 207

109 Dlamini 2012 http://mg.co.za/article/2012-07-03-icc-credibility

Besides the question of selectivity, the USA has adopted domestic laws to limit cooperation with the ICC and such legislative enactments speaks to the fact that the government is not ready to cooperate let alone be subjected to the jurisdiction of the Court. The law in question is the American Service Members Protection Act (2002), also referred to as the 'Hague Invasion Act'.[110] According to this law, any country that hands over a USA national to the ICC shall be penalize by the USA government. Even more problematic, the USA threatened to arrest ICC judges who continue to probe war crimes in Afghanistan allegedly committed by USA's soldiers.[111] Despite the country's systematic adoption of legislations meant to undermine international criminal justice and as well jeopardize the functions of the ICC, Security Council referrals under Article 13(b) of the Rome Statute provides an opportunity for the USA and other superpowers to continue to participate in the affairs of the ICC by virtue of the Council's authority to make determinations in accordance with its mandate arising from Chapter VII of the UN Charter.[112]

Whereas the Security Council was quick to refer the Libya and Sudanese situations to the ICC, it continues to be reluctant to refer the situation obtaining in Syria to the Court.[113] There have been calls for Bashar al-Assad to be investigated by the Court, including by UN officials.[114] Unfortunately, political divisions between some of the permanent members (Russia, USA and China) have continued to be a stumbling block to such initiatives and consequently the victims of serious crimes committed in Syria have been left without a legal remedy and the question 'justice is for whom', continues to feature on the spotlight?[115] The political nature of Security Council referrals as portrayed in the character of states bestowed with veto powers seem to have compromised the credibility of the Council's authority arising from Article 13(b) of the

---

110 US Congress Passes Anti-ICC Hague Invasion Act' Coalition for the International Criminal Court, Press Release, 26 July 2002 http://www.iccnow.org/documents/ 07.26.02ASPAthruCongress.pdf [Accessed 15 May 2018]

111 BBC News 2018, ICC 'undeterred' by US sanctions threat https://www.bbc.com/news/world-us-canada-45487865 [Accessed 31 October 2018]

112 Odero Politics of International Criminal Justice C. Murungu and J. Biegon (eds.) 158

113 Dlamini 2012 http://mg.co.za/article/2012-07-03-icc-credibility [Accessed 14 March 2018]

114 Heinrich 2015 http://www.e-ir.info/2015/03/09/one-war-many-reasons-the-us-invasion-of-iraq/ [Accessed 14 March 2018]

115 Dlamini 2012 http://mg.co.za/article/2012-07-03-icc-credibility [Accessed 14 March 2018]

Rome Statue and as well advanced the practice of selective morality in the pursuit of international criminal justice.[116]

The Court's legitimacy problem was exacerbated by the indictment of top government officials in Kenya, including the President and Vice President of the Republic.[117] Uhuru Kenyatta and his deputy William Ruto became the first sitting Heads of State to stand trial before the ICC since its came into force in 2002.[118] Although such trials came to a stalemate for lack of evidence and witness testimonies, the AU argued that the ICC was and still continues to be unfair to Africans.[119] Numerous calls from the government of Kenya and the AU to have the case against Kenyatta and Ruto deferred for the interest of peace were unsuccessful.[120] Rather, the Court insisted on prosecuting the leaders, despite political uncertainties that faced the country.[121] Admittedly, the AU has accused the Court of being racist, asking African countries to consider withdrawing their membership from the Court.[122]

Pursuant to this call from the AU, Kenya resolved to quit the ICC.[123] Numerous challenges posed by the peace v. justice debate strained Kenya's relationship with the Court and consequently proceedings against Kenyatta and his counterparts were withdrawn. As a matter of law, the inability or delay of any judicial institution to render justice in a timeous manner is a serious concern for those who look up to such an institution as the proper body to bring justice. It is for such reasons that the drafters of the Rome Statute foresaw the need to incorporate a provision for review of the Statute after seven years of operation, in order to address these concerns.[124] Even though the ideals of the ICC seem to be noble, the practical realities of running a court with an international reach are challenging. Impeded by selective morality and double standards, logistical and financial challenges, the ICC may become a toothless bulldog,

---

116 Dlamini 2012 http://mg.co.za/article/2012-07-03-icc-credibility [Accessed 14 March 2018]
117 See Lynch The ICC Intervention in Kenya 5
118 Lynch The ICC Intervention in Kenya 5
119 Okoh Africa, the United Nations Security Council Werle G et al. (eds.) 198
120 Okoh Africa, the United Nations Security Council Werle G et al. (eds.) 198
121 Okoh Africa, the United Nations Security Council Werle G et al. (eds.) 198
122 Extraordinary Session of the Assembly of the AU, Addis Ababa, Ethiopia. Decision No. Ext/Assembly/AU/Dec.1 2013
123 Smith 2013 http://www.theguardian.com/world/2013/sep/05/kenya-quit-international-criminal-court
124 Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 17

like many international organizations around the world. The research seeks to investigate the conflated issues surrounding referrals under Article 13 of the Rome Statute, including the impact of global power politics on the smooth-functioning of the ICC.

1.3 AIMS AND OBJECTIVES OF THE STUDY

From the above, the central research question seeks to address this problem:

- *To what extent does global power politics affect the trigger mechanisms of Article 13 of the Rome Statute? How does such political interplays impact on the smooth functioning of the ICC?*

The central research question will be guided by a sub-research question as follows:

- *What is the impact of Article 13 referrals on the legitimacy of the ICC?*

The aim of this study is to explore the impact of selective morality and/or global political interplays and their effects on the trigger mechanisms of Article 13 of the Rome Statute in particular and the functioning of the ICC in general. In doing so, the researcher hopes to propose an amendment to the Statute that canvasses in a legal fashion the challenges facing Article 13 referrals. The study will be guided by the following objectives:

First, to examine the nature and implications of referrals under Article 13 of the Rome Statute and evaluate the merits of the criticisms advanced against the ICC regime in the light of such referrals, with a view to exploring law reform that will enhance the functioning of the Court. Secondly, to propose a novel referral authority that addresses the concerns raised by Article 13 of the Rome Statute and in the process contribute to the existing body of knowledge regarding the ICC in relation to emerging jurisprudence in international criminal law.

1.4 DEFINITION OF KEY TERMS

1.4.1 Morality

The term morality is frequently invoked as a reflection of religious values.[125] However, the meaning is often construed depending on the subject within the scheme of interdisciplinary academic discourse.[126] The definition of morality in the context of this study is informed by Piaget's philosophical theory of moral judgment. He propounded the concept of morality on the basis of three categories of moral judgments which include: society-centered morality, self-centered morality and person-centered morality.[127] This study adopts the society-centered morality approach to discuss the role of morality *vis-à-vis* criminal law in the general quest to provide sanctions to the perpetrators of serious crimes in international law. Piaget defined society-centered morality as 'rights' identified with rules legally or conventionally advocated by society, even if personal interest may suffer. Modes of correction of wrongdoers are similarly derived, usually involving punishment and/or reformatory training. This category of morality carries with it societal dynamics and collective ethical values.[128]

It is instructive to point out that the link between morality and criminal law is hardly simple or straightforward. The proponents of political philosophy see the law as grounded in effective political authority and its institutional execution, and for them moral claims are only ideological justifications of authority.[129] They propagate the philosophy that morality does not have power on its own, but can be justified by political authority through institutional execution to determine what is right or wrong.[130] However, international criminal law deviates from this political orientation by providing a counter argument that morality is not necessarily justified by political authority. Rather, its justification can be interpreted as a function of the law. Fundamentally, there are some crimes that are too serious to be ignored and, in turn, they generate

---

125 Kelly 2010 *JHR*
126 Kelly 2010 *JHR*
127 Piaget The moral judgment 15
128 Piaget The moral judgment 15
129 Hoover 2014 *LCP*
130 Hoover 2014 *LCP*

norms that should be protected everywhere.[131] The protection of such norms irrespective of personal interests actually justifies the function of morality in the context of this study.

The sanctity of morality in the pursuit of international criminal justice was emphasized by the statutes of the ICTY and ICTR.[132] Both statutes mentioned the importance of morality by stating that the judges should be chosen from among persons who possess "high moral character, impartiality and integrity", including the necessary requirement for such persons to qualify for the highest judicial office in their respective countries.[133] The drafters of the Rome Statute adopted the same formula. Article 36(3)(a) of the Statute is *pari materiae* to Article 13 of the ICTY Statute, Article 12(1) ICTR Statute and, Article 13(1) of the Statute of the SCSL.[134] All provisions mentioned above clearly inform that morality plays a critical role in the enforcement of criminal justice. In the context of this study, morality is used as discussed by Piaget and applied by the Statute of the relevant international criminal tribunals mentioned above.

1.4.2 Jus cogens

The norms of *Jus cogens* often referred to as peremptory norms are said to possess a universal character in that no state may derogate from them, despite the will of the state to do so.[135] *Jus cogens* refer to certain fundamental and overriding principles of international law. These principles are based on values considered to be fundamental to the international community and that cannot be set aside by way of a treaty agreement.[136] Article 53 of the Vienna Convention on the Law of Treaties provides that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law".[137] Therefore, it is argued that *jus cogens* norms have rendered certain domestic principles like immunity for senior government officials' non-

---

131 Hoover 2014 *LCP*

132 See ICTY Statute, Art. 13 and ICTR Statute, Art. 12(1). See also, the Statute of the SCSL, Art. 13(1)

133 ICTY Statute, Art. 13 and ICTR Statute, Art. 12(1). See also, the Statute of the SCSL, Art. 13(1)

134 Rome Statute of the International Criminal Court. Art. 36(3)(a)

135 See Conklin 2012 *EJIL*

136 See Hossain 2005 *SCJIL*

137 See Vienna Convention on the Law of Treaties 1969. Art. 53

existent in terms of priority for criminal responsibility.[138] The norms of *jus cogens* as used in the context of this study are peremptory norms of general international law recognized by the international community of states as norms from which no derogation is permitted. Such norms can be modified only by a subsequent norm of general international law having the same character.[139]

The essence of a contextual definition of *jus cogens* is to provide clarity on the nature of serious crimes in international law which the ICC seeks to prevent and punish. To effectively discharge the obligations arising from the Rome Statute, the ICC has been vested with the responsibility to compliment domestic courts where they are unable or unwilling to prosecute serious crimes in international law that violate the norms of *jus cogens*.[140] Such is the relationship between *jus cogens* crimes and the ICC as discussed in the context of this study.

1.4.3 Serious crimes in international law

Serious crimes in international law are crimes committed with immense gravity to warrant international prosecution irrespective of the status (official capacity or nationality) and/or geographic location of the perpetrator/s.[141] While international crimes are defined as crimes which affects the peace or safety of more than one state or which are so condemnable to warrant intervention by international agencies, serious crimes in international law go beyond interstate relations to violate the norms of *jus cogens* stated under Article 53 of the Vienna Convention on the Law of Treaties.[142] Their occurrences attract sanctions from the broader international community and states bear the primary responsibility to ensure their effective prosecution or extradite the perpetrators to another state with competent jurisdiction to do so.[143] Crimes falling under the category of serious crimes as defined by the Rome Statute and applied in the

---

138 See Wyler 2002 *EJIL*

139 Vienna Convention on the Law of Treaties 1969. Art. 53

140 See UN General Assembly Doc. A/64/452-RES 64/117

141 See Rome Statute of the International Criminal Court 1998. Art. 5

142 See Conklin 2012 *EJIL*; See also Vienna Convention on the Law Treaties, 1969. Art. 53

143 See International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, 1996. Art. 9; See also Final Report of the International Law Commission on the obligation to extradite or prosecute (*aut dedere aut* judicare), 2014 http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf [Access 18 Sep 2018]

context of this study include genocide, war crimes, crimes against humanity and the crime of aggression.[144] Other crimes considered to be serious crimes in international law include torture, rape, murder and enforced disappearances.[145]

The role of international criminal justice *vis-à-vis* the ICC as discussed in the context of this study is to provide an institutional framework that guarantees effective prosecution of the perpetrators of serious crimes in circumstances where domestic courts fail to do so due to the inability or unwillingness to prosecute. The law requires that states should take appropriate measures at domestic levels to prosecute and punish the perpetrators of serious crimes committed within and outside their territories. For instance, contracting parties to the Genocide Convention agree that genocide is a crime under international law which they undertake to prevent and punish whether committed in time of war or peace.[146] It is instructive to point out here that there are no statutory limitations to bar the prosecution of serious crimes stated under Article 5 of the Rome Statute. The Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity 1968 provides that the crimes stated therein cannot be statutorily barred from prosecution.[147] Therefore, the role of the ICC acting as a court of last resort is of crucial importance as it ensures accountability for serious crimes in circumstances where domestic courts fail to do so.

1.4.4 Universal jurisdiction

The Institutional Treatise published under the authority of Roman Emperor Justinian provides: "All nations are governed partly by their own particular laws, and partly those laws which are common to all [those that] natural reasoning appoints for all mankind."[148] Accordingly, Justinian acknowledged the existence of a universal system of law regulating the conduct of humankind. In the seventeenth century, the Dutch jurist Hugo Grotius laid the foundation for the theory of universal jurisdiction in modern international law. He advanced from his *De Jure Pradae* (of captures) which was later

---

144 Rome Statute of the International Criminal Court 1998. Art. 5

145 See Trial Chamber I decision in *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T

146 Convention on the Prevention and Punishment of the Crime of Genocide (1948). Art. 1

147 See Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, 1968. Art. 3

148 Maine and Sumner Ancient Law, (1861 first ed.) 38

referred to as *De Jure belli ac pacis* (of the law of war and peace) the view that there are universal principles of right and wrong.[149] Within this transitional period, international law came to recognize the concept of *hostes human generis* (enemies of the human race) and they include pirates, hijackers, and similar outlaws whose crimes were typically committed outside the territory of any state. From this premise, the idea of trans-territorial and trans-cultural standards of right and wrong gave birth to the theory of universal jurisdiction

What seem to constitute serious crimes in international law and therefore subject to universal jurisdiction, are those crimes directed against the interest of the international community as a whole. Due to the universal nature of such crimes, the international community is empowered to prosecute and punish their perpetrators regardless of the geographical location and/or the personality of the perpetrator.[150] The latter provision implies that the duty to prosecute and punish the perpetrators of crimes that attracts universal jurisdiction rests within the authority of states at the domestic level. The ICC only takes responsibility to prosecute the perpetrators of such crimes when domestic authorities fail to do so.[151] The role of the ICC as defined by the Rome Statute in accordance with the principle of complementarity,[152] and applied in the context of this study is to rubber stamp the principle of universal jurisdiction by ensuring accountability for the most serious crimes of concern to the international community as a whole, especially in circumstances where states breach their duty to accord justice to such perpetrators.

1.5 THEORETICAL JUSTIFICATION AND THE DUTY TO PROSECUTE OR EXTRADITE

This study adopts the comparative historical research approach to examine the historical events and legal phenomenon that impacts on the different international

---

149 As discussed in introductory notes, Grotius' account of universal principles of right and wrong derived from reason and divine Will, the underpinning of much modern international law. For detailed discussion See Grotius *The Authority of The Highest Powers* 30-31. See also Grotius *The Law of War* 1949. [published originally in 1625], Book I, Chapter II. p. 29. Further readings can be found in Grotius *De Jure Pradae* xviii., and also Edmond 1995 http://ro.uow.edu.au/ltc/vol2/iss1/9 Accessed 11/06/2016

150 See Bonacker and Safferling *Victims of International Crimes* 7

151 UN General Assembly Doc. A/64/452-RES 64/117

152 See Rome Statute of the International Criminal Court 1998. Art. 1 and 17

criminal tribunals including the ICC. The focus on legal phenomenon's and historical events is to provide explanations that analyze and justify current debates with regards to international criminal justice and more specifically the functioning of the ICC.[153] In this regard, analysis is based on three sub approaches which include; direct comparison of historical and contemporary events based on the application of international criminal justice, a theoretical conceptualization based on universal jurisdiction and a balance between competing political and legal claims in the application of international criminal justice.[154] Also, contextual analysis of the relevant materials focused on historical antecedents in a chronological manner to discuss how legal phenomenon's impact on the functioning of the ICC.[155] From a comparative legal perspective, the study utilized Karl Max capitalist theory of class struggle to analyze and discuss the phenomenon of selectivity through which African states, including the AU have raised the issue of bias prosecutions by the ICC.[156]

According to the Marxist theory of class struggle, where the society is structured into two spheres, the bourgeoisie who represents the upper class (capitalist) and the lower class (proletariats), and in which there is visible inequality in terms of economic, political and social justice, there is bound to be a revolution in which the oppressed (proletariats) will strive to counter the oppressor (capitalist).[157] In his theoretical orientation of a capitalist society, Karl Marx referred to the oppressor as bourgeoisie or capitalist whose role is to govern, yet, not subjected to governance, lead, yet, not loyal to leadership, control, yet, not subjected to control as well as oppressing the majority of the population, yet, not susceptible to oppression.[158] On the other hand, he referred to the oppressed as proletariat whose duty is to provide the necessary labor force and obey orders from the capitalist.[159] Karl Marx further cautioned that based on the dynamics of a capitalist society, including the fact that appropriate measures are not implemented to strike a balance and ensure equality between the capitalists and the

---

153 Bennett 2009 *IJCACJ*
154 Savage, Bennett and Danner 2008 *EJC*
155 Bennett 2009 *IJCACJ*
156 Max cited in Smith, 2002 http://www.merxists.org/arcchive/marx/works/1845/theses/index.htm
157 Taiwo Legal Naturalism: A Marxist theory of law 5
158 Taiwo Legal Naturalism: A Marxist theory of law 5
159 Max cited in Smith, 2002

proletariats; there will be a revolution in which the proletariats will rise against the capitalist to ensure economic, political and social justice.[160]

Marxist capitalist theory of class struggle is topical to the issues advanced in this thesis considering the recent debates that the ICC is pro-West and anti-Africa.[161] The AU has argued that Africans have become victims of the ICC while the same is not true for their western counterparts.[162] A number of instances raised herein, supports the argument of class distinctions between Africans and the citizens of other Western countries in terms of ICC prosecutions.[163] Given that only Africans have been tried before the Court since it was created and also considering the fact that no trial has been conducted for the sake of prosecuting any western leader or government official, the AU alleged that African nationals have been considered low class citizens and hence victimized by the ICC.[164] These allegations formed the basis upon which the AU in 2014 called on its members to find African solutions to African problems by instituting the Malabo Protocol.[165] However, the opinion of the AU is not the only idea discussed in this thesis. The thesis also discusses legal developments prior to the creation of the ICC, including the dominant role played by African States towards the adoption of the Rome Statute.[166] Scholarly debates from academics and professionals regarding the allegation of selectivity by the ICC have been discussed as well.

By utilizing the communist political orientation favoring classlessness, Lenin invoked the left-wing politics to analyze and justify the Marxist capitalist theory.[167] In analyzing the

---

160 Max cited in Smith, 2002 http://www.merxists.org/arcchive/marx/works/1845/theses/index.htm

161 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49

162 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49

163 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49

164 Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the international Criminal Court (ICC), Assembly/AU/Doc.245(XIII), Sirte, 2009, para. 6; Africa Union Assembly, Discussion on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec., 2013

165 See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,' AU Doc. No. STC/Legal/Min. 7(1) Rev.1 (14 May 2014) [hereinafter 'Malabo Protocol']. The AU Assembly adopted the Malabo Protocol on 30 June 2014 at its 23rd Ordinary Session. See, AU Doc. No.assembly/AU/Dec.529 (XXIII) (2014)

166 Monageng Africa and the International Criminal Court G Werle et al (eds.) 14

167 Left-wing politics supports social equality and egalitarianism, often in opposition to social hierarchy. It typically involves a concern for those in society whom its adherents perceive

essential differences between reform and revolution which are the two important categories of left-wing politics, Lenin argue that the Marxist orientation of a capitalist society can be advanced through renunciation of every pillar of the traditional bourgeois culture.[168] These cultures which may include among others; "individualism, accumulationism, liberal agnostism, the reification of the public-private divide, political conformism and so on-could save modern society from the nearly certain disaster to which it was condemned by predatory capitalism".[169] In the opinion of Rasoluv, anything less than the renunciation of the traditional bourgeois culture was a symptom of political cowardice through which proletarians are given the opportunity to revolt.[170] In an era in which proletarian revolutions are made possible by the proletarians, their main objective will be tailored towards the creation of "objective and subjective conditions" under which mass revolutionary actions are made possible.[171]

Whereas the eminent disaster of capitalism is exposed by the left-wing politics, Rasoluv advanced the structural importance of international law in the contemporary global social formation in which, the "objective and subjective conditions" will also have to be created and given attention among the respective communities of international law related agents.[172] His argument fosters the belief that international law is a driving force for equality and good societal behavior, that international legal rules matter, that the proliferation of international legal institutions promote progressive ethical and societal values and such values signifies a desirable move towards a superior state of social development. To achieve the desired state of social development, the left-wing politics drives the Marxist debate towards exploring the ambivalence, contradictions and dynamics of a capitalist society as well as appealing to the collective potentials of bourgeoisie and the proletariat to promote peace, stability and social cohesion.[173]

The idea of Marxism in the context of this study is to critique the practice of selective application of criminal sanctions given that there is an international law obligation to

---

as disadvantaged relative to others as well as a belief that there are unjustified inequalities that need to be reduced or abolished.

[168] Lenin Left-Wing Communism 54
[169] Rasulov 2018 *EJIL*
[170] Rasulov 2018 *EJIL*
[171] Rasulov 2018 *EJIL*
[172] Rasulov 2018 *EJIL*
[173] Rasulov 2018 *EJIL*

prosecute or extradite the perpetrators of serious crimes in international law.[174] It is also instructive to point out that such obligations under international law applies to all and not some as would be discussed in the text below.[175] The failure to enforce such obligations amounts to breach of legal responsibilities arising from treaties.[176] Admittedly, many international law treaties have provided the legal framework for states to prosecute or extradite the perpetrators of serious crimes in international law. Due to widespread representative participation, obligations arising from some of these treaties have been interpreted as custom over time.

Similarly, member states bear the primary responsibility to punish all "grave breaches" stipulated under the Geneva Conventions of 1949 and Additional Protocols of 1977.[177] The crimes classified as "grave breaches" have been discussed in detail under the Conventions and Additional Protocols mention above to include: "wilfully causing great suffering or serious injury to body or health; extensive destruction of property not justified by military necessity; wilfully depriving a civilian of the right of fair and regular trial; and the unlawful confinement of civilians".[178]

The commentary to the Conventions clearly provides for an absolute duty to prosecute and punish.[179] According to the commentary to the Conventions, states parties breach their obligations arising from the Conventions by failing to prosecute or extradite the

---

[174] Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11

[175] Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11

[176] See International Law Commission's Draft on Responsibility of States for Internationally Wrongful Act, 2001. Art. 2

[177] So far, 194 states are party to the Geneva Conventions, 170 states to Optional Protocol 1, and 165 states to Optional Protocol II. See ICRC website http:// www.icrc.org/Web/Eng/siteeng0.nsf/html/party_main_treaties [Accessed 17 March 2018]

[178] See Geneva Convention for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, (Geneva Convention I) Art 50; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, (Geneva Convention II) Art 51; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (Geneva Convention III) Art. 130; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Geneva Convention IV) Art. 147; Protocol 1 Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977 (Protocol I) Art. 4. See especially Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 December 1977 (Protocol II) Art. 11, 85, 86.

[179] See Vienna Convention on the Law of Treaties. Art. 32.

perpetrators of the "grave breaches" stated therein.[180] Conflict requirements constituting grave breaches have been described by Article 2 common to the four Geneva Conventions as cases of a full blown armed conflict or any other armed insurgency arising between two or more of the contracting powers, even if a state of war is not acknowledged by one of them; and cases of partial or complete occupation of the territory of the contracting party, even if the said occupation meets no armed resistance.[181] However, a genuine armed conflict requires a high threshold of violence compared to minor disorders such as riots and sporadic acts of fighting.[182]

The Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention)[183] as well imposes a duty on states parties to prosecute criminal acts as defined by the Convention.[184] Article 7 of the Convention imposes a duty on states parties either to prosecute or extradite alleged offenders.[185] The formulation of Article 7 evokes the notion that the Convention Against Torture does not impose prosecution or punishment.[186] Rather, the provision was constructed to the understanding that "no offender would have the opportunity to escape the consequence of [his/her] acts of torture".[187] Under Article 5(2), the Convention provides for a form of universal jurisdiction to guarantee prosecution in circumstances where a state party fails to prosecute due to the inability or unwillingness to do so.[188] The purpose of Article 5(2) of the Convention is to ensure that "[n]o one guilty of torture [would] feel safe from prosecution".[189]

---

180 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 16

181 See Art. 2 Geneva Conventions I, II, III, IV

182 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 17

183 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/39/51, Art. 4

184 See Inter-American Convention on Human Right (OEA/ser A /42 (1986), Art. 6 and 12

185 Obura K *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 18

186 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 18

187 Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 18 See also Report of the Working Group on a Draft Convention Against Torture, UN Doc E/CN 4/1367 (1980), para 61

188 See Art. 5(2) of the Torture Convention. See also Report of the Working Group on the Draft Convention Against Torture, UN Doc E/CN 4/1982/L, para. 40

189 See Summary Records of the 32nd Meeting, UN Doc E/CN 4/1984/SR, para 85

International human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR),[190] the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),[191] the American Convention on Human Rights (Inter-American Convention),[192] and the African Charter on Human and Peoples' Rights (African Charter),[193] stipulates that states parties breach their legal responsibilities by failing to enforce the obligations stated therein, including to prosecute and punish persons responsible for serious violations of physical integrity rights such as torture, extrajudicial executions and forced disappearances.[194]

It has been acknowledged by the Human Rights Committee established to monitor compliance with the ICCPR that states parties must investigate, prosecute and punish those responsible for summary execution,[195] torture,[196] and unresolved disappearances.[197] The Committee further established that states responsibility arising from the ICCPR does not include amnesties for serious violations of human rights.[198] Similarly, both the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have interpreted the Inter-American Convention of Human Rights[199] to require states parties to adopt strong measures towards investigating, prosecuting and punishing the perpetrators of serious violations of human rights which may include extrajudicial executions and forced disappearances. In the case of

---

190 See International human rights instruments, including the International Covenant on Civil and Political Rights, Adopted 19 December 1966 and entered into force 23 March (1976)

191 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950 and entered into force 3 September (1953)

192 American Convention on Human Rights, adopted 7 January 1970, OAS Official Records, OEA/Ser K/XVI/1.1, doc 65 rev 1, corr 1 (1970)

193 African Charter on Human and Peoples' Rights, adopted 26 June 1981, OAU Doc CAB/LEG/67/3 Rev 5 (entered into force 21 October (1986) Art. 22

194 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 21. Arguing that it is the responsibility of states to prosecute and punish persons who violate physical integrity rights.

195 *Baoboeram v. Surinam* Comm 146/1983 and 148-154/1983, UN Doc A/40/40 (1985). Para 13.2

196 *Muteba v. Zaire* Comm 124/1982, UN Doc A/39/40 (1984). See also GA Res 3452, UN Doc A/10034 (1975) Art 10).

197 See Report of the Human Rights Committee para 3, UN Doc E/CN 4/Sub 2/Add1/963 (1982); *Quinteros v. Uruguay* Comm 107/1981, UN Doc A/38/40 (1983); See also *Bleir v. Uruguay* Comm 107/1981, UN Doc A/38/40 (1983).

198 See UN Doc CCPR/C21/Rev 1/Add 3, para 15

199 See Resolution XXII 'Expanded Functions of the Inter-American Commission on Human Rights' Final Act of the Second Special Inter-American Conference, OAS/serE/XIII 1, 45-46 (1965)

Velasque Rodrique,[200] the issue was the unresolved disappearance of *Manfredo Velasque* in September 1981. In the interpretation of the Court, Article 1(1) of the Inter-American Convention imposes a legal duty on states parties to investigate violations, punish the perpetrators and compensate the victims.[201]

In like manner, it has been acknowledged by the Inter-American Commission of Human Rights that states parties to the Inter-American Convention are duty bound to prosecute and punish persons responsible for serious violations of physical integrity rights.[202] The Inter-American Court and the Inter-American Commission of Human Rights have stated that amnesties are incompatible with the American Convention of Human Rights.[203]

Both the European Court of Human Rights and the European Commission of Human Rights have stated clearly that states parties are duty bound to prosecute and punish serious violations of certain rights under the European Convention.[204] In *X and Y v. Netherlands*,[205] the Court held that the Netherlands violated the European Convention by failing to provide the victim's aggressor. In *Tas v. Turkey*,[206] the European Court stated that the state's obligations with reference to Article 13 of the European Convention on the right to an effective remedy-was found by the Court to require additional investigation for the sake of punishing the perpetrators.[207]

Likewise, both the African Charter and the African Commission on Human and Peoples' Right provides that states parties are oblige to prosecute and punish serious violations

---

200 See *Velasquez Rodriquez* case, Inter-Am CHR (Ser C) 4 para 174 (1998)

201 See *Velasquez Rodriquez* case, Inter-Am CHR (Ser C) 4 para 174 (1998); See also *Gary Hermosilla et al.* case 10.843, Inter-Am CHR (1988) para 77, which held that a state bear responsibility to investigate violations committed within its jurisdiction for the purpose of identifying the perpetrators as well as imposing appropriate sanctions and ensuring adequate reparations for the victims.

202 See Case 10.150, Informe 3/90 (Suriname), OEA/Ser L/V/II 77, doc 23, 14 (1990)

203 Inter-American Commission on Human Rights, Report 29/92 (Uruguay) 82nd Session OEA/LV/II.82 Doc25 (2 Oct 1992); Inter-American Commission on Human Rights, Report 29/92 (Argentina) 82nd Session OEA/LV/II.82 Doc24 (2 Oct 1992).

204 See European Convention of Human Rights, Arts 24 and 25

205 See European Court of Human Rights (ser A) (1985), judgment 91

206 See European Human Rights Report 15 PPHI-H3 (2000). para. 33

207 See European Human Rights Report 15 PPHI-H3 (2000). para. 33

of certain rights stated under the African Charter.[208] Such obligations include the duty to prosecute and punish suspects charged with extrajudicial executions,[209] torture,[210] slavery[211] and forced disappearances.[212] In like manner, the Commission has established that the duty to prosecute and punish does not cover amnesties for serious violations stated under the African Charter.[213]

The analyses above constitute the international legal framework upon which states are bound to prosecute or extradite the perpetrators of serious crimes under international law. It is acknowledged both at the national and international courts that the duty to prosecute and punish serious crimes in international law is part of customary international law. In the *Lockerbie case*,[214] Judge Weeramantry affirmed that the duty to prosecute or extradite the perpetrators of serious crimes under international law constitute a well-established principle of customary law. Similarly, the Appeals Chamber of the SCSL stated in the *Prosecutor v. Gbao*,[215] that "under international law, states are under a duty to prosecute crimes whose prohibition has the status of *jus cogens*". In *State v. Wouter Basson*,[216] the South African Constitutional Court stated that international law obliges states to prosecute and punish crimes against humanity and war crimes. Therefore, the state's failure to prosecute and punish serious violations of *jus cogens* norms breaches the customary obligation to respect and protect the same set of peremptory rights they have undertaken to protect.

---

208 See African Charter on Human and Peoples' Rights. Arts 47-59 provides that the mandate of the African Commission includes communication procedure, which examines complaints from states, individuals, NGOs and others.

209 See *Amnesty International and Others v. Sudan* (2000) AHRLR 296 (ACHPR). para 56; see also *Commission Nationale des Droits de l'Homme et des Libertes v. Chad* (2000) AHRLR 66 (ACHPR). para 22

210 *Amnesty International and Others v. Sudan* (2000) AHRLR 296 (ACHPR), para 52

211 See *Malawi African Association and Others v. Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 134

212 See *Commission Nationale des Droits de l'Homme et des Libertes v. Chad* (2000) AHRLR 66 (ACHPR); See also *Malawi African Association and Others v. Mauritania* (2000) AHRLR 149 (ACHPR 2000)

213 See *Malawi African association and Others v. Mauritania* (2000) AHRLR 149 (ACHPR 2000), paras 82 and 83

214 See *Libyan Arab Jamahiriya v. United States,* 1992, ICJ 114, 160-181

215 See *Prosecutor v. Gbao,* SCSL-04-15-PT-141

216 *The State v. Wouter Basson* 2005 SA 30/03 (CC) para 37

Owing to the demand of accountability for serious crimes in international law, The ICC was created as foresighted by the drafters of the Torture Convention[217] and reaffirmed at the 32 meeting of the UN General Assembly.[218] The Court was created as a complementary institution with the mandate to punish the perpetrators of serious crimes stated under Article 5 of the Rome Statute in circumstances where states parties are unwilling or unable to do so. The ratification of the Rome Statute by a huge number of states indicates their acknowledgment of the duty to prosecute and punish these crimes.[219] In actual fact, the Rome Statute makes no provision for amnesty and therefore justifies the ICC's commitment to prosecute and punish the perpetrators of serious crimes.[220] The relevance of the ICC within the framework of international criminal justice is that it acts as a last resort[221] with regards to serious crimes stated under Article 5 of the Rome Statute. Therefore, perpetrators cannot evade justice by virtue of their geographic location, official capacity or nationality or still, justice cannot be impeded for the mere fact that a state is unable or unwilling to prosecute.[222]

1.6 RATIONALE AND JUSTIFICATION OF THE STUDY

The quest for power, religious, ethnic and political domination in the twentieth century triggered the bloodiest events ever recorded in the history of humankind. Over the last century, deadly ideologies such as Apartheid, Communism, Capitalism, Fascism and Nazism emerged.[223] Such ideologies later inspired the emergence of some of the worst tyrants ever known to humanity, including their tyrannies and barbaric activities that gave birth to two major world wars and countless minor armed conflicts around the globe. These conflicts were used as the basis upon which the most serious crimes were committed against humanity.[224] Such crimes inflicted untold suffering and misery to the victims, including those who reside on the African continent. In Africa, the countries

---

217 See Torture Convention, Art. 5(2)
218 See UN General Assembly 32 meeting, Doc. E/CN4/1984/5R. para. 85
219 The Rome Statute requires states to either prosecute and punish the enshrined crimes domestically or submit the suspects to ICC prosecution. See Rome Statute of the International Criminal Court 1998. Art. 17(1)(a)–(b).
220 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11
221 See Rome Statute of the International Criminal Court 1998. Art. 27.
222 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11
223 See Nsereko 1994 *UBCLR*
224 Brown Ethnic and Internal Conflicts 209

trapped in this coinage of human misery included the DRC, Liberia, Rwanda, Sierra Leone, Burundi, Somalia and Uganda. Hundreds of thousands of people from these countries have lost their lives. Also, millions of people have been forced to flee their countries, while survivors are often confronted with high rates of destitution and in most cases rendered homeless.[225]

Even though the twentieth century presented a very horrific picture, it has also recorded alongside significant achievements in most areas of human endeavour. In the sphere of the rule of law and human rights, one of the most important contributions that marked a turning point in human history is the establishment of the ICC under the Rome Statute, adopted at the Rome Diplomatic Conference in 1998.[226] The Court presents a kind of jurisdiction never before experienced in the history of International Criminal Law (ICL). The jurisdiction of the Court covers serious crimes like war crimes, crimes against humanity, genocide and the crime of aggression.[227] Also, the Rome Statute confers upon the Court the responsibility to target and prosecute the aforementioned crimes irrespective of where they were committed within the international community.[228]

Even though the functions of the Court are clearly stipulated under the Rome Statute, its role as an independent judicial institution has been met with severe resistance.[229] The primary aim of the Court was and still is to prosecute those responsible for the core crimes stated under Article 5 of the Rome Statute, thereby bringing an end to a culture of impunity, with the likely consequence of penalizing the perpetrators regardless of their personality or nationality. So far, the Court has not been able to live up to its obligations due to competing political and legal challenges.[230] Among these challenges includes issues of enforcement as the Court continues to be ineffective in enforcing arrest warrants against suspects like the Sudanese President Omar Al Bashir and the

---

225 Nsereko 1994 *UBCLR*

226 Rome Statute of the International Criminal Court 1998

227 Rome Statute of the International Criminal Court 1998. Article 5 of the Rome Statute clearly stipulates the nature of international crimes covered by the jurisdiction of the ICC.

228 Rome Statute of the International Criminal Court 1998.

229 Batohi *Africa and the International Criminal Court*. Werle *et al* (eds.) 49

230 Batohi *Africa and the International Criminal Court*. Werle *et al* (eds.) 49

leader of Uganda's Lords Resistant Army (LRA) Joseph Kony, including other senior members of the militia.[231]

Besides the challenge of enforcement, the Court has been criticized of selective prosecutions by the AU which is why the Union advised its members to quite the jurisdiction of the ICC.[232] These and other challenges discussed in the thesis provide the basis upon which the research is conducted. The justification for the study therefore is to critically examine the nature of these challenges affecting the smooth-functioning of the Court. It is worthy of note that the ICC is not an end in itself, but a means to an end and the said end in the context of this study is to bring to an end a culture of impunity thereby achieving international justice, security, peace and reconciliation. How important is such an affirmation is what this study seeks to investigate, by exploring multiple perspectives that will enhance the functioning of the Court and limit impunity within the global community. Given that the study is policy oriented, critical analysis of the relevant policies will identify the weaknesses in the Rome Statute and propose appropriate reforms to the Statute.

Furthermore, it is hoped that the findings of this study will assist policy makers within the international legal framework to develop strategies and come up with good criminal law policies that will enhance the functioning of the ICC in bringing to justice perpetrators of serious crimes inside and outside the continent of Africa. The study will also contribute significantly to the long standing debate about the ICC and the morality behind Article 13 referrals under the Rome Statute. The study will address these concerns with a view to proposing law reforms that will counter both the present and foreseeable challenges facing the Court. Lastly, the results of the study will generally inform the vulnerable members of the broader international community of their rights and duties within the international legal framework.

---

231 See Barnes 2011 *FILJ*

232 Batohi *Africa and the International Criminal Court*. Werle *et al* (eds.) 49, African leaders have been joined by the AU and the threats of withdrawal by African states have gradually become a seriouse challenge for the ICC to grapple with.

1.7 LITERATURE REVIEW

The organic evolution of international criminal law necessitated the birth of the ICC by the Rome Statute in 1998.[233] The Court happens to be the first permanent international criminal tribunal to hold individuals responsible for serious crimes in international law.[234] Before the birth of the ICC, individual criminal responsibility in international law has often been associated with conflicting views.[235] Proponents of International Criminal Law (ICL), including political leaders from the African continent alongside their western counterparts, argued that the creation of an international criminal court would assist in deterring government officials and warlords from committing serious crimes against humanity, achieve justice and facilitate peace-making in countries torn by crisis.[236] This argument sounds reasonable and is supported by the fact that the ICC has managed to bring to justice some perpetrators of serious crimes committed most especially in Africa.[237]

Mendel acknowledges that the aforementioned school of thought represents the ideals of an equitable and just International Criminal Court. However, he regretted the fact that the current regime is founded on the expediency of political orientations that undermine the interest of international justice in favour of international politics. Therefore, he remarks that the International Criminal Law (ICL) system has been noted for creating a regime that is not applicable to its Western advocates, applying only to the 'usual suspects' in Africa.[238] More to this is reflected in the overall debate advanced in this thesis.

This study adopts a thematic approach in presenting preliminary literature based on concepts that underpins the operations of the ICC as well as the challenges facing the Court. The study explores three themes with regards to the operational efficacy of the ICC. First, the principle of complementarity is discussed in relation to the operations of the ICC followed by the peace v. justice debate that has placed the Court between

---

233 See Barrie 2012 *SAYBIL*.
234 See Rome Statute of the International Criminal Court. Art. 5(d)
235 Schabas *An Introduction* 1
236 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49; Monageng Africa and the International Criminal Court: then and now Werle at al (eds.) 17
237 Igwe 2008 *CILJSA*
238 Mendel cited in Du Plessis 2003 *ASR*

politics and justice. The last theme focuses on the ICC and the concept of universal jurisdiction with specific emphasis on the position of African leaders towards the territorial jurisdiction of the Court.

1.7.1 ICC and the concept of complementarity

The origin of the concept of complementarity can be traced from the Draft Statute of the International Law Commission (ILC)[239] commonly considered to be the cornerstone of the idea of complementarity contained in the Rome Statute.[240] The Draft Statute provides in its Preamble that the ICC is designed to complement national criminal justice systems in cases where such domestic systems lack the necessary resources or political will to prosecute the perpetrators of serious crimes in international law.[241] John Holmes noted that the uniqueness of the legislative history regarding the complementarity concept is that most controversial issues were largely resolved in the Preparatory Committee prior to the Rome Conference.[242] By this observation, Holmes argue that States were actually concerned as to how the ICC would affect their sovereignty, and also to make sure the Court did not hijack the mandate of genuine national judicial institutions set up to ensure accountability for serious crimes at the domestic level.[243]

According to the ICC former Chief Prosecutor Luis Moreno-Ocampo, the ICC's effectiveness should not be measured by the number of cases that come before it. Rather, complementarity refers to the absence of trials before the ICC as a result of the regular functioning of national institutions.[244] The Office of The Prosecutor (OTP) considers its engagement in the fight against impunity as not only the prosecution of

---

239 The Draft Statute for an International Criminal Court was adopted by the ILC at its forty sixth session in 1994, and was submitted to the General Assembly as a part of the ILC's Report covering the work of that session (1994 ILC Draft)

240 El-Zeidy The principle of complementarity in international criminal law 126

241 Para 3 1994 ILC Draft.

242 Holmes Principle of complementarity 43

243 Holmes Principle of complementarity 43

244 ICC 'Statement made by Mr Luis Moreno-Ocampo during the ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court 16 June 2003' http://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf (Accessed 21 April 2018)

serious crimes, but as well, the encouragement and facilitation of national judicial institutions to act effectively in cases of crimes within the jurisdiction of the ICC.

Trendafilova and Philippe Kirsch argue that the primary responsibility of states to criminalise, investigate, prosecute and punish war criminals has been advanced by the principle of complementarity.[245] Joining in this debate, Shelton argues that countries recovering from war need accountability and justice to maintain peace and promote reconciliation.[246] Furthermore, Shelton suggests that in targeting the perpetrators of serious crimes in international law, the ICC should be fashioned in such a way as to complement national criminal jurisdictions, and in deserving cases, political and diplomatic settlement of disputes.[247] Such efforts would play a crucial role towards ensuring national peace and reconciliation which is part of the agenda for global peace and security.[248]

The late Koffi Annan referred to the ICC as the missing link in international justice.[249] Ellies further confirms that the presence of the ICC serves as a deterrent to would-be dictators and their collaborators and also helps to end impunity for gross human rights violations.[250] Olugbuo expounds that whereas the ICTY, ICTR and the SCSL had primacy over national courts, the ICC gives primacy to national courts by operating on the basis of the complementarity principle which imposes a duty upon states to prosecute the perpetrators of serious crimes under international law.[251] Olugbuo contends that even before the adoption of the Rome Statute, some international law treaties had invoked the principle of complementarity by encouraging domestic prosecutions.[252] These treaties include the Geneva Convention for the Amelioration of

---

245 Trendafilova *Africa and the International Criminal Court: A judge's perspective*, G Werle et al (eds.) 22, Kirch 2014 http://www.un.org/News/Press/docs/2005/sc8351.doc htm Accessed 11/08/2014

246 Shelton 2014 http://ssrn.com/abstract=2226071

247 Shelton 2014 http://ssrn.com/abstract=2226071. See also Sarooshi *The peace and justice* paradox 106

248 Sarooshi The peace and justice paradox 106

249 Kofi Annan http://www.iccnow.org/documents/KofiAnnanPressConf11April02.pdf [Accessed 14 March 2018]

250 Ellis 2002 *FJIL*

251 Olugbuo *Positive complementarity* in C. Murungu and J. Biegon (eds.) 249

252 Olugbuo *Positive complementarity* in C. Murungu and J. Biegon (eds.) 249

the Condition of the Wounded and Sick in Armed Forces in the Field,[253] the International Convention on the Suppression and Punishment of the Crime of Apartheid,[254] and the Convention on the Prevention and Punishment of the Crime of Genocide.[255] Therefore, the ICC was created to complement and not supplant the prosecution of serious crimes by national courts.[256]

The complementarity principle has been elaborated under the Rome Statute as the basis upon which the ICC operates.[257] Kuwonu argues that an important reason for the Court's presence in Africa is that national justice systems within the continent are not well equipped and therefore not capacitated to apprehend and prosecute war criminals.[258] This argument can be invoked as the reason why the ICC, acting in accordance with the principle of complementarity, always comes as a last resort for the interest of the victims of serious crimes committed in the region.[259]

Burke-White posits that whereas the ICC extends its mandate to address the plight of victims in Africa, western regions (Europe and the USA) have established judicial foundations to target and prosecute serious crimes committed in their territories, thereby relieving the ICC of any such duties as may be the case.[260] To justify this assertion, Shenkman mentions that among others, the European Court of Human Rights and the Inter-American Court of Human Rights are fully operational in committing member states to preventing human rights violations that could possibly amount to serious crimes committed in their respective regions.[261] Unfortunately, this is not true

---

253 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1950). Art. 49

254 International Convention on the Suppression and Punishment of the Crime of Apartheid UN Doc A/9030 (1974) entered into force (1976). Art. 4(b)

255 Convention on the Prevention and Punishment of the Crime of Genocide 1948. Art. 5 and 6

256 Olugbuo *Positive complementarity* in C. Murungu and J. Biegon (eds.) 249

257 See Paragraph 10 of the Preable of the Rome Statute read along with Arts. 1 and 17 of the Statute.

258 Kuwonu Africa Renewal 29. See for example *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* 2013 ICC-01/11-01/11, Prosecution's response to "Libyan Government's further submission on issues related to the admissibility of the case against Saif Al-Islam Gaddafi"

259 Kuwonu *Africa Renewal* 29

260 "The possibility of international prosecution can create incentive that make states more willing to investigate and prosecute international crimes themselves." See Burke-White 2008 *HILJ*

261 Shenkman 2012 *NYULR*

with reference to Africa. Elizabeth has noted that the entire African region, including individual states, have proved to be weak in terms of judicial capacity. It is for this reason that the African Court of Human and People's Rights (ACHPR) has not been able to reverse the culture of impunity rampant across the African continent.[262]

Sandholtz points out that the question surrounding the ICC's presence in Africa lies not with the Court as an institution but with the entire region of Africa.[263] In support of this argument, Monageng states that so far, 5 out of 8 cases before the Court were at the request of African states by declarations under Article 12(3) of the Rome Statute.[264] Two of the cases referred to the Court were initiated by the UN Security Council.[265] Kuwonu added that the Kenyan situation represents the one instance where the former Chief Prosecutor of the ICC used *pro prio motu* authority to investigate alleged perpetrators of serious crimes in the country.[266] These statistics are sufficient to justify that it is Africa that is showing interest in the intervention of the Court and not the other way round.[267] Notwithstanding, the Court's continued presence in Africa remains questionable and as well, it constitutes one of the major challenges facing the ICC regime.

1.7.2 ICC and the competing claims of peace v. justice

In trying to counter the argument of an ICC bias against African leaders, and as well build on the debate that peace is preferable to justice as invoked in the Kenyan situation, Grono remarks that peace and justice are not mutually exclusive.[268] Instead, they are mutually reinforcing as they represent two sides of the same coin in the process of conflict resolution.[269] They operate as independent, but interdependent components that influence one another to reach a successful and sustainable resolution

---

262 Elizabeth 2015 *ILJ*

263 Sandholtz Creating Authority by the Council 3-6

264 Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 3

265 Monageng Africa and the International Criminal Court: then and now Werle et al (eds.) 3. The situation of Sudan and Libya were referred to the ICC by the UN security Council in accordance with its chapter VII mandate.

266 Kuwonu *Africa Renewal* 29

267 Kuwonu *Africa Renewal* 29

268 Grono *et al,* 2008 http://www.royalafricansociety.org/index.php?option=com content&task=view&id=415 Accessed 18/08/2014

269 Grono *et al,* 2008 http://www.royalafricansociety.org/index.php?option=com content&task=view&id=415 Accessed 18/08/2014

of violent conflicts. This means the conflict-resolution process is a mechanism that encompasses different stakeholders, including but not limited to human rights activists, humanitarian aid workers, peace-keeping operators, negotiators, mediators and even judicial officers.[270] Their collective effort is what brings about the successful resolution of the conflict. From the standpoint of this debate, it is difficult to exclude peace-keeping operators or judicial officers in their official capacity as potential stakeholders in the conflict-resolution process, or maybe, attempt to prioritize one of the factions to the detriment of others as their individual efforts are of equal importance in a collective manner to the envisioned process of conflict resolution.[271]

Ralph Henham is of the opinion that even though perpetrators of the most serious crimes known to humankind deserve severe sanctions through retribution, it does not follow automatically that such sanctions through retributive justice become the prerequisite condition to restore peace in the face of turbulence.[272] The morality behind retribution, according to Henham, may not be taken into account due to extraneous factors, including but not limited to issues particular to the individual and/or state concerned, the morality of social and criminal justice policy or the fundamental nature of the state's relationship with its citizens.[273] Because retributive punishments are often perceived as a form of vengeance, Beresford suggests that imposing such sanctions will not engender the culture of human rights and good conscience envisaged by the broader international community.[274] Henham and Beresford support the argument that the ICC should not impose itself but complement domestic courts where they seem unable or unwilling to prosecute.[275]

Murithi aligns with Henham's political orientation to say that the ICC's intervention in Kenya deviates from the noble demands of meeting the ends of peace and good governance in favour of justice, which was not a call for concern at that crucial stage of

---

[270] Grono *et al,* 2008 http://www.royalafricansociety.org/index.php?option=com content&task=view&id=415 Accessed 18/08/2014

[271] Grono *et al,* 2008 http://www.royalafricansociety.org/index.php?option=com content&task=view&id=415 Accessed 18/08/2014

[272] Henham 2003 *JICJ.* The concept of retributive justice is often used in court to dish out punishments according to the weight of the crime in question. See Chirwa 1998 *SAJCJ*

[273] See Henham 2003 *JICJ*

[274] See Beresford 2001 *ICLR*

[275] Henham 2003 *JICJ* and Beresford 2001 *ICLR*

the conflict.[276] Murithi contended that it was necessary for the Court to trade justice for peace in Kenya by deferring the case for hearings to be made in the future as provided for by Article 16 of the Rome Statute.[277] Kersten points that the complaints regarding Article 16 deferrals has increased for one simple reason: most of the states concerned hold the view that judicial interventions by the ICC complicate efforts at conflict resolution.[278] Likewise, Okoh argues that ICC interventions in most cases negatively affect the efforts of home-grown conflict resolution efforts and peace building initiatives within the African continent. Sudan and Libya are examples on how the ICC's intervention affected the conflict resolution efforts.[279] Therefore, Okoh suggests that Article 16 deferrals presents a possible justification for halting ICC investigations or prosecutions in exchange for peace and good governance, which of course will put an end to bloodshed.[280]

In the context of the *Al-Bashir* case, the Former President of Malawi, Joyce Banda, stated that it is unfair practice against Africa to issue a warrant of arrest against a sitting head of state. Her argument was strongly supported by Jean Ping, the Former Chairperson of the A Commission.[281]

Jean Ping reportedly expressed Africans' disappointment with the ICC in noting that rather than going after situations around the world including cases such as Colombia, Sri Lanka and Iraq, the Court committed all its efforts and resources towards Africa, undermining rather than assisting African efforts to solve its problems.[282] In the British Broadcasting Corporation (BBC) broadcast of September 2008, Ping was quoted as complaining that it was 'unfair' that all those indicted by the ICC so far were African

---

276 See Murithi Between political justice and judicial politics: Charting a way forward for the African Union and the International Criminal Court, G Werle et al (eds.) 182

277 Murithi Between political justice and judicial politics: Charting a way forward for the African Union and the International Criminal Court, G Werle et al (eds.) 182

278 Kersten 2014 http://justiceinconflict.org/…/trading-justice-for-temporary-peace-not-just-a-bad-idea Accessed 11/08/2014

279 Okoh Africa, the United Nations Security Council Werle G et al. (eds.) 198

280 Okoh Africa, the United Nations Security Council Werle G et al. (eds.) 198

281 See Ping cited in Sudan Tribune 2010 http://www.sudantribune.com/spip?articles35748 Accessed 18/08/2014

282 See Ping cited in BBC News 2008 http://news.bbc.co.uk/2/hi/africa/7639046.stm. Accessed 18/08/2014

leaders.[283] While confirming that the AU was not against international justice, Batohi laments that it seems Africa has become a testing ground for the new international law system the consequence of which, only Africans have been summoned before the ICC.[284]

Mamdani joins Ping and Batohi to argue that the ICC is rapidly turning into a western court to try Africans suspected of committing crimes against humanity.[285] Kuwonu confirms that the ICC has targeted governments that are USA adversaries and ignored actions the USA does not oppose like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them.[286]

Bassiouni defines international criminal law alongside international politics as a cat and mouse game through which newly-born international criminal tribunals have come into being.[287] Still, he regrets the fact that international politics has always been and still remains a stumbling block to such courts. In the brightness of this argument, he raises a number of questions as follows:

> Did [the ICTY] achieve its objectives? Was it able to free itself from political influence? Did it succeed in grafting a transplanted justice into a society where it was foreign? … I think [the] answers are: (a) Some but not all; (b) Not entirely; and (c) No. The question that I would ask is somewhat different: "How close to justice can war crimes courts come in a world still dominated by the realpolitik of force and diplomacy?" I personally suspect that international criminal courts will never be free of political pressure and that global event will always inhibit their ability to pursue justice in ways that they might prefer. That has been the experience of the ICTY and, to varying degrees, of the international tribunals that have followed in Rwanda, Sierra Leone, and East Timor. However, we can learn lessons from their histories that could help future courts to navigate the political rapids.[288]

On this note, Bassiouni's argument "Without justice" explains:

---

283 Ping cited in BBC News 2008 http://news.bbc.co.uk/2/hi/africa/7639046.stm. Accessed 18/08/2014

284 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49

285 Mamdani 2008 http://www.thenation.com/doc/20080929/mamdani Accessed 18/08/2014

286 Kuwonu Africa Renewal 29

287 Bassiouni cited in Wald 2005 *AJIL*

288 Bassiouni cited in Wald 2005 *AJIL*

> …there can be no lasting peace after bloody and violent conflicts…… Only retributive justice can bring some form of closure to these tragedies…… Realpolitik is still stronger than the commitment of government to international criminal justice….[289]

Goldstone concurs with the argument that war crime investigations can impede the process of peace. However, the said investigation of serious crimes can also not be ignored as it constitutes a significant stratum in the conflict-resolution continuum.[290] The only weakness identified by Goldstone regarding the Kenyan situation has to do with quality control before cases could be approved for indictment before the ICC. Unlike the ICC, most of the referrals made to the *ad hoc* tribunals had been subjected to critical analysis by all the lawyers of the Court so as to determine the quality of their facts as qualified to be approved for indictment by the Court.[291] Unfortunately, that is not the case with the ICC.[292]

1.7.3 ICC and the concept of universal jurisdiction

According to Jeßberger, the concept of universal jurisdiction provides that certain crimes threaten the interest of the international community as a whole and therefore states are oblige to ensure that such crimes are duly prosecuted. In this regard, any state may act as a trustee or agent for the international community.[293] Jeßberger points that customary international law allows for the exercise of universal jurisdiction by domestic courts as well as the ICC for crimes such as genocide, crimes against humanity and war crimes.[294] The fact that the crimes stated herein threaten the interests of the international community as a whole, the duty to prosecute falls on the international community as well as individual states. Therefore, states can assume responsibility to prosecute such crimes, regardless of where, by whom and against whom they have been committed.[295] Whereas the concept of universal jurisdiction is well established under international law, states have expressed both positive and

---

289 Bassiouni cited in Wald 2005 *AJIL*
290 See Goldstone *For humanity* 9
291 See Goldstone and Smith International Judicial Institutions 11
292 Goldstone and Smith International Judicial Institutions 11
293 On the theory of universal jurisdiction, see Sammons 2003 *BJIL*
294 Jeßberger F Africa and the International Criminal Court: then and now, G Werle et al (eds.) 155
295 Jeßberger F Africa and the International Criminal Court: then and now, G Werle et al (eds.) 155

negative attitudes towards its application. In Africa for example, diverse opinions exist regarding the ideals of universal jurisdiction. However, the point of reference in the debate is usually the position shared by the Heads of State and Government in the Assembly of the AU.[296]

This position of the AU has been shared by high caliber officials of individual states within the continent. For example, European judges have been accused by the Rwandan Minister of justice for attempting to re-colonialize Africa through what he referred to as a "neo-colonial judicial *coup d'etat"* influenced by the concept of universal jurisdiction.[297] On the occasion of the extraordinary meeting in October 2013, the AU encouraged Member States to engage in the development of an "African Union Model National Law on Universal Jurisdiction over International Crimes"[298] for purposes of strengthening domestic legislation in this area. The Model Law, drafted by a group of experts and government officials however, does not impose limits on the concept of universal jurisdiction.

According to the Report of the *ad hoc* expert group jointly established by the AU and European Union (EU), international law does not provide for any rule specifically restricting the exercise of universal jurisdiction.[299] Under the Report, unrestricted universal jurisdiction is approved for serious crimes in international law. Furthermore, the Report recommends that the territory where the crime was committed be given priority in terms of jurisdiction.[300] This Report was seconded by the AU Assembly when it encouraged EU members to implement the suggestions of the AU-EU Joint *ad hoc*

---

296 See Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/731(XXI), AU 19th session, 2012 Addis Ababa, Doc. Assembly/AU/Dec. 420 (XIX).

297 See Statement by Rwandan Minister of Justice and Attorney General cited in Commentator 2008 *JICJ*

298 African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–15 May 2012, Addis Ababa, EXP/MIN/Legal/VI.

299 AU-EU Expert Report on the Principle of Universal Jurisdiction, Doc. 8672/1/09 Rev. 1, 16 April 2009.

300 AU-EU Expert Report on the Principle of Universal Jurisdiction, Doc. 8672/1/09 Rev. 1, 16 April 2009.

Expert group.[301] The views expressed above speak to the fact that both the EU and AU share the same perspectives on the concept of universal jurisdiction.

Although concerns have been raised regarding the concept of universal jurisdiction, the AU does not reject the idea completely. Rather, the AU approves that universal jurisdiction is a relevant principle in international law as well as an important tool in the fight against impunity.[302] Jalloh has argued that the main concern of African states seem not to be linked to the question of universal jurisdiction but the supposed disregard of sovereign immunity for heads of states in Africa as well as the overriding interest of Security Council members with veto powers over the activities of the ICC.[303] According to Paul Kagame, the President of Rwanda, the ICC is a neo colonial tool that seeks to advance western imperialism by undermining people from Africa and other powerless countries in terms of economic development and politics.[304] Kagame laments the fact that giant nations and top government officials continue to resist being held responsible under universally applicable standards of justice.[305]

Perhaps the AU is reluctant to cooperate with the Court for the fact that it focuses primarily on Africa under the directives of States that are themselves not committed to the jurisdiction of the Court.[306] Article 13(b) of the Rome Statute "hijacks" the supposed independence of the ICC by bestowing upon the UN Security Council the authority to exercise jurisdiction that otherwise would not have existed given that the Rome Statute was established on the basis of voluntary consent by States Parties.[307]

According to Jalloh, the exercise of Article 13(b) by the UN Security Council does not only violate the general principles of international law which maintain that only states parties to a treaty are bound by the treaty's provisions, but also it drives the activities

---

301 Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/640(XVIII), AU 16th session, 2011 Addis Ababa, Assembly/AU/ /Dec. 335 (XVI), para 6; Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/606(XVII), AU 15th session, 2010 Kampala, Assembly/AU/Dec. 292 (XV), para 8

302 AU-EU Expert Report on the Principle of Universal Jurisdiction, Doc. 8672/1/09 Rev. 1, 16 April 2009

303 See Jalloh 2010 *CLF*

304 See Kagame P cited in Mamdami 2008 *IJPSS*

305 Kagame P cited in Mamdami 2008 *IJPSS*

306 Jalloh 2010 *CLF*

307 Jalloh 2009 *ICLR*

of the ICC in tandem with the changing international power politics currently overshadowed by the permanent members of the Security Council with veto powers.[308] The ICC has consequently been reduced to a shadow of what it would have represented in the real world of international criminal law. So far, the Court is perceived most especially by Africans as a symbolic institution weakened by the lack of jurisdiction over powerful nations in areas torn by crisis.[309] Jalloh point out that the idea of a system of universal accountability for serious crimes in international law would not have been achieved if the most influential personalities and powerful nations are still determined to stay away from the reach of international criminal justice.[310] He notes in particular that the ICC's alliance with the UN has further compromised the independence of the Court.[311]

Obura also questions the Court's selectivity in terms of referrals and prosecutions. He argues that universal jurisdiction has been guaranteed under international Law.[312] In this light, he refers to Article 5(2)[313] of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment as well as the 32 meeting of the UN General Assembly of 1984.[314] In his view, the question as to whether heads of states can, in their official capacity, invoke sovereign immunity as a defence to exonerate themselves from serious crimes committed in their respective regions has been discredited by Article 27 of the Rome Statute.[315] This provision, by implication, approves universal jurisdiction for serious crimes stated under Article 5 of the Rome Statute. Article 27 confers upon the ICC the capacity to target and prosecute the perpetrators of serious crimes in international law irrespective of their personality or nationality.[316]

---

308 Jalloh 2009 *ICLR*
309 Jalloh 2009 *ICLR*
310 See Jalloh 2009 *ICLR*
311 Jalloh 2009 *ICLR*
312 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11
313 See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/39/51
314 See UN General Assembly 32 meeting, Doc. E/CN4/1984/5R, para. 85
315 Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11
316 See Charter for the International Military Tribunal Aug. 8, 1945, Art. 7 and 59; See also Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589 at 3; Statute of the ICTY, Art. 7(2); Statute of the ICTR Art. 6(2)

Literature has revealed that power politics continue to dominate the international criminal justice system.[317] This culture has been transferred from the *ad hoc* tribunals as reflected in Bassiouni's argument, to the Rome Statute by virtue of Article 13(b), which provides for a new foundation upon which powerful personalities and/or giant nations continue to manipulate the international criminal justice system by means of political advantages, a gap which must be minimised to better the future of international criminal law.[318] In the quest to minimise this gap, this study reviews contemporary literature to develop an alternative framework and/or mechanisms that will unify referrals under Article 13 such that the referrals reflect the intent and purpose of international criminal law. Owing to the arguments raised in the various themes discussed under literature review, the study departs from the view point that the founding treaty of the ICC, the Rome Statute needs amendments through law reforms that addresses the concerns raised by academics and professionals in the sphere of international criminal justice. The study will engage and analyse the relevant materials to recommend the relevant reforms in the concluding chapter of this thesis.

1.8 DATA COLLECTION AND METHODOLOGY

The study adopted the qualitative research method and various databases were consulted, including Science Direct, Sabinet and EBSCOhost among others. Databases were accessed from university libraries, including among others, the North-West University Library, the University of Fort Hare Library, Kenyatta University Library and the National University of Lesotho Library. Journal articles were referred using the criteria that they were full-text peer reviewed articles written in the English Language. For referencing and bibliography, the study adopts the North-West University house style which is different from other conventional referencing styles like those used by the American Psychological Association (APA) and the Harvard referencing style. Other portions like the table of cases and the table of statutes, including reports, decisions and declarations have as well been constructed according to the North-West University format.

---

317 Goldstone *For humanity* 9
318 Wald 2005 *AJIL*

1.8.1 Data collection and analysis

Data collection was limited to secondary sources like textbooks, journal articles, newspapers and internet materials alongside primary sources like statements, reports, declarations, treaties, case law and other necessary legal documents pertaining to the ICC. Data analysis means categorizing, ordering, manipulating and summing up of data so as to obtain answers to research questions. According to Whiting,[319] data analysis should occur at the same time as data collection because it enables the researcher to align research questions and data collection procedures with research findings.[320] This study adopted the triangulation and interpretative phenomenological approach in which the researcher fused the necessary data collected from diverse sources as listed above, to realize a specific outcome that answered the research questions and also justified the research objectives.

1.8.2 Triangulation

Triangulation is always projected in research as a strategy that helps the researcher to assert that data interpretation is credible. In triangulating, the researcher aims at proving that the participants and/or sources from which research information has been gleaned are real and authentic. Marshall and Rossman opine that triangulation can be achieved by gathering data from multiple sources and multiple methods including the use of multiple theoretical lenses.[321] After this process, collected data can be fused, giving the researcher an opportunity to discuss his/her findings and ensure that analysis is grounded in the data.[322] In this study, the researcher achieved triangulation by synthesizing primary data obtained from sources including treaties or conventions, case law and legal authorities with secondary data borrowed from sources like text books, scholarly articles, official gazettes, newspapers and alternative internet materials. Triangulation was also achieved by testing collected data with peers through presentation at conferences.

---

319 Whiting 2008 *RCN*
320 Whiting 2008 *RCN*
321 Marshall and Rossman cited in Whiting 2008 *RCN*
322 Marshall and Rossman cited in Whiting 2008 *RCN*

1.8.3 Reliability and trustworthiness

(a) Credibility

Credibility in qualitative research is similar to internal validity in quantitative research. Generally, credibility is described as the extent to which research results can be supported by the researcher and other relevant users.[323] Establishing credibility in qualitative studies is essential because it determines whether the research findings are consistent with collected data. In this study, credibility will be obtained by triangulating primary and secondary data to establish consistency.[324] Triangulation is a technique where two or more methods are used to validate research results.[325] As pointed out earlier in this study, the researcher will conduct data triangulation through multiple sources which include legal documents, news briefs, case law reports and related literature. The researcher will also employ theoretical triangulation through the use of legal theories that underpin the ICL system.

(b) Transferability

According to Posner and Rudnistsky, transferability is when a reader passes judgment that the research findings of a particular study might be analogous to their own study.[326] Therefore, in order to establish transferability the authors suggest that a thick description of the research setting will enable readers to decide the applicability of research findings to their own studies.[327] On this note, the researcher will ensure transferability by making use of legal documents and research information that contain in-depth knowledge about the research topic and setting.

(c) Dependability

Dependability is equivalent to reliability in quantitative inquiry. Generally, dependability refers to the extent to which the same research findings can be replicated in a similar

---

323 Whiting 2008 *RCN*
324 Whiting 2008 *RCN*
325 De Beer and Arnold 2004 *EN*
326 Posner and Rudnitsky *Course Design* 20
327 Posner and Rudnitsky *Course Design* 20

environment.[328] However, Posner and Rudnitsky contend that dependability refers to the degree to which a reader can be convinced that research findings occurred the way the researcher said they would occur.[329] Therefore, in this study, dependability will be ensured through providing the reader with information collected from relevant secondary sources as mentioned under data collection and analysis. Also, data presentation will be consistent with the relevant literature to avoid falsification or fabrication of research information.[330]

(d) Conformability

According to Wagner, conformability in research means that data is accurate, dependable and can be easily traced back to its source so as to justify its validity.[331] In order to establish conformability in this study, the researcher has provided for substantial information about the methods used to collect and analyze data. Relevant literature advanced in the thesis has also been traced to appropriate sources to avoid plagiarism and conform to the North West University's policy on research.

1.9 SCOPE AND LIMITATIONS OF THE STUDY

The discussion concerning the creation of a permanent International Criminal Court is a debate about a means to an end and not an end in itself.[332] Therefore, it is important to differentiate this debate from other aspects of international law so as to actualize the vision of the aims and objectives directing this study. At the heart of the system of international law, there is a continuum of related organs that operate independently from one another depending on the agenda behind their establishment.[333] These organs include, but are not limited to the European Court of Justice (ECJ), the Inter-American Court of Human Rights (IACHR), the African Court on Human and Peoples' Rights (ACHPR), the ICTY, the ICTR, the ICJ and the ICC. Even though they all observe and enforce the standards and customs of international law established through case law, treaties and conventions, they face different challenges with regard to their scope

---

328 Posner and Rudnitsky *Course Design* 20
329 Posner and Rudnitsky *Course Design* 20
330 Posner and Rudnitsky *Course Design* 20
331 Wagner 2009 *SAJHE*
332 See Bachmann 2007 *JSAL*
333 Mugwanya 2006 *AHRLJ*

and modes of operation. Considering the ever-growing nature of public international law, Strydom has noted:

> At the heart of the matter lies the problematic nature of the traditional conceptualization of the sources of international law in view of the impact of several fast-developing new fields and uncertainties. These developments have brought in the wake with regard to law creating competence of various international law organs and the legal status of the documents they produce.[334]

Among the series of documents mentioned by Strydom is the Rome Statute that established the ICC.[335] So far, discussions' concerning the Statute touches on the challenges that impact on the smooth functioning of the Court and such challenges have occupied the forefront of the debate concerning the ICC. This study will therefore be limited to targeting this debate with specific reference to double standards and selective morality in the referrals. Also, the study avoids any attempt that pushes the research into an area not justified by the research objectives, for such attempts could lead to ambiguity of facts and poor outcome in terms of research findings. Lastly, the study is limited to ICC operations within the African continent; it only sources information from outside this continent for reasons of comparative analysis.

The study consists of six chapters. Chapter one presents a general introduction to the study. The contextual background to the study is presented. The chapter defines the key terms as used in the context of the study and as well provides a preliminary theoretical approach to guide the focus of the study. It identifies the research problem, gives the justification for the study and articulates the aims, objectives, scope, methodology, research questions, literature review and the significance of the study. It also gives the outline and overview of the chapters in the thesis.

Chapter two discusses the historical context of the struggle to develop a permanent international criminal tribunal to regulate the conduct of warfare within the international community, with a view to highlighting the historical antecedents of the calls for the creation of a permanent international criminal court for the prosecution of serious crimes in international law. It reflects on the prosecution of serious crimes committed

---

334 See Strydom et al, International Human Rights Standards 29
335 Strydom et al, International Human Rights Standards 29

before and after the cold war era. The chapter follows through to analyse the strengths and weaknesses of previous international criminal tribunals so as to establish the *raison d'être* for which the ICC was created. In conclusion, amplifies whether any lessons have been learnt from the past attempts at enforcing international criminal justice mechanisms.

Chapter three discusses the creation of the ICC with specific reference to the political debates through which the Court came into existence. The controversies that prompted the situation in which advocates of the ICC failed to ratify the Rome Statute after it was adopted at the Rome Conference are brought to the spotlight. The chapter also addresses the legal framework that underpins the operations of the Court as stipulated under the Rome Statute.

Chapter four provides a conceptual approach to the theoretical evidence relevant for understanding the international criminal law system. The chapter also examines the sources and principles of international criminal law that underpins the operations of the ICC. In continuation, it discusses the importance of individual criminal responsibility in international law. The analysis is limited to the most important and representative literature, trends and issues surrounding the contemporary international criminal law debate.

Chapter five undertakes a legal analysis of the mandate to prosecute serious crimes conferred upon the ICC by the Rome Statute, the nature of these crimes, their committal within the global landscape, and the punishment of perpetrators. The chapter also investigates the ICC's operations in Africa based on three case studies which includes the situation in Uganda, the situation in Sudan and the situation in Kenya. The chapter furthermore discusses in a comparative manner, the politics of prosecution in these three countries. Also, the chapter deliberate on the dynamics surrounding the Court's functions as mandated by the Rome Statute with a view to suggesting reform where necessary. The key objective of this analysis in chapter five is to provide reasons upon which the Rome Statute can be reformed to enhance the functioning of the ICC.

Chapter six offers a synthesis of the study in order to summarise the main findings and draw conclusions from the thesis. Based on arguments raised in previous chapters, chapter 6 provide conclusions to arguments advanced in the study. It also provides

practical recommendations to enhance the functioning of the ICC. In this regard, a comprehensive legal framework is proposed for the purposes of unifying the referral mechanisms under Article 13 of the Rome Statute. The chapter concludes by proposing areas recommended for further research.

1.10 ETHICAL CONSIDERATIONS

Ethics are generally defined as a set of widely accepted moral rules that control the conduct and expectations of researchers during the process of research.[336] This research is based on desktop studies from which all primary and secondary sources are obtained. As such, no individual or group interviews and/or questionnaires will be used as instruments of research with the objective of holding discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting. No criminal or other disclosures requiring legal action and having potentially adverse effects or risk for research participants are made in the course of the study. There is therefore no need for arrangements to be made in respect of insurance or indemnity to meet the potential legal liability of the North-West University for harm to participants arising from the conduct of the research. Rather, the researcher conforms to the North-West University's policy on research which prohibits all forms of research misconduct, falsification, fabrication, or plagiarism. He will also avoid misinterpretation of credentials in proposing, performing, reviewing or reporting research. Lastly, he acknowledges all assistance and collaboration of others or sources from which information was obtained.

1.11 SUMMARY

The chapter provides an introduction to the study and expounded on the statement of the research problem. The aims and objectives, directing the study have been discussed, including the theoretical approach. Furthermore, the rationale for conducting the research has been elaborated upon, including literature from multiple scholarly perspectives regarding the operations of the ICC in Africa. The chapter introduced the qualitative methodological approach through which data was collected and analyzed. Relevant tools such as academic databases and related internet resources were consulted to access literature relevant to the study. The chapter concluded by

---

336 Wagner 2009 *SAJHE*

highlighting the scope of the study and a brief explanation of the ethical principles and norms as provided for by the North West University's policy on research. The next chapter introduces the international criminal law debate in relation to the evolution and progressive development of the international criminal justice system.

CHAPTER TWO
HISTORICAL EVOLUTION AND PROGRESSIVE DEVELOPMENT OF THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

2.1 INTRODUCTION

This chapter interrogates different periods that have marked the historical development of the international criminal justice system. The application of relevant legal instruments that shaped and informed the criminal justice system prior to the birth of the Rome Statute that established the ICC is at the heart of this chapter. The proliferation of treaties and constant work to expand the scope of international law by creating new jurisdictions and by clarifying concepts both in legal provisions and in judicial decisions are the salient features of the evolutionary process that the chapter addresses. The importance of this chapter is to identify the historical context of the struggle to develop a system of global accountability for the prosecution of serious crimes in international law. The progress made and challenges encountered in the process dominate the debates advanced in subsequent sections of the chapter. Also, the chapter reflects on the genesis of individual criminal responsibility in international law.

Individual criminal responsibility was first invoked at the Hagenbach Trial of 1474.[337] Accused of crimes such as murder, rape, perjury and other crimes in violation of the laws of man, Hagenbach was tried by a panel of 28 judges and legal experts from different geographic locations across the globe.[338] The trial established the unprecedented principle of individual criminal responsibility in international law.[339]

The Hagenbach judgment laid the building blocks for subsequent international criminal jurisprudence that foresaw the creation of a permanent international criminal court that would ensure accountability for serious crimes in international law. Such calls became more persistent during the 19th century that witnessed two major world wars and countless minor armed conflicts.[340] In this light, reference can be made to the Balkan conflicts that recorded the deaths of more than one hundred and forty thousand

---

337 See Greppi 1999 *IRRC*
338 Greppi 1999 *IRRC*
339 Greppi 1999 *IRRC*
340 Heller and Simpson The hidden history of War Crimes Trials 16

people,[341] the Rwandan genocide that witnessed more than half a million dead in just three months[342] and the Darfur conflicts in the Sudan that recorded an estimated four hundred thousand deaths.[343] These and other situations have haunted the conscience of humankind over the last decade of the twentieth century.

Such horrifying moments in history justify the long-standing arguments that the provisions of the Hague Conventions needed to be backed by a permanent international criminal tribunal that would guarantee punishments for those found guilty of heinous offences committed against humanity. The argument gained attention in 1998 when delegates assembled in Rome to adopt the Rome Statute that established the ICC.[344] The Court became operational in 2002 with the mandate to prosecute serious crimes stated under Article 5 of the Statute.[345] During the long walk towards the creation of the ICC, the international criminal justice system metamorphosed through a transformational process that is discussed below.

2.2 THE DEVELOPMENT OF THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

As pointed out earlier, prosecutions of war criminals for crimes committed against humanity occurred before the advent of the ICC in 2002.[346] International tribunals, treaties, conventions, legal principles, case law and justifications from customary international law provided the legal framework for such trials.[347] Modern codifications of international legal norms, including the text prepared by Francis Lieber and applied by Abraham Lincoln during the American Civil War, forbade inhuman conduct and prescribed notable punishments.[348] The sanctions included, among others, the death penalty for pillaging, raping civilians, abuse of prisoners and similar atrocities.[349] It is worth noting that the prosecution of war criminals was limited to national courts up

341 Tabeau Conflict in numbers 14
342 See Babatunde 2015 *ASR*
343 Babatunde 2015 *ASR*
344 Greppi 1999 *IRRC*; Armstead 1998 *SCLR*
345 Heller and Simpson The hidden history of War Crimes Trials 16
346 Yuval 2009 *ASILP*
347 Yuval 2009 *ASILP*
348 Schabas An Introduction 3
349 Burke-White 2011 *MJIL*

until national justice systems proved themselves ineffective.[350] Such situations arose, particularly when the perpetrators of the alleged war crimes happened to be those with political authority as witnessed in Germany under the leadership of Adolf Hitler.[351] Under such circumstances, the perpetrators of serious atrocities often invoked the doctrine of state sovereignty to justify immunity in the face of impunity. It is in the wake of such events that the responsibility to try war criminals took a shift from the national to the regional and international dimension.[352]

With regards the early trial of Hagenbach as pointed out in previous sections,[353] the accused was the governor of the Duke's Alsatian territories in the period 1469-1474. During this period, he masterminded a campaign that degenerated into widespread atrocities, including rape and murder, committed against the people of Breisach. Charged with war crimes, Hagenbach was subsequently convicted and beheaded.[354] The trial became known as the first case in history to set aside the defence of superior orders as a justification for crimes committed under international law.[355] However, the trial faced opposition for reasons of want of jurisdiction and the dilemma as to whether the said atrocities constituted crimes at the time of the trial.[356] The development of such experiences in medieval international criminal justice resulted in the emergence of the concept of international prosecution for humanitarian abuses.[357] Such concepts later challenged the doctrine of sovereign immunity under international law.[358]

The doctrine of sovereign immunity provides that sovereign authorities are free from political and/or judicial interference from other states.[359] On the one hand, the doctrine was good in that sovereign authorities were allowed to manage their own internal affairs in a manner that conformed to domestic legal orders. On the other hand, the doctrine was flawed by the fact that heads of states and top governmental officials in

---

350 Schabas *An Introduction* 3
351 Schabas *An Introduction* 3
352 Schabas *An Introduction* 3
353 Bassiouni 1997 *HHRJ*
354 Gregory The trial of Pete Von Hagenbach 17
355 Gregory The trial of Pete Von Hagenbach 17
356 Gregory The trial of Pete Von Hagenbach 17
357 Anderson 2009 *EJIL*
358 Pugh 1953 *LLR*
359 See Araujo 2000 *FILJ*

most cases took advantage and used political machineries to oppress their citizens with knowledge of the absence of accountability from external forces.[360] The doctrine gradually evolved to restrict the development of international criminal justice as many perpetrators of serious crimes in international law went unpunished by reason of the shield of sovereign immunity.[361] However, the doctrine later faced challenges from emerging international treaties as discussed below.[362]

2.3 CODIFICATION OF INTERNATIONAL LAWS RELATING TO ARMED CONFLICTS

The first substantial codification of the laws of war in an international treaty can be traced to the Hague Conventions of 1899 and 1907.[363] Incorporated in these treaties were relevant provisions dealing with the security of civilian populations in armed conflicts. The regulations annexed to the Hague Convention IV of 1907 enshrined the respect of "family honour and rights, the lives of persons and private property, as well as religious convictions and practice". These provisions also extended to embrace the protection of ethnic objects and individual property of civilians.[364] The Preamble to Convention IV of 1907 significantly insisted that during armed conflict, combatants had to be guided by their conscience and the rules of humanity for the protection of civilian populations. However, considering the demands of criminal justice, the provisions of the Hague Conventions were deemed not sufficient to deal with the challenges posed by international criminal law. For this reason, the Martens Clause was introduced in the Preamble to the Conventions which stipulated as follows;

> [T]he High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law

---

360 See Yannis 2002 *EJIL;* See *Henderson v. Defence Housing Authority*, HCA 36, 190 CLR 140 (1997)

361 Yannis 2002 *EJIL*

362 See Allott The Concept of International Law 2

363 Convention Concerning the Laws and Customs of War on Land (Hague IV), 3 *Martens Nouveau Recueil* (3d) 461

364 Convention Concerning the Laws and Customs of War on Land (1899)

> of nations, as they result from the usage established among civilized people, from the laws of humanity, and the dictates of the public conscience.[365]

However, the Hague Conventions were international treaties not necessarily designed to create criminal liability for individuals, but imposed obligations and duties upon states.[366] The Hague Conventions attributed illegality to certain acts without making declarations as to whether they were criminal. For instance, the use of balloon warfare,[367] asphyxiating gases, [368] and expanding bullets[369] were classified by the 1899 and 1907 Conventions as prohibited weapons under the Laws and Customs of War on Land.[370] However, given that accountability was not guaranteed by a competent tribunal, such international legal obligations were-abandoned when states chose to boost their military capabilities in order to defend their territories from external interventions.[371] Therefore, the Conventions were interpreted as a source of the law of war crimes.[372] In 1913 for example, the Hague Convention IV was used as a corner-stone for the description of

---

365 The provision above is known as the 'Martens Clause'. See Meron 2000 *AJIL* See also Miyazaki *The Martens Clause,* Swinarsky C (ed.) 433. The Martens Clause is named after Fyodor Martens, the Russian diplomat and jurist who drafted it. A similar formula appears in each of the 1949 Geneva Conventions and in the 1977 Protocols. See Geneva Convention I 1949 Article 63(4); Geneva Convention II 1949 Arttile 62(4); Geneva Convention III 1949 Article 142(4); Geneva Convention IV 1949 Article 158(4); Protocol I additional to the Geneva Conventions of 1949, 1997 at Article 1(2); Protocol II Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977

366 Allott The Concept of International Law 2

367 See Declaration (IV, 1) to prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature 1899 http://www.icrc.org/ihl-nsf/FULL/160?OpenDocument

368 See Hague Declaration (IV, 2) Concerning Asphyxiating Gases (1907) UKTS 32, Cd. 3751. 1899

369 See Hague Declaration (IV, 3) Concerning Expanding Bullets (1907) UKTS 32, Cd. 3751. 1899

370 See Hague Convention (II) with Respect to the Laws and Customs of War on Land, 26 Marten Nouveau Recueil (ser. 2) 949: for the 1907 Hague Convention IV. 1899

371 Not until the final years of the Vietnam War did states return to the negotiating table keen to discuss multilateral weapons prohibitions. But when they did, they now did it in a comprehensive manner, such as the 1972 Convention on the Prohibition and Development, Production and Stockpiling of Bacteriological (Biological) and Toxins Weapons and their Destruction. For detail, see Nigel and Henderson, *Research handbook* 327

372 Schabas *An introduction* 17

war crimes by the Commission of Inquiry setup by the Carnegie Foundation to look into atrocities committed during the Balkan Wars.[373]

After World War I, international outrage, particularly from the Allied Powers, led to mounting pressure for criminal prosecution of those generally considered to be responsible for the war.[374] The quest for criminal prosecution took into account the violation of the laws and customs of war, including the waging of war itself as breach of international treaties.[375] However, the legality of such trials was challenged by the Allied Powers during the Paris Peace Conference of 1919.[376] In particular, the USA argued that accountability for violation of international treaties- a reference to crimes committed by civilians within a state border- was a question of morality not law.[377] This argument held a minority position that stood out in stark contrast to the general opinion.[378]

The Versailles Treaty provided the legal basis upon which the defeated German Emperor was accused for being the mastermind of World War I and the Treaty pave way for the creation of a special tribunal for his trial.[379] However, the Emperor escaped to Holland, which had earlier declared its neutrality regarding the war, and subsequently Holland refused to extradite the German Emperor; consequently the trial never commenced.[380] The Treaty also recognised the right of the Allies to set up

---

373 Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars, Washington: Carnegie Endowment for International Peace, (1914).

374 See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (1919). The commission condemned the Central Power's war of aggression, but did not recommend prosecution for those who designed and ordered such military action. It urged that in the future that penal sanction should be lodged against those responsible for such grave outrages against the elementary principles of international law. This recommendation was based on the lack of positive law regulating States' deployment of force. In addition, the complexity and time-consuming nature of such an investigation would consume time and attention and detract from the prosecution of those responsible for violations of the laws and customs of war. Punishment inevitably would be tardily imposed and would lack moral potency. See Lippman 1993 *IICLR*

375 Matas 1989 *FLJ*

376 King *The Moldovans* 38

377 Goldberg *The Peace to End Peace* 13

378 Goldberg *The Peace to End Peace* 13

379 Brezina C, The Treaty of Versailles, 1919: A Primary Source Examination of the Treaty *That Ended World War I*. Primary Sources of American Treaties. New York: Rosen Central, 2006. p. 3., See also Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), (1919) TS 4, Article 227

380 Manfred *et al*, *The Treaty of Versailles* 8., See also Macmillan M and Otte T, *The Times* Literacy Supplement. No. 5143, 3

military tribunals to try German officers and soldiers accused of war crimes.[381] Germany strongly opposed this position and in conclusion, the Allies were instructed to prepare a list of the German suspects to be tried before the German courts.[382] Although a total of close to 900 names were submitted for trial, the roster was reduced to about 40, of which just a dozen were actually tried.[383] Most of the offenders were acquitted and those found guilty received minimal terms of imprisonment which, in most of the cases, resulted in nothing more than time already spent in custody prior to conviction.[384]

The convicted German officers and soldiers received liberal punishments that were more representative of corrective measures of the German army and more liberal compared to any international criminal trial. Therefore, such trials were called the *'Leipzig Trials'*[385] and the perceived failure of this early attempt to meet the demands of international criminal justice generated efforts towards the establishment of a permanent international criminal tribunal for the prosecution of war criminals.[386]

A significant effort towards achieving international criminal justice was also derived from the Treaty of Sèvres in 1920 which governed the peace with Turkey.[387] The terms of the treaty were far more severe than those imposed on the German Empire in the Versailles Treaty. Factually, the proposed prosecutions against the Turks were still more revolutionary and went beyond the prosecution of suspects whose victims were either

---

381 Shire *The Rise and Fall of the Third Reich* 21

382 Shire *The Rise and Fall of the Third Reich* 21

383 Schabas *An introduction* 17

384 Bendersky A History of Nazi Germany 5

385 See Charter of the International Military Tribunal for the Far East, on the basis of directive from the Commander-in Chief of the Allied Forces (1946) (IMTFE Charter), [thereafter] (Tokyo International Military Tribunal), done at Tokyo., See also Law Reports of War Criminals selected and prepared by the United Nations War Crimes Commission and published in London by the Majesty's Stationery office, Volume 1, 1947

386 German War Trials, Report of Proceedings Before the Supreme Court in Leipzig, London: His Majesty's Stationery Office, (1921). See also James *Prologue to Nuremberg* 39

387 Treaty of Sèvres, Post-World War I pact between the victorious allied powers and representatives of the government of Ottoman Turkey (1920). The treaty did not just put an end to the Ottoman Empire but also, it placed Turkey under the obligation to renounce all rights over Arab Asia and North Africa. The treaty as well provided for an independent Armenia, for an autonomous Kurdistan, and for a Greek presence in eastern Thrace and on the Anatolian west coast, including Greek control over the Aegean islands commanding the Dardanelles. Rejected by the new Turkish nationalist regime, the Treaty of Sèvres was replaced by the Treaty of Lausanne in 1923

soldiers of the Allied nations or civilians in occupied territories to include subjects of the Ottoman Empire, particularly victims of the Armenian genocide.[388]

The S`evres Treaty was originally designed to cater for the conduct of warfare as it required determination of those responsible for the "barbarous and illegitimate methods of warfare… [including] offences against the laws and customs of war and the principles of humanity."[389] Article 230 of the Treaty also criticised such activities.[390] However, the Treaty of S`evres was devoid of any popular recognition as it was neither ratified by Turkey, nor were the trials ever held.[391]

2.4 THE BIRTH OF THE UNITED NATIONS ORGANIZATION

Numerous demands to bring an end to bloodshed resulted in the formation of the League of Nations at the Paris Peace Conference. However, the League failed to act against the Japanese invasion of Manchuria in 1931, the second Italo-Ethiopian war in 1935, the Japanese invasion of China in 1937 and German expansions under Adolf Hitler that culminated in World War II.[392] Such occurred due to inherent weaknesses that characterised the operational framework of the organization. For instance, membership to the League was neither compulsory nor was it universal. The League members operated on the basis of decentralised sanctions and the willingness to cooperate. However, this operational mode became a failure as many states were not ready to cooperate with the organization. The Covenant that established the League was also deficient in that it failed to provide a mechanism of accountability against individuals who committed crimes under international law. These pitfalls pushed members of the international community towards the creation of a new organisation that would meet the challenges of international law and politics.

On 14 August 1941, Prime Minister Winston Churchill of Great Britain and President Franklin Roosevelt of the USA, the leaders of the two great democratic powers standing

---

388 Helmreich From Paris to Sèvres 320

389 See Friedman *British Miscalculation* 217., See also, Mandelbaum *The Fate of Nations* 61

390 See Treaty of Sèvres, Post-World War I pact between the victorious allied powers and representatives of the government of Ottoman Turkey (1920)., Art. 230

391 Helmreich From Paris to Sèvres 320

392 Higgins 1995 *EJIL*

in opposition to the Axis Power assault on the territorial independence and fundamental freedoms of persons across Europe concluded their conference in a joint declaration of principles in what became known as the Atlantic Charter.[393] The principles of the Charter enforced the notion of State Sovereignty in international law and became the catalyst for the idea of the UN. The Charter, conceived in the midst of the greatest carnage ever seen in human history, was the first international document in which the most powerful world leaders had the courage to stress, while respecting the principles of sovereign independence and right to be free from external aggression, the right of all people to 'live out their lives in freedom from fear'.[394] Also, it emphasised the need for 'a wider and permanent system of general security for the world'.[395]

The Yalta Conference became one of three wartime conferences held in preparation towards the birth of the UN.[396] The Conference was preceded by the Tehran Conference of 1943,[397] followed by the Potsdam Conference, also known as the Berlin Conference of July 1945.[398] All these conferences were held in accordance with the declaration to liberate Europe and the rest of the world from the scourge of human misery.[399] Besides the war crime conferences, delegations from the Soviet Union, the UK, the USA and Republic of China met in Washington DC and the Dumbarton Oaks Conference was held in 1944 to negotiate the formation of the United Nations.[400] At Dumbarton Oaks outside San Francisco, the great powers emphasised national sovereignty, territorial integrity and political independence. Thereafter, the UN Conference on International Organisation began in San Francisco and the UN Charter was born on 24 October

---

393 See Atlantic Charter, Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom (1941)

394 Antlantic Charter, Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom (1941

395 Mendes Global Governance 277

396 Yalter Conference also referred to as the Crimea Conference and codenamed the Argonaut Conference was held from February 4 to 11, (1945)

397 Tehran Conference also referred to as Eureka was a strategy meeting of Joseph Stalin, Franklin Roosevelt and Winston Churchill, held in the city of Tehran in Iran from 28 November to 1 December, (1943)

398 Postdam Conference also referred to as the Berlin Conference of the Three Heads of Government of the USSR, USA and UK was held at Cecilienhof in occupied Germany from 17 July to 2 August (1945)

399 Howard *The United Nations* 2nd (ed.) 1

400 Weiss et al, The Reality of UN Security Efforts 3

1945.[401] The Organisation was created to maintain the peace and security, develope friendly relations among nations, putting in place conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life for all.[402]

The members agreed to tolerate one another and live in peace as good neighbours, unite their strength in maintaining peaceful and secured environment and unanimously accept that armed force should not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all people.[403] In 2015 the Organization boasted of 193 member states, including 120, 000 peace-keepers in 16 operations distributed over four continents.[404] In the same year, it mobilised 12.5 billion US dollars in humanitarian aid assistance following emergencies over an estimated 34 million refugees and also it vaccinated about 58% of children globally.[405] These are a few among other activities carried out in line with the purpose of the Organization as stipulated under the UN Charter.

2.4.1 Significance of the Yalta Conference and the veto power rhetoric

The Yalta Conference was significant in establishing the voting pattern applied by the Security Council as discussed under Article 27 of the UN Charter. At Yalta, the voting arrangement by the Security Council was agreed upon in a compromised between the USA, the Soviet Union and the UK.[406] This proposal subjected Security Council decisions to unanimity of the permanent members regarding enforcement actions and the peaceful settlement of disputes. The consequence is each of the five permanent members was vested with the authority to veto an affirmative decision before the Security Council.[407] During the negotiations of the UN Charter in 1945, numerous small

---

401 Howard *The United Nations* 2nd (ed.) 1

402 See Preamble of the Charter of the United Nations and Statute of the International Court of Justice. Entered into force (1945). See also Article 1 of the same Document, the purpose of the organisation

403 Preamble of the Charter of the United Nations and Statute of the International Court of Justice. Entered into force (1945), Article 41, the use of force by the UN Security Council

404 See Ahmia The Collected Documents 69

405 See Ahmia The Collected Documents 69; Koh and Koh 50 Years of Singapore and the United Nations 48

406 Simma and Brunner 'Article 27' in Simma, Mosler and Randelzhofer (eds.) 435

407 Simma and Brunner 'Article 27' in Simma, Mosler and Randelzhofer (eds.) 435

and middle sized States challenged the privileged status of the five permanent members as a form of victors' justice and an abuse to the sovereign equality of States.[408]

The veto pattern adopted at the Yalta Conference and inserted under Article 27 of the UN Charter has generated the veto problem which has become one of the most controversial issues before the UN.[409] On numerous occasions, a single negative vote of a great power has blocked and affirmative decision of the Security Council.[410] By voting against any motion of a substantive nature, any one or more of the five powers having permanent seats at the Security Council can prevent adoption of that motion.[411] The voting arrangement under Article 27 of the UN Charter ties the Security Council's decisions directly to the politics of the great powers.[412] Even more problematic, the construction of Article 27 of the Charter gives room for the permanent members to choose which matter receives an affirmative vote.[413]

According to the construction of Article 27 of the UN Charter, two important issues that stemmed from the Yalta Conference have been brought to the fore.[414] First, there is the issue of "double veto" given the possibility that a permanent member can ask for a preliminary vote on the nature of a question and consequently veto it.[415] Secondly, the fact that the permanent members are require to vote concurrently on other matters seems problematic as the absence of one among the five permanent members can block an affirmative decision.[416] Also, the meaning of "other matters" as stipulated under Article 27(3) is unclear as the permanent five can decide which other matter to veto and block affirmative decision.[417] These are some of the factors that influence the politics of voting at the Security Council. The veto question has gradually undermined Article 2(1) of the UN Charter which provides that "the Organization is based on the

---

408 Ruys and Wouters 2005 *IIL*
409 Ruys and Wouters 2005 *IIL*
410 See Padelford The use of the veto 227
411 Ruys and Wouters 2005 *IIL*
412 Padelford The use of the veto 227
413 See United Nations Charter 1945, Article 27
414 Statement by the Delegation of the Four Sponsoring Government on voting procedure in the Security Council', June 7 1947, UNCIO vol. XI, at 754
415 Ruys and Wouters 2005 *IIL*
416 Ruys and Wouters 2005 *IIL*
417 Padelford The use of the veto 227

principle of sovereign equality of all its members.[418] The veto power rhetoric constitutes one of the factors that influence the Security Council's decisions in referring cases to the ICC as would be discussed in subsequent sections of this thesis.

2.4.2 United Nations' contribution towards global peace and security

The Organisation consists of main organs and subsidiary bodies, including the ICJ which is the judicial organ.[419] The ICJ is the judicial arm of the UN which became operational in 1946.[420] The Court is charged with the responsibility to adjudicate disputes between states parties or provide Advisory Opinions at the request of other UN bodies.[421] The Court consists of 15 judges elected by the General Assembly, and no two of whom shall come from the same state.[422] Besides this judicial organ, the Economic and Social Council (ECOSOC) is one of the principal organs of the UN that consists of 54 members elected for three year terms by the General Assembly.[423] The mandate of the Council extends to cover all economic, social and environmental concerns.[424]

The Security Council is the executive arm of the UN with the primary responsibility to maintain international peace and security and its resolutions bind all UN members.[425] In the performance of its duties, the Council has been allowed to authorise the use of force where necessary.[426] The Council consists of fifteen members and five of them the UK, France, Peoples Republic of China (PRC), Russian Federation and the USA have permanent seats with veto power bestowed upon them from the inception of the UN.[427]

---

418 United Nations Charter 1945, Article 2(1)

419 See Charter of the United Nations and Statute of the International Court of Justice (1945)

420 Charter of the United Nations and Statute of the International Court of Justice (1945). Article 92, See also Weiss and Kalbacher, *The United Nations in Williams, P.D (ed.)* 2

421 Charter of the United Nations and Statute of the International Court of Justice (1945). Article 96

422 See Statute of the International Court of Justice (1945) Articles 4(1) and 4(2)

423 ECOSOC, one of the six main organs of the United Nations established in 1946. It is the principal body for coordination, policy review, policy dialogue and recommendations on economic, social and environmental issues, as well as for implementation of the internationally agreed development goals. See Charter of the United Nations and Statute of the International Court of Justice 1945

424 See Egelston Sustainable Development 24

425 See Charter of the United Nations 1945 Articles 24 and 25

426 See Charter of the United Nations 1945. Articles 41 and 42

427 Brown and Ainley Understanding International Relations 4th (ed.) 12 See also the Yalta

The remaining ten members of the Council are elected for a two-year term by the General Assembly.[428] The deliberative arm of the UN is the General Assembly which includes all UN member states and also plays an important role due to its power to elect and appoint members to all other UN bodies.[429] Its responsibilities also encompass additional duties which other UN bodies are mandated to perform.[430]

The General Assembly officially works through six Committees.[431] The First Committee the Disarmament and International Security Committee (DISEC) deals with issues regarding disarmament and threats to peace and security.[432] The Committee places strong emphasis on disarmament as a means of creating global peace and stability.[433] The Second Committee, the Economic and Financial Affairs Council (ECOFIN) deals with economic and financial issues regarding trade, financial systems, debt sustainability, economic growth, development and poverty eradication among many other things.[434] The Third Committee, referred to as the Social, Humanitarian and Cultural Committee (SOCHUM) deals with the vast array of matters including the advancement of women, children, refugees, human rights and freedom, self-determination and anti-discrimination.[435]

The Special Political and Decolonisation Committee (SPECPOL) is the Fourth Committee of the UN that deals with decolonisation and other special political issues, including matters peculiar to decolonised states such as peace-keeping, monitoring and

---

Agreement, 1945

428 Claude 1994 *FILJ*

429 See General Assembly of the United Nations Rule of Procedure: XII-Plenary Meetings which provides that General Assembly decisions shall be reached by a two-third majority of the members present and voting

430 Dunbabin *The United Nations* 2nd (ed.) 43

431 Cassese The Role of the United Nations 2nd (ed.) 5

432 See United Nations General Assembly Resolution 1(1) entitled "Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy", adopted on recommendation by the First Committee (1946)

433 Resolution 1(1) represented the first ever resolution of the UN General Assembly and therefore paved the way for a series of resolutions that gradually transformed international law in the quest to counter global challenges.

434 Like the rest of the UN General Assembly Committees, ECOFIN was formed at the time of the establishment of the UN, in 1945 following the end of World War II. See Roberts and Kingsbury *Introduction* 4

435 SOCHUM was established after the development of the Universal Declaration of Human Rights in 1948., See Felice 1990 *IA*

refugees.[436] The Committee also deals with extra activities such as airspace regulations and atomic radiation. The Fifth Committee deals with administrative and budgetary matters of the UN. It ensures that the UN has sufficient funds to carry on with its missions and related operations as stipulated under the UN Charter.[437] The Sixth Committee is responsible for legal affairs and the task of developing public international law in conjunction with the ILC.[438]

Besides the operations of the Committees discussed above, the UN also functions through specialised agencies coordinated by the United Nations Economic and Social Council (UNESC) at the inter-governmental level, and through the Chief Executive Board for Coordination (CEB) at the inter-secretariat level.[439] Specialised agencies may or may not have been originally created by the United Nations, but they are incorporated into the United Nations System by the United Nations Economic and Social Council acting under Articles 57 and 63 of the United Nations Charter. At present the UN has in total 15 specialized agencies that carry out various functions on behalf of the UN.[440] This basic framework reflects the structure of the UN and the mandate upon which its operations have been made whole since 1945.

---

436 SPECPOL was created to address significant political matters that the First Committee DISEC was not able to handle, such as self-determination, decolonization, and other international security matters. See United Nations General Assembly Resolution 43/233, Doc. A/RES/47/233. (1993)

437 The UN Charter guarantees the approval of budget to the General Assembly (Chapter IV, Article 17) and for preparing the budget to the Secretary-General, as "chief administrative officer" (Chapter XV, Article 97) The Charter also addresses the non-payment of assessed contributions (Chapter IV, Article 19). The planning, programming, budgeting, monitoring and evaluation cycle of the United Nations has evolved over the years; major resolutions on the process include United Nations General Assembly resolutions: 41/213, (1986), United Nations General Assembly resolutions: 42/211, (1987), and United Nations General Assembly resolutions: 45/248, (1990)

438 While international law-making negotiations take place in a variety of specialized bodies of the United Nations, depending on their actual subject-matter, those negotiations related to general international law are usually held at the Sixth Committee., See United Nations General Assembly Rules of Procedure embodying amendments up to September 2007. United Nations Publications, Doc. A/520/Rev. 2008; 17. Article 98., See also Boyle and Chinkin *The Making of International Law* 117.

439 The UN specialised agencies includes among others; International Civil Aviation Organisation (ICAO), Food and Agricultural Organisation (FAO), United Nations Educational, Scientific and Cultural Organisation (UNESCO), International Monetary Fund (IMF) and many more

440 For details, see Reinisoh *The Convention* 630

Although the UN established a complex mechanism to cater for the well-being of humanity, the question of individual criminal responsibility and the quest to end impunity still remained unaddressed.[441] The ICJ only had jurisdiction over states regarding the diplomatic settlement of disputes.[442] On their part, the Allied Powers established the Nuremberg Tribunal to deal with the question of individual accountability in international law. The Tribunal became the first of its kind to enforce the principle of individual criminal responsibility in international law as would be elaborated upon in the next section.[443]

2.5 THE NUREMBERG TRIALS

The Moscow Declaration of 1943 was dominated by the Allies' decision to try the Nazi leaders for war crimes.[444] During the Moscow Conference of October 30, 1943, four declarations were signed, including the Declaration of the Four Nations on General Security, the Declaration on Italy, the Declaration on Austria, and the Declaration on Atrocities.[445] Based on this determination, a United Nations Commission for the Investigation of War Crimes was established.[446] The Commission's representatives were mostly from the Allies, and its main duty was to set the stage for post-war prosecutions.[447] The Commission prepared a 'Draft Convention for the Establishment of

---

441 See Somavia "The Humanitarian Responsibility of the United Nations Security Council: Ensuring the Security and Wellbeing of the people"

442 See Report of the Secretary General on the work of the organisation [A/60/1] 2005, Submitted to the Sixtieth session of the General Assembly. The Assembly took note of the document (decision 60/504) (2005)

443 See United Nations 2005 *DPI*

444 See Roosevelt *et al*., *Moscow Declaration on atrocities* 35., The Joint Four-Nation Declaration was attended by the governments of The USA, UK, the Soviet Union and the PRC. The Declaration was established on the bases of unconditional surrender as it stipulated under Article 2 of section one that "those of them at war with a common enemy will act together in all matters relating to the surrender and disarmament of that enemy". For more clarification see, A Decade of American Foreign Policy : Basic Documents, 1941-49 Prepared at the request of the Senate Committee on Foreign Relations By the Staff of the Committee and the Department of State. Washington, DC : Government Printing Office, 1950

445 Roosevelt et al., Moscow Declaration on Atrocities 35

446 See United Nations War Crimes Commission: Summary of AG-042 United Nations War Crimes Commission (UNWCC) (1943-1948), United Nations Archives and Record Management Section.

447 See Pedaliu 2003 *JCH*

a United Nations War Crimes Court', and based its text largely on the 1919 treaty of the League of Nations.[448]

The text was also inspired by an informal body, the London International Assembly, that carried out legal duties during the early years of WW II.[449] The Agreement for the prosecution and punishment of major war criminals, including the validation of the Charter of the International Military Tribunal (IMT-Charter), was formally adopted on 8 August 1945.[450] The London Agreement laid down the basis for the prosecutions at Nuremberg and was accompanied by the signatures of the four major powers; the United States, the United Kingdom, France and the Soviet Union. Annexed to the Agreement was the IMT Charter ratified by nineteen additional states who sought to show their support for the new approach to justice.[451]

In the month of October 1945, twenty-four Nazi leaders were indicted and tried before the IMT for major war crimes. The trials took almost a year, recording nineteen defendants' convictions with the imposition of the death sentence in twelve cases.[452] The judgment at Nuremberg established that international crimes were perpetrated by men and not abstract entities, and international law provisions could be enforced only by punishing persons who participated directly or fostered the commission of such crimes.[453] The Tribunal's jurisdiction was limited to three categories of offences which were "crimes against peace, war crimes and crimes against humanity".

However, the London Charter that established the Tribunal has been criticised by academics and legal practitioners on the basis of retroactive criminalisation since it was

---

448 Draft Convention for the Establishment of a United Nations War Crimes Court, UN War Crimes Commission, Doc. C.50(1) (1944)

449 See London International Assembly Commission I for Questions concerned with the Liquidation of the War: A note on the Jurisdiction of Military Courts Concerning War Crimes, and on Art. 226-230 of the Versailles Treaty http://www.legal-tools.org/doc/9f3318/ [Accessed 8 November 2018]

450 See London Agreement of 8 August 1945, setting down the laws and procedures by which the Nuremburg trials were to be conducted

451 United Nations Charter and judgment of the Nuremberg Tribunal-History and Analysis: MemorandumSubmitted by the Secretary-General. Doc.A/CN.4/5 Anon.

452 See Interagency Working Group (IWG), Trial of the Major war criminals before the International Military Tribunal Nuremberg. Volume 1. Published at Nuremberg, Germany (1947)

453 Judgment of the International Military Tribunal for Nuremberg, 1 October 1946, Vol. 1. p. 249.

adopted after the crimes had already been committed.[454] The Tribunal responded to this criticism by making reference to The Hague Conventions for war crimes and the 1928 Kellogg-Briand Pact for crimes against peace.[455] Furthermore, the IMT argued that, instead of letting the Nazi crimes go unpunished, the interest of justice had to be prioritised over the principle of retroactivity for the sake of the victims.[456] This statement was especially significant with regard to the category of crimes against humanity for which there was little real precedent. The Tribunal, however, refused to prosecute some charges of war crimes after having knowledge of similar behaviour by British and American soldiers.[457]

The Nuremberg tribunal was also criticised on the basis of selective criminalisation.[458] In practice, the prosecutorial policy of the tribunal was drafted by Allied governments who indeed participated in the war whose outcome resulted in the establishment of the Tribunal.[459] Such direct involvement had significant impact on the selection process that summoned only German defendants given that the trials were driven by the Allies determination for vengeance and the need to oust the German leadership.[460] A Commission set up by the Allied Forces came up with a calculated strategy to systematically identify and compile a list of the German suspects charged for waging an

---

454 The principle of retroactivity in law forbids a statute and/or legal institution from imposing prosecution on offences committed before such a statute and/or legal institution came into force. For example, Tomuschat argue that the prosecutions at Nuremberg were based on *ex post facto* laws. Crimes Against Peace was introduced in the London Charter in 1945 to try German officers for offences committed before the Charter came into force. It is generally argued that such trials contradicted the *nullum crimen* principle since no prior legal text defining the appropriate criminal responsibilities for crimes against peace existed for which the German defendants could address their minds to. Hence, they were charged for an act that had not been criminalised before it was committed. See Tomuschat 2006 *JICJ*

455 The Kellogg–Briand Pact represented a bilateral treaty entered into between the US and France. The treaty challenged the settlement of international dispute using warfare. Previously, international law placed no restriction on warfare. Rather, states developed a system of network based on bilateral and multilateral treaties of non-aggression and alliance for the purpose of protecting themselves from attack and invasion

456 *France et al. v. Goering et al*, 22 IMT 203, 1946

457 *France et al. v. Goering et al*, 22 IMT 203, 1946; *France et al. v. Goering et al*; 13 ILR 203, 1946. See also Taylor *The Anatomy of the Nuremberg Trials* Anon

458 See DeGuzman 2012 *MJIL*

459 DeGuzman 2012 *MJIL*

460 See Teitel 2005 *CILJ*

aggressive war.[461] In December 1944, the Commission published a list of 712 German suspects, of which, 49 were deemed major war criminals.[462] The prosecution team, including the US prosecutor Telford Taylor later prioritized the offense of waging an aggressive war as a crime against peace and subsequently it became the foundation upon which the criminal jurisdiction of the Nuremberg Tribunal was crafted to prosecute and punish German defendants.[463]

Crimes against peace had been considered the major crime at Nuremberg for obvious reasons. First, the crime provided the foundation for the Allied to justify their involvement as an effort to suppress the war that was waged against the peace of Europe and the Pacific region.[464] From this premise, the important question "who started the war" became a tool against the German forces.[465] Secondly, crimes against peace formed the basis upon which the planners of the war were prosecuted as opposed to low-rank perpetrators who indeed committed mass atrocities.[466]

Besides the flaws listed above, the trials at Nuremberg were remarkably significant in the evolution of ICL as the precedent of individual criminal responsibility was laid down. The cumulative effects of the Nuremberg judgments motivated the international community through states and international organizations like the UN and the ICRC to initiate the codification and adoption of treaties aimed at enforcing international humanitarian norms.

In December 1946, the UN General Assembly in a unanimous vote, adopted Resolution 95(1) entitled "Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal".[467] The decision of the Assembly to adopt

---

461 Kochavi Prelude to Nuremberg 100

462 Kochavi Prelude to Nuremberg 100

463 See Taylor The Anatomy of the Nuremberg Trials 83

464 DeGuzman 2012 *MJIL*

465 DeGuzman 2012 *MJIL*

466 DeGuzman 2012 *MJIL*

467 See United Nations General Assembly Resolution 95(1) "Affirmation of the principles of international law recognised by the Charter of the Nuremberg Tribunal" Doc. A/RES/1/95 (1946). General Assembly resolution 95 (I) was adopted by the initiative of the United States delegation. The adoption of this resolution followed the judgment of 1 October 1946 by the International Military Tribunal ('IMT') at Nuremberg which sentenced twelve Nazi defendants to death and seven to periods of imprisonment ranging from ten years to life.

Resolution 95(1) was important for two main reasons. First, the Assembly considered the fact that the Nuremberg Tribunal had recognised already- established principles of international law as evident in its judgments.[468] Secondly, the Tribunal upheld these principles codified by the ILC, which is a subsidiary organ of the UN General Assembly.[469] By virtue of Resolution 95(1), the General Assembly confirmed that a number of general principles belonging to customary international law had been recognised by the Nuremberg Charter and judgment.[470] It was important therefore to incorporate such principles into a measure of codification by way of a "general codification of offences against the peace and security of mankind" or as an "international criminal code."[471]

2.5.1 Significance of the Nuremberg Tribunal

The London International Military Tribunal is significant in the history of international criminal law for obvious reasons. Article 1 of the London Charter that established the Tribunal invoked and enforced the principle of individual criminal responsibility in international law as it provided "for the trial of war criminals whose offences have no particular geographic location."[472] In essence the Charter clarified that the acceptance of criminal conduct under domestic legal systems did not bar its prosecution under international law.[473] The Charter further classified what became known as serious

---

468 Falk and Black The future of the International Legal order 304

469 Falk and Black The future of the International Legal order 304

470 United Nations General Assembly Resolution 95(1) "Affirmation of the principles of international law recognised by the Charter of the Nuremberg Tribunal" Doc. A/RES/1/95 (1946)

471 See Cassese *et al, International Criminal Law* (3rd ed.) 39

472 United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, 82 U.N.T.C. 280, available at: http://www.refworld.org/docid/47fdfb34d.html. Article 1 of the IMT-Charter which was annexed to the London Agreement further provides; "In pursuance of the Agreement signed on 8 August 1945, by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis".

473 See Article 1 of the London Agreement. In the same vein, Art. 27 of the Vienna Declaration on the Law of Treaties provide that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46 of the Declaration.

crimes into different sub-categories including; crimes against peace; war crimes; and crimes against humanity [only] if committed in an armed conflict.[474]

Article 7 of the Charter provided that the perpetrator's official capacity did not bar punishment, a complete denial of the concept of immunity under international law.[475] The Charter provided for punishment of crimes committed in the name of certain organisations: Punishment of membership in organisations whose criminal character was to be determined by the IMT and thereby lifting the veil of incorporation in international law.[476] In the premises, the IMT Charter is considered the genesis of individual criminal responsibility in international law.[477]

The Charter revolved around the notion that crimes against peace, war crimes and crimes against humanity called for individual criminal responsibility under international law. The Charter merely concur with the judgment at Nuremberg which stated clearly that "crimes against international law are committed by men not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[478] This was a milestone in the evolution of the nascent system of international criminal law.

2.6 THE TOKYO TRIALS

The Tokyo International Military Tribunal was established in 1946 with the mandate to prosecute Far Eastern criminals for "Crimes against Peace", "Conventional War Crimes" and "Crimes against Humanity" stated under Article 5 of the Tribunal's Charter."[479]

---

474 See Article 6 of the London Agreement

475 See Article 7 of the London Agreement. Article 8 of the Agreement further denied the defence of a superior order by stating; The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires

476 See Article 10 of the London Agreement

477 Gerhard *Principles of International Criminal Law* Cassese, Paola Gaeta and John R.W.D. Jones (eds.) 23.

478 See Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nuremberg (1947)

479 See Charter of the International Military Tribunal for the Far East, on the basis of directive from the Commander-in Chief of the Allied Forces (IMTFE Charter) (1946). Article 1., See also Mega *Judgement at Tokyo* 13., All Japanese Class A war criminals were tried by the International Military Tribunal for the Far East (IMTFE) in Tokyo. The prosecution team consisted of justices from eleven Allied nations: Australia, Canada, Republic of

Pursuant to the provisions of Article 5, the defendants at Tokyo were accused of the following: advancing a scheme of conquest that "contemplated and carried out ... murdering, maiming and ill-treating prisoners of war [and] civilian internees ... forcing them to labour under inhumane conditions ... plundering public and private properties, wantonly destroying cities, towns and villages beyond any justification of military necessity; committing mass murder, rape, pillage, brigandage, torture and other inhumane conducts upon the helpless civilian population of the over-run countries."[480] In a press release, the US Prosecutor Joseph Keenan commented: "War and treaty-breakers should be stripped of the glamour of national heroes and exposed as what they really are, ordinary murderers".[481]

The Tokyo International Tribunal operated under the direct command of prosecutors from different Allied countries as was the case with the Nuremberg proceedings. Out of the twenty-eight defendants, two died of natural causes during the trial.[482] One defendant suffered mental disorder and was sent to a psychiatric ward after which he was set free in 1948.[483] The remaining twenty five accused persons were found guilty of many counts and seven were sentenced to death by hanging, sixteen to life imprisonment and two to lesser terms of imprisonment.[484] All seven accused persons sentenced to death were found guilty of inciting mass atrocities, among other counts.[485] Three of the sixteen accused sentenced to life imprisonment died before 1950 while the remaining thirteen were paroled between 1954 and 1956 thereby spending less than eight years in jail for crimes committed during World War II.[486]

China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States of America. The Tokyo trial lasted from May 1946 to November 1948

480 Horwitz 1950 *IC*

481 See Piccigallo 1979 Available at http://www.archives.gov/iwg/japanese-war-crimes

482 See International Military Tribunal for the Far East 1948

483 See Piccigallo 1979 Available at http://www.archives.gov/iwg/japanese-war-crimes.

484 Charter of the International Military Tribunal for the Far East, on the basis of directive from the Commander-in Chief of the Allied Forces (IMTFE Charter) (1946)

485 Charter of the International Military Tribunal for the Far East, on the basis of directive from the Commander-in Chief of the Allied Forces (IMTFE Charter) (1946)

486 See *United States et al v. Araki Sadao et al* in The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East, with an Authoritative Commentary and Comprehensive Guide (2002)

The morality behind the Tokyo trials was indeed questionable given that the tribunal completely relied on the governments of Allied nations who had their strategies mapped out to advance a political rather than legal agenda.[487] Such selectivity applied at both the Nuremberg and Tokyo tribunals resulted in the notion of victor's justice as will be discussed hereinafter.

2.7 EMERGENCE OF VICTOR'S JUSTICE

The principle of sovereign immunity invoked at the *Treaty of Westphalia* of 1684 became a stumbling block to the growth of international law of armed conflict.[488] Heads of states subsequently invoked sovereign immunity from prosecution as a shield.[489] This principle was first challenged when the *Versailles Treaty* provided under Article 227 the authority for the creation of a special tribunal to try Kaiser Wilhelm II, the former German Emperor.[490] Even though the trial never materialised, the attempt marked a significant point of departure from the traditional belief that Heads of States were wholly immune from prosecution by states other than their own.[491]

The new approach to international criminal justice gained strength in the course of its development as the Allied Powers took the general position after World War I that the political will of the world's major powers was and still is essential to the enforcement of international humanitarian norms.[492] This among other factors, became the *raison d'être* for the institution of the Nuremberg and Tokyo Tribunals that punished those who were considered to have orchestrated World War II.[493] Robert M. Jackson, US Supreme Court Justice and US Chief Representative at Nuremberg commented:

---

487 DeGuzman 2012 *MJIL*

488 See The *Treaty of Westphalia* Signed 15May-24October at Osnabruck and Minister West, (1648)., The Treaty signed by 109 parties marked the end of the Thirty Years' War (1618-1648) between Spain and Dutch Republic, with Spain formally recognizing the independence of the Dutch Republic

489 Bassiouni Historical Survey 7

490 The *Treaty of Versailles* signed and open for ratification on 28 June 1919 and came into force (1920). , Article 227 reads in part: "The Allied and Associated Powers publicly arraign William II

491 See The Inter-Allied Declaration Signed at St. James Palace, London, (1942) [Therein after], the St. James Declaration.

492 Bassiouni Historical Survey 7

493 See Minear *Victors' Justice* 75-76. Under Article 2 of the Nuremberg Tribunal's Charter,

> That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason … We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.[494]

After World War II, each of the "Big Four" nations appointed a chief prosecutor at Nuremberg. The prosecutors were responsible for investigating and prosecuting major war criminals.[495] The Supreme Commander of the Far East, General MacArthur appointed a tribunal of a similar character to that of Nuremberg.[496] The Tribunal comprised eleven nations that had been at war with Japan with the aim of punishing Japanese soldiers. Except for a few variations, the Charter governing the Tokyo Tribunal was similar to Nuremberg, which punished German officers.[497] Both tribunals represented a form of transitional justice mechanism designed to address the challenges of the post-World War II era with the noble objectives of enforcing international criminal justice.[498] As a US government policy paper of October 25, 1945 puts it,

> Any such plan [for an international military tribunal for the Far East] should provide for the use of rules of procedures and the application of principles in accord with those adopted for use by the International Military Tribunal for Europe established by the Agreement executed 8th August 1945, except where change is necessitated by differing circumstances in the Far East.[499]

'The Tribunal shall consist of no less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India and the Commonwealth of the Philippines'. See also Cassese *International Criminal Law* 332

494 See Barnett The International Criminal Court 4

495 Barnett The International Criminal Court 4

496 Ferencz 1997 *PILR*

497 See Kaufman 2010 *JMLR*. Even though the Tribunals exhibited similar characteristics, minor differences still featured with regards to the nature of the crimes and their mode of occurrence for example, the definition of "crimes against peace" was altered to make it applicable to "declared or undeclared" war, as Japan had not made any formal declaration and the defendants could have argued that, technically, Japan was not at war

498 See Phil Clark *et al*, *Tensions in Transitional Justice* (Phil Clark and Zachary D. Kaufman eds.) 132., See also Kaufman 2005 *SAIR*

499 Policy of the United States in Regard to the Apprehension and Punishment of War

Although both tribunals played important roles in enforcing international criminal justice, one question remained: Whose justice was it? "Whose justice" was a question in the spotlight considering the fact that the Allied Powers were neither prosecuted nor their citizens brought to justice. The proceedings only targeted defeated nations and common to the Nuremberg and Tokyo tribunals were the following: No code of conduct and specific rules of evidence were available to the lawyers involved in the proceedings and the prosecutors were appointed by the victorious powers whose political goals were hardly obscured.[500] Wallach points out that whereas the defendants were fairly treated in most instances, the flexibility of the rules left open the possibility of abuse, which did occur.[501] In this regard, reference was made to the *"Malmedy Massacre Case"* involving the execution of American prisoners-of-war by German soldiers.[502] The case of *USA v. Valentin Bersin et al*,[503] was held in May-July 1946 to try German Waffen soldiers accused of the Malmedy Massacre of December 17, 1944. Lieutenant Colonel Burton Elis appeared before the US Senate to testify that he conducted mock trials with defendants including some who were induced into believing that they had actually been convicted in an attempt to evoke incriminating statements.[504]

In a similar vein, the Nuremberg and Tokyo tribunals promoted the rule of law internationally and are commonly referred to as the antecedents of modern international criminal justice for establishing a "moral legacy."[505] However, the systems remained

---

Criminals in the Far East (1945), reprinted in The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal For The Far East in Twenty-Two Volumes xv (R. John Pritchard & Sonia Magbanua Zaide eds.,) 1981

500 The London Charter for Nuremberg stated that the tribunal would not be bound by technical rules of evidence. With amazing candour, President Webb of the Tokyo Tribunal stated in respect of judicial decisions on the admissibility of evidence: "The decision of the Court will vary with its constitution from day to day." For a detailed review of the rules of procedure and evidence, or lack thereof, see Wallach 1999 *CJTL*

501 Wallach 1999 *CJTL*

502 See *United States v. Valentin Bersin et al,* Case No. 000-006-0024referred to as "The Malmedy Massacre Trial" 1946. The Trial was held between May-July 1946 in the Dachau Concentration Camp to try the German Waffen-SS Soldiers accused of the Malmedy Massacre of December 17, 1944. On July 16, 1946, the verdict was delivered on 73 defendants among which, 43 were sentenced to death, 22 sentenced to life imprisonment, 2 sentenced to 20 years imprisonment, 1 sentenced to 15 years imprisonment and 5 sentenced to 10 years imprisonment

503 See *USA v. Valentin Bersin et al*, Case No. 000-006-0024, July 1946.

504 Wallach 1999 *CJTL*

505 Bassiouni Historical Survey 7

imperfect examples from an international perspective.[506] Although judges and prosecutors were drawn from more than one country, the consequence of which the notion of universal jurisdiction was invoked, they were in essence military courts created by the victors with jurisdiction founded on the basis of unconditional surrender.[507] The Tribunal at Tokyo was considered by the Japanese and other observers to be more of vengeance than justice.[508] Moreover, acts of inhumanity were also committed by US soldiers with reference to the atomic bombs dropped on Hiroshima and Nagasaki. In this light, the Tokyo Tribunal was considered America's hypocrisy as it selectively prosecuted Japanese soldiers, thereby advancing the so called victor's justice agenda.[509]

Despite the prosecutor's statements at Nuremberg, including the tribunal's commitment to bring an end to a culture of impunity for serious crimes in international law, the question of selective prosecutions continued to challenge the credibility of international criminal jurisprudence as evident post-Nuremberg tribunals discussed above. The debates concerning the AU's allegation of selective prosecution by the ICC would be explored in subsequent chapters, but before delving into such details, it is important to reflect on the problem against which the research is conducted.[510]

The Dachau trials were also criticized for advancing victor's justice given that the trial process was dominated by USA military officials and their quest to punish the Nazi regime.[511] Unlike the Nuremberg trials that prosecuted the German war criminals under the jurisdiction of the four Allied occupying powers, the trials at Dachau were held exclusively by the USA military officials under the command of the chief prosecutor William Denson, who was also a USA army lawyer.[512] The authority to commence with

---

506 Sunga The Emerging System of International Criminal Law 281

507 For example, with regards to the Tribunal at Nuremberg, the four occupying powers were granted "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal, or local government or authority": Declaration concerning the defeat of Germany, Department of State Bulletin, Volume 12, 10 June (1945). See also Sunga *The Emerging System of International Criminal Law* 281

508 Bassiouni Historical Survey 7

509 See Ferencz 1997 *PILR*

510 For details see Joshua G, *Justice at Dachau* 400

511 Joshua G, *Justice at Dachau* 400

512 See Joshua G, *Justice at Dachau* 400

the six major Nordhausen trials at Dachau[513] stemmed from several sources, including the Declaration of German Atrocities (Moscow Declaration) of November 1943.[514] The Declaration stated that "the Allies were determined to ferret out and bring to justice all Axis war criminals after hostilities".[515] According to the USA's army investigation and trial records of war criminals, USA army military courts and commissions in Germany tried a total of 1,672 defendants in 489 cases from 1945 to 1958.[516] Such trials merely promoted the culture of selective morality in the pursuit of international criminal justice.

2.8 POST-NUREMBERG DEVELOPMENTS

Control Council Law No. 10 was adopted by the Allied Powers in December 1945 as a modified version of the IMT Charter.[517] The new document provided the legal foundation for subsequent trials that were run by the victorious Allies, including trials conducted by German Courts in the years that follow.[518] The document also serves as a form of domestic legislation applicable to the prosecution of Germans by courts with civil authorities. Control Council Law No. 10 borrowed the definition of crimes against humanity from the Charter of the Nuremberg Tribunal but fail to establish a nexus between crimes against humanity and the existence of a state of war as stipulated

---

513 The Nordhausen trials at Dachau include, *USA v. Kurt Andrae et al.* (and related cases) April 27, 1945-June 11, 1958; *USA v. Michail Grebinski,* Case No. 000-Nordhausen-1 of 22-23 October, 1947; *USA v. Albert Mueller*, Case No. 000-Nordhausen-2 of 1 December 1947; *USA v. Georg Finkenzeller, Case No. 000-Nordhausen-3 of 10 November, 1947*; *USA v. Philipp Klein*, Case No. 000-Nordhausen-5 of 1 December 1947 and *USA v. Stefan Palko*, Case No. 000-Nordhausen-6 of 3-12 December 1947.

514 Moscow Declaration on atrocities (1 November 1943)

515 United States Army Investigation and Trial Records of war criminals, *USA v. Kurt Andrae et al.* (and related cases) April 27, 1945-June 11, 1958.

516 See United States Army Investigation and Trial Records of war criminals, *USA v. Kurt Andrae et al.* (and related cases) April 27, 1945-June 11, 1958. The records were reproduced from the Records of the Office of the Judge Advocate General (Army) Record Group 153 and Record of USA Army Commands, 1942-Record Group 338

517 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, 31 January (1946)

518 Boas G et al, International Criminal Law 148

under the IMT Charter.[519] It is for this reason that Control Council Law No. 10 was considered a transformed or modified version of the Nuremberg Tribunal.[520]

Contemporary legal discourse show that just like the crime of genocide, crimes against humanity must not necessarily be linked to a state of war to have materialized.[521] Both categories of crimes belong to the same '*genus*' and what justifies their commission is the intention to commit such a mischief against humanity.[522] Such evolving concepts facilitated the prosecution for pre-1939 crimes committed against German civilians, including persecution of the Jews and euthanasia of the disabled.[523]

Other important trials held in accordance with Control Council Law No. 10 in the period 1946-1948 by American Military Tribunals focused on groups of defendants such as judges, doctors, bureaucrats and military leaders.[524] A few of these are the cases of *USA v. Karl Brandt et al* (Doctors' Trial)[525] and *USA v. Erhard Milch*.[526] These trials made significant contributions towards enforcing international criminal norms after Nuremberg.

2.8.1 The genesis of the law on Genocide

Because the term 'genocide' was not contained in the Statute of the Nuremberg Tribunal, the Nazi war criminals were tried for 'crimes against humanity' for heinous

---

519 Jose Doria et al, The legal regim of the International Criminal Court: Essays in honour of *Professor Igor Blishchenko.* Martinus Ninjhoff Publishers Netherlands, 2009. p. 58. See also Article 2(c) of Allied Control Council Law No. 10

520 Taylor Final Report of the Secretary Anon

521 Robinson 1999 AJIL 43-57

522 Hwang Defining Crime Against Humanity 457-504

523 Lippman 1992 IICLR

524 Frank *The US War Crimes Trial Program in Germany* 29

525 See *USA v. Karl Brandt* (Doctors Trial) also referred to as *The Medical Case* 1946. The case heard in the period 1946-47 against twenty-three doctors and administrators accused of organizing and participating in war crimes and crimes against humanity in the form of medical experiments and medical procedures inflicted on prisoners and civilians

526 See *USA v. Erhard Milch* also referred to as *The Milch Case* 1946. The acts of the accused were said to constitute violations of the international conventions, particularly of Articles 4, 5, 6, 7, 46 and 52 of the 1907 Hague Regulations and Articles 2, 3, 4, 6 and 31 of the Prisoner-of-War Convention (Geneva, 1929), the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal panel laws of the countries in which such crimes were committed and Article II of Control Council Law No. 10

offences committed against the Jewish people in Europe.[527] This gap in international criminal law generated efforts by the General Assembly of the United Nations to push for the development of the law further in this arena. In December 1946, the General Assembly adopted Resolution 96(1) declaring genocide a crime against international law and calling for the preparation of a convention on the subject.[528] In 1948, the General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide.[529]

Despite significant developments in international law, the question of selective prosecutions continued to challenge the credibility of international criminal jurisprudence as evident in post-Nuremberg tribunals discussed above.[530] The General Assembly adopted Resolution 260 B (III) calling upon the International Law Commission (ILC) to prepare a statute for an international criminal tribunal as mentioned in Article VI of the 1948 Convention.[531] Before detailing the work of the ILC, it is important to throw light on the Geneva Conventions of 1949 regulating the conduct of combatants in the battle field.

2.8.2 The Geneva Conventions of 1949 regulating the conduct of warfare

Prior to the works of the ILC, a global outcry for strengthening the international criminal justice system gave birth to the four Geneva Conventions of 1949.[532] The Conventions

---

527 Horvitz and Catherwood Encyclopedia of War Crimes and Genocide 463.

528 United Nations General Assembly Resolution 96(1), Resolution adopted by the General Assembly during its first session on 24 January (1946) on the establishment of a commission to deal with the crime of Genocide.

529 Convention on the Prevention and Punishment of the Crime of Genocide adopted by resolution 260 (III) A of the United Nations General Assembly on 9 December (1948) [Thereinafter], The Genocide Convention.

530 Schabas *An introduction* 33

531 UN General Assembly Resolution 260 B (III) of 1948. Study by the International Law Commission on the Qeustion of an International Criminal Tribunal. Doc.A/RES/3/260 B

532 See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as Geneva Convention I of 1949]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 6 U.S.T. 3217, T.I.A.S. No. 3368, 75 U.N.T.S. 85 [hereinafter cited as Geneva Convention II of 1949]; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as Geneva Convention III of 1949]; Geneva Convention Relative to the Protection of Civilians Persons in Time of War of 12 August 1949, 6 U.S.T.

clarified long standing warfare practices established on the basis of military necessity.[533] They maintained that violence and destruction that were superfluous to actual military necessity were not only immoral and wasteful of scarce resources but were also counter-productive and directly in contradiction to the attainment of the political objectives on which the functions of the military force were based.[534] Therefore, the Conventions paved the way for the ILC to clearly define and characterise what elements constituted international crimes as currently stipulated under the Rome Statute.

However, the call to show restraint on the methods and means of warfare had been a recurring demand throughout history. Sun Tzu's classic, *The Art of War* noted in the fourth century BC that there was an obligation to care for the wounded and prisoners-of-war.[535] He further observed that atrocities only fuelled the enemy's fury, stiffened their resistance and increased their combat techniques instead of making them powerless.[536] By 634 AD, Caliph Abu Bakr inspired the Muslim army that invaded Christian Syria to commit certain rules to heart, including the following;

> Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives.[537]

Shakespeare aligns Caliph Abu Bakr's view to that of Henry V who instructed his army on the march to Agincourt: "[W]e give express charge, that in our marches through the country, there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language; for when lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner".[538]

Rodgers William further observed the patterns of war and wrote in 1923:

3516, T.I.A.S. No. 3365, 75 U.N.T.S 287 [hereinafter cited as Geneva Convention IV of 1949] [all four hereinafter collectively cited as the Geneva Conventions of 1949]

533 Solf 1986 *AUILR*

534 See Geneva Conventions of 1949

535 Sun Tzu 1986 *AUILR*

536 Sun Tzu 1986 *AUILR*

537 Khadduri 1986 *AUILR*

538 See Shakespeare W, The Life of Henry the Fifth, act III, sc. vi (1599)

> It pleases us to call rules of war humanitarian, but really they fulfil a double object: as toward the individual enemy, these restrictive rules are humane; as towards one's own organized forces these restrictive [rules] promote discipline and efficiency, and so help to shorten war through earlier and more complete victory over the hostile state**. .** [T]hus these so called humane rules are advantageous simultaneously to both sides.[539]

Besides the humanitarian school of thought mentioned above, ancient societies were often challenged by a category of conflicts that defied morality, humanity, family bonds and societal unity.[540] They were characterised as war of neighbour against neighbour, brother against brother, father against son and most of all nations against nations.[541] They were and still are called by many names such as rebellion, terrorism, revolutions and insurgencies of many kinds. Whatever the name associated with such practices, they all exhibited common characteristics, including people being murdered, wounded and sometimes captured. Most often the question arose as to what was the legal status of combatants who engaged in the battle front with their fellow countrymen? What was the position of prisoners captured as a result of such conflicts? Were they covered by any legal framework against ill-treatment?

In a quest to provide answers to these questions, 59 nations assembled in Geneva in 1949 to create and set up an improved set of rules that would provide a greater measure of protection for prisoners of war, wounded prisoners, non-military personnel and civilians not engaged in any form of hostility. Such rules were referred to as the Geneva Conventions on the Laws and Customs of War and have since been adopted by almost all nations of the world. Before 1949 the early Geneva Convention of 1864[542] became the first multi-lateral treaty governing the conduct of warfare. Such laws resulted in the protection of wounded armies in the battle field, medical personnel, units and transports. With the inputs of the ICRC, the laws of the 1864 Geneva Convention were updated in 1899, 1907, 1929, 1949 and 1977.[543]

---

539 Rodgers 1923 *AJIL*

540 See Solf 1986 *AUILR*.; Judith *Necessity* 41

541 Sivakumaran 2011 *EJIL*

542 Geneva Convention for the Amelioration of the Condition of the Wounded and Armies in the Field. 940, T.S. No. 377. (1864)

543 See International Committee of the Red Cross, International Red Cross Handbook 407

Contained in the 1864 Conventions were rules regulating the conduct of warfare between two or more nations as observed in World War II. Also, the Conventions covered specific rules designed to protect and prohibit inhuman treatment of prisoners-of-war, helpless civilians and populations under captivity.[544] Those who chose to disregard the Conventions were subject to prosecution at the end of hostilities, a precedent that was already established by a series of war crimes trials at the 1945 Nuremberg proceedings. Therefore, the new Conventions were designed to uphold a greater measure of protection and humane treatment for prisoners-of-war and other helpless victims of armed conflicts.

Even though the Conventions covered many aspects of international armed conflicts, the question remained:[545] What was the fate of prisoners of internal armed conflict fought by civilised nations where the actions were contained within a nation's borders? What was their protection? Such questions received answers from Article 3 common to the four Geneva Conventions of 1949.[546]

Generally, it was acceptable that international humanitarian law related to non-international armed conflicts, particularly the contents of Article 3 common to the Geneva Conventions of 1949 alongside Protocol II where necessary, applied to parties to a conflict whether states or non-state armed groups.[547] Also, it was a generally acceptable practice that, rules of customary international law related to non-international armed conflicts including the principles of distinction and proportionality were applicable to non-state armed groups.[548] Such was the case for the simple explanation that customary rules were fast becoming similar in both international and

---

(1983) (discussing the Statutes of the International Red Cross which set out the organizational structure of the Red Cross). For further readings, see Solf 1986 *AUILR*.; Bettez 1988 *RJRUSIDS*

544 See Common Article 3 of the Geneva Conventions of 1949

545 See Clapham 2010 http//:papers,ssrn.com.

546 Article 3 common to the Geneva Conventions of 1949 relates to the protection of civilians in a non-international armed conflict. The Article provides a protective framework that guides combatants in non-international armed conflicts to differentiate combat forces from persons taking no active part in the conflict

547 See Report of the United Nations Human Rights Office of the High Commission on the "International Legal Protection of Human Rights in Armed Conflicts." (2011)

548 Report of the United Nations Human Rights Office of the High Commission on the "International Legal Protection of Human Rights in Armed Conflicts." (2011)

non-international armed conflicts. In resolution 1265[549] of 1999, the Security Council on the one hand recognized that states bore the primary responsibility of adopting feasible measures that provided for civilian protection. Furthermore, the Council demanded that parties to armed conflicts must strictly adhere to legal obligations arising from international humanitarian law, human rights and refugee law.

In *the Prosecutor v. Anto Furundžija*, the Trial Chamber of the ICTY emphasized that the general principle of respect for human dignity was the "basic underpinning" of both human rights law and international humanitarian law.[550] The Inter-American Commission on Human Rights, in *Juan Carlos Abella v. Argentina*,[551] stated that its authority to apply international humanitarian law could be derived from the overlap between norms of the American Convention on Human Rights and the Geneva Conventions. The Commission stated that the "provisions of common Article 3 are pure human rights law […] Article 3 basically requires the state to do, in large measure, what it is already legally obliged to do under the American Convention".[552]

2.8.3 The work of the International Law Commission

The ILC[553] represents a body of experts charged with the responsibility of ensuring the progressive development and codification of International Law.[554] Article VI of the Genocide Convention provided the mandate upon which the statute of an international criminal court was derived. However, the General Assembly also instructed the Commission to prepare what was known as the 'Nuremberg Principles' and the 'Code of Crimes Against the Peace and Security of Mankind'.[555] The Commission completed the

---

549 See United Nations Security Council Resolution 1265 Adopted by the Security Council at its 4046th meeting, (1999)

550 See *The Prosecutor v. Anto Furundžija,* IT-95-17/1-T, 1998. para. 183

551 *Juan Carlos Abella v. Argentina*, Inter-American Commission of Human Rights case 11.137, Report No. 55/97. p. 23.

552 *Juan Carlos Abella v. Argentina*, Inter-American Commission of Human Rights case 11.137, Report No. 55/97. p. 23

553 Recognising the need for giving effect to Article 13 paragraph 1 (a) of the Charter of the United Nations stipulating that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification, the Assembly adopted resolution 174(II) to fulfil its obligation. See United Nations General Assembly Resolution 174(II) adopted in its hundred and twenty-third plenary meeting (1947)

554 Helfer and Meyer 2015 http://ssrn.com/abstract=2585608

555 Draft Code of Offences against the Peace and Security of Mankind. Text adopted by the

former task in 1950 but the latter took a considerably longer period. Therefore one can presumably conclude that since the Commission had the duty to ensure the development of international law, such duties as prescribed by the General Assembly could be reasoned by analogy to have been rooted in domestic laws, including the definitions of crimes and general principles found in domestic criminal codes alongside their procedural framework.[556] It is for this reason that the Commission's work proved to be very cumbersome.

The ILC also adopted a report in 1950 entitled "Principles of International law recognised in the Charter and Judgment of the Nuremberg Tribunal".[557] However, the Commission did not pay attention to whether such principles belonged to the positive aspects of international law for which they could become norm-generating or not.[558] In the opinion of the Commission, such questions had already been dealt with by the UN General Assembly Resolution 95(1).[559] Therefore, the principles adopted by the Commission were considered as already established international law principles recognised by civilised nations.[560] Principle 1 of the ILC's report enforces the principle of individual criminal responsibility by stating "any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment."[561] The introductory phrase "any person" generates a sense of individual

---

International Law Commission at its sixth session, in 1945, and submitted to the General Assembly as a part of the commission's report covering the work of that session at para. 54. The report which also contained commentaries on some of the draft articles appeared in Yearbook of The International Law Commission, 1954, vol. II. The commentaries on the remaining draft article are reported in the Yearbook of the International Law Commission, 1951, vol. II. at para. 59ff

556 Bassiouni Crimes Against Humanity 171

557 See Principles of International law recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal with commentaries. Text adopted by the International Law Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 97). The report, which also contains commentaries on the principles, appears in *Yearbook of the International Law Commission, 1950*, vol. II

558 Sunga The Emerging system of International Criminal Law 8

559 Sunga The Emerging system of International Criminal Law 8

560 Sunga The Emerging system of International Criminal Law 8

561 See principle I of the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal

criminal responsibility regardless of official capacity, thereby excluding the defence of superior orders.[562]

Principle II provided that the law remained unchanged even if the offence in question did not amount to a crime under domestic law.[563] Therefore, the national legal framework of a country cannot shield a perpetrator of international crimes from international prosecution. Also, a person who takes action in his capacity as a head of state or government official would in all circumstances be treated equally as he who acted under the authority of a superior official as indicated above, and neither categories of persons would be relieved from criminal responsibility should it arise.[564] These principles are in line with Articles 7 and 8 of the Nuremberg Charter.[565] Principle IV of the ILC document provides a modified approach by stating that the individual will not be relieved of responsibility "provided a moral choice was in fact possible to him."[566] The emerging question of a "moral choice" became significant yet controversial as subsequent international tribunals had to decide whether or not the accused indeed had a "moral choice" not to comply with an order given by a superior.[567]

Principle VI simply codifies the three categories of crimes established under Article 6 of the Nuremberg Charter.[568] What the London Agreement considered to be "crimes coming within the Tribunal" became known under the ILC's document as "crimes under international law." The principle therefore represents the core of a possible international criminal code.[569] It follows that the enforcement of the Nuremberg Principles by the

---

562 See Badar The Concept of Mens Rea 268

563 See principle II of the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.

564 See principle III of the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.

565 Article 7 of the Nuremberg Charter provides that "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." And Article 8 is to the effect that "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

566 See principle IV of the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.

567 Takemura International Human Rights 3

568 See principle IV of the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal

569 Article 6 of the Nuremberg Charter has since come to represent general international

1946 General Assembly Resolution and other subsequent formulations by the ILC marked important steps towards the establishment of a legal order that invokes individual criminal responsibility in international law.[570]

Besides the Commission's work, the General Assembly established a Committee to assist and possibly contribute in preparing the statute of an international criminal court.[571] The Committee, whose final report and draft statute was submitted in 1952 comprised of seventeen member states.[572] The General Assembly further established an interim committee to review the draft statute in the light of comments made by Member States and the report of the committee was submitted to the General Assembly in 1954.[573] On their part, the ILC also attained significant progress on its draft code and actually submitted a proposal in 1954.[574] After these rigours, the General Assembly at a later stage suspended the mandate of the Commission to allow for the outstanding task of defining the crime of aggression.[575]

In further compliance with a series of events that accompanied the drafting of the Rome Statute, the General Assembly in 1974 adopted a definition of aggression[576] and re-employed the ILC to review the work on its draft code of crimes in 1981.[577] The Commission assigned a Special Rapporteur to produce reports on a yearly basis concerning aspects of the draft code and the process lasted for more than a decade. Accordingly, a number of questions, including the definition of crimes, criminal participation, defences and penalties were address by a combination of reports from

---

law." See Shaw *International Law* 471.; See also, Brownlie *Principles of Public* International Law 562

570 Sunga The Emerging system of International Criminal Law 8

571 See United Nations General Assembly resolution 260 B (III) of 9 December 1948 on the Establishment of a Committee to contribute in drafting the Statute of the International Criminal Court. (1948)

572 Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2135 (1952)

573 Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2645 (1954)

574 Johnson 1955 *ICLQ*

575 See Draft code of offences against the peace and security of mankind, 504th plenary meeting, 4 December 1954. GA Res. 897 (IX) (1954)

576 See United Nations General Assembly Resolution. 3314 (XXIX) (1974). According to the Definition, "aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations".

577 See United Nations General Assembly Resolution 36/106 (1981)

within the Commission. In 1991, the Commission adopted a revised version of the 1954 draft code and forwarded it to the Member States for possible inputs.[578]

However, the code did not expressly address the question of an international jurisdiction. However, such aspect of the work was initiated in 1989, the year of the fall of the Berlin Wall. Among the Caribbean States plagued by drug issues and related cross-border crimes, the situation obtaining in Trinidad and Tobago forced the General Assembly to initiate a resolution to combat such criminal activities.[579] The Resolution served the purpose of directing the ILC to consider the subject of an international criminal court within the context of its work on the draft code of crimes.[580] An initial presentation on the subject was made in 1992 followed by a draft statute prepared by the Commission under the directives of the Special Rapporteur in 1993. The Commission submitted the final version of its draft statute for an international criminal court to the General Assembly of the UN in 1994.[581]

The 1994 draft statute of the ILC focused more on procedural and organizational matters, failing to address the sensitive question of defining the crimes prohibited or punishable under the Statute including their associated legal principles as contained in the code. For this reason, the Commission's final draft of on the 'Code of Crimes against the Peace and Security of Mankind' was adopted in 1996.[582] However, the 1994 draft statute and the draft code of 1996 played a foundational role in the preparation of the Statute of the ICC.

The draft code of the ILC actually became the foundation upon which the Rome Statute was drafted at the Rome Diplomatic Conference in 1998.[583] The Conference was attended by a considerable number of states who pledged their loyal support to ensure the existence of a permanent International Criminal Court that finally came into force in

---

578 See Crawford The International Law Commission's Draft Statute 404

579 See United Nations General Assembly Resolution 44/89

580 See United Nations General Assembly Resolution 44/89

581 See Report of the Internal Law Commission on the work of its Forty-Sixth Session, UN Doc. A/49/10, Chapter II, (1994)

582 John and Jones 1997 *EJIL*.; McCormack and Simpson, "The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions", 5 *Criminal Law Forum* 1, (1994)

583 Helfer and Meyer 2015 http://ssrn.com/abstract=2585608

2002.[584] It is worth noting that continuing threats to international and regional peace and security pushed the General Assembly of the UN to adopt alternative measures alongside the work of the Commission before the birth of the ICC. Such measures were directed towards addressing regional conflicts that necessitated the birth of *ad hoc* tribunals.[585]

2.8.4 Ad hoc tribunals

Amongst the regional tribunals established by the UN Security Council on an *ad hoc* basis, the ICTY represented the first precedent of war crimes trials after the Nuremberg Trials. The dawn of 1991 saw related discussions for the establishment of a tribunal in Europe to try Saddam Hussein, the former president of Iraq, and other Iraqi leaders after the Gulf War.[586] Such discussions became more engaged in 1992 as the Bosnian war continued to rage on. In response to these catastrophes, the UN Security Council established a Commission of Experts who subsequently uncovered a chain of continuing war crimes and crimes against humanity being perpetrated in the conflict in the Balkans.[587] The Security Council therefore called upon the General Assembly to adopt a resolution providing for the creation of an *ad hoc* tribunal in the Former Yugoslavia.[588] The proposal was approved followed by a draft statute prepared by the rapporteurs appointed under the Moscow Human Dimension Mechanism of the Conference on Security and Cooperation in Europe.[589]

The Security Council in February 1993 established a tribunal with the mandate to prosecute persons responsible for serious crimes under international law committed in the territory of the Former Yugoslavia since 1991.[590] The Council further adopted Resolution 827 to approve a draft statute proposed by the Secretary General of the UN. According to the statute, the tribunal was created to apply rules of international

---

584 Schabas An introduction 1
585 Nagan 1995 *DJCIL*
586 Nagan 1995 *DJCIL*
587 See United Nation Security Council Doc.S/1994/674
588 See United Nations Sesurity Council Resolution 808 (1993). The resolution established the International Criminal Tribunal for the Former Yugoslavia to try the perpetrators of war crimes committed in the territory
589 See Morris and Scharf *An Insider's Guide* 21
590 United Nations Security Council Resolution 808 (1993)

humanitarian law that seemed 'beyond any doubt part of customary law'.[591] The statute in its initial stage was defective as to what constituted a crime within the context of the tribunal; therefore it merely borrowed the code of crimes from the work of the ILC.[592] The combined effects of these two instruments defined the crimes and established appropriate legal procedures that were subsequently applied by the Court. The tribunal had had territorial jurisdiction over the Former Yugoslavia with the mandate to prosecute offences committed in the territory since 1991.[593]

In the case of *Prosecutor v. Slobodan Milosevic*[594] the former President of Yugoslavia and Serbian Military Leader, the defendant was accused in line with Articles 7(1) and (3) of the Statute of the ICTY and subsequently charged with committing crimes against humanity and war crimes in Kosovo. Although the accused hastily declared his refusal to recognise the Tribunal and his intention not to appoint a defence counsel despite the availability of lawyers who were ready to identify themselves with the famous case, the Tribunal went on to clarify that the appointment of three *amicus curiae* was 'not to represent the accused but to assist in the proper determination of the case.'[595] On October 8, 2001, a second indictment against the accused, charging him with crimes against humanity and war crimes committed in Croatia, was confirmed.[596] The fight against impunity grew even stronger as genocide charges concerning Bosnia were confirmed against the accused on 22 November 2001.[597] Despite such developments, the accused died in his prison cell on 11 March 2006 the consequence of which his trial was never concluded.[598]

---

591 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993)

592 Schabas An introduction 5

593 United Nations Security Council Resolution 808 (1993)

594 See *Prosecutor v. Slobodan Milosevic et al*, IT-99-37-PT. 1999

595 The Registrar appointed a team of experienced international lawyers as *amicus curiae* to assist the Trial Chamber in determining the proper outcome of the case. See Press Release of the Registry, CC/P.I.S./617e, The Hague, 6 September 2001

596 See *Prosecutor v. Slobodan Milosevic et al,* IT-01-50-PT, 8 October 2001. Judge Rodrigues confirms indictment charging Slobodan Milosevic for crimes committed in Croatia. See Press Release of the Chambers, JL/.I.S./627e, The Hague, 9 October 2001

597 See *Prosecutor v. Slobodan Milosevic et al,* IT-01-51-PT, 22 November 2001. See also McDonald *The Year in Review* 255

598 See Report of the death of President Slobodan Milosevic, ICTY 30 May 2006, para. 4. Archived 24 Decenber 2016 at the Wayback Machine. [Accessed 9 November 2018]

Besides President Milosevic, other defendants were tried before the ICTY, including Ratko Mladic. In his role as a general in the Yugoslavia People's Army and the Chief of Staff of the Army of Republika Srpska, Mladic was charged and subsequently convicted for committing a number of crimes, including crimes against humanity, particularly in connection with the Srebrenica massacre and Siege of Sarajevo.[599] Based on the numerous trials before the Tribunal, the Prosecutor Carla Del Ponte stated that the ICTY marked an important milestone for international criminal justice.[600]

In response to Rwanda's genocide in 1992-3, the Security Council in 1994 voted for the creation of a second *ad hoc* tribunal in Rwanda.[601] The ICTR became the first international tribunal to deliver a verdict against persons responsible for committing the crime of genocide and also it was the first institution to recognise rape as a means of perpetrating genocide.[602] In the *Prosecutor v. Jean Paul Akayesu,*[603] the accused was found guilty and subsequently sentenced to life imprisonment for the crime of genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II.

Although the ICTY and ICTR were designed to achieve different goals, they shared common characteristics including the fact that both structures had the same prosecutor and reflected the same composition at the Appeal Chamber.[604] Their jurisdictions and mode of operation made historic progress in the development of international humanitarian law.[605] To mention a few, rape and enslavement, for example, had been recognised as crimes against humanity under the jurisdiction of the ICTY,[606] including the fact that a head of state was indicted while still in office with reference to the

---

599 See *The Prosecuto v. Ratko Mladic*, ICTY judgment of 23 November 2017

600 See Press Release of the Registry, CC/P.I.S./597e, The Hague, 29 June (2001). See also statement of Carla Del Ponte, Press Release of the office of the Prosecutor, F.H./P.I.S./598e, The Hague, 29 June (2001)

601 United Nations Security Council Resolution 955 (1994)

602 See Russel-Brown 2003 *BJIL* Issue 2, 2003. p. 350-374

603 See *Prosecutor v. Jean Paul Akayesu,* ICTR-96-4-T. 1998

604 See UN Doc. S/RES/1329 (2000)

605 Yacoubian 2003 *WA*

606 See *The Prosecutor v. Dragoljub Kunavac, Radomir Kovac, and Zoran Vukovic,* IT-96-23, 2001.

Prosecutor v. Slobodan Milosovic.[607] Also, it is interesting to note that some indicted persons voluntarily surrendered to the ICTY.[608] Observers became more amazed when the former Prime Minister *Jean Kambanda* of Rwanda pleaded guilty to the crime of genocide, admitting his role in the murder of more than half a million people.[609] The decision of the ICTR against *Akayesu* in 1998 became the first conviction by an international tribunal for the crime of genocide.[610]

Unlike previous international tribunals, the ICTY and ICTR adopted a more critical and detailed approach in setting out the functions and duties of a prosecutor. At Nuremberg, prosecutors were made up of separate national teams of organised military lawyers with shared assumptions about legal and procedural matters.[611] In the case of the latter tribunals, the prosecutor's team at the ICTY and ICTR consisted of lawyers from diverse legal backgrounds and justice systems. The ICTY's Chief Prosecutor was appointed by the UN Security Council for a term of four years as an independent entity free from any instructions from the national government.[612] Although the Prosecutors' Office of the ICTY was distinguished from the tribunal itself, any proposed indictment was to be submitted for approval by a judge of the Court. In this case the prosecutor's autonomous discretion as to whom the tribunal should prosecute was tempered by judicial oversight.[613]

Similarly, the ICTR's prosecutor was an independent organ free from any interference or instructions received from government or alternative sources.[614] Besides the overwhelming similarities exhibited by the ICTY and ICTR including the fact that they

---

607 Slobodan Milosovic was indicted for crimes against humanity and violations of the laws or customs of war in respect of the Kosovo conflict; See *The Prosecutor v. Slobodan Milosovic,* IT-99-37. He died in March 2006 before a verdict was reached

608 For example, former Bosnian Serb President Biljana Plavsic voluntarily surrendered to the ICTY in January 2001; others have since followed

609 *The Prosecutor v. Jean Kambanda*, ICTR-97-23-S 1998

610 *The Prosecutor v. Akeyesu*, ICTR-96-4-T 1998

611 Schrag 1995 *DJCIL*

612 Article 16 of the Statute of the International Tribunal (adopted 25 May 1993, as amended 13 May 1998)

613 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence, UN Doc. IT/32 (1994), as amended, Part Five, Rule 47

614 See Article 15(2) of the ICTR Statute

shared the same Chief Prosecutor, they had a significant difference relating to subject matter jurisdiction.[615] The ICTY was established for reasons of a war raging in the territories of the Former Yugoslavia[616] while the ICTR was created to address the genocide campaign launched by the Hutus against the Tutsis.[617] Therefore, the ICTY dealt with an international armed conflict while the ICTR addressed the genocide committed in Rwanda, including atrocities committed by Rwandan citizens in neighbouring territories as characterised under Article 3 common to the four Geneva Conventions of 1949.[618]

The tribunal at Nuremberg was more of a multilateral military court than a truly international tribunal. Whereas it comprised judges from the victorious Allies, the ICTY had started functioning as an international tribunal while the conflict in the Balkans continued to rage.[619] Most defendants at Nuremberg had been in custody while the trial was on-going and also, trial in absentia was permitted for those who were not present, an approach that was strongly objected to by the *ad hoc* tribunals.[620] At Nuremberg, no right of appeal was granted to persons found guilty whereas the *ad hoc* tribunals allowed guilty persons to make appeals before the Court.[621] The evolving concept of an independent prosecutor had emanated from both the ICTY and ICTR. Although they exhibited greater political autonomy than their Nuremberg counterparts, the tribunals

---

615 See Akhavan 1996 *AJIL*

616 See O'Brien 1993 AJIL

617 It is worthy to note that the people of Rwanda voted against the ICTR for a few among other reasons, "the limitation of the tribunal's *ratione temporis* jurisdiction (temporal jurisdiction) to acts committed in 1994, the fact that countries that had supported the genocidal regime would participate in the nomination of judges, and the exclusion of capital punishment from the penalties available": for a detailed review, see Dubois 1997 *IRRC*. The ICTY also suffered the same effect in terms of territorial jurisdiction. See for example the case of *The Prosecutor v. Slobodan Milosevic*, decision on preliminary motions 2001. para. 52. In its ruling, the Trial Chamber held as follows; "The *amici curiae* content that the limitation on the territorial jurisdiction of the International Tribunal to the Former Yugoslavia is discriminatory". This is a restatement of earlier arguments of the *ad hoc* nature of the International Tribunal and selective prosecution.

618 Dubois 1997 *IRRC*

619 Schwarzenberger The Judgement of Nuremberg, 167

620 Nuremberg Trial Proceedings Rules of Procedure, adopted by the tribunal in accordance with Article 13 of the Tribunal Charter, 29 October (1945)

621 Arbour 1999 DLJ

remained creations of the UN Security Council limited by funding, enforcement assistance and other judicial necessities.[622]

Also, a significant difference could be observed how the statutes of these two tribunals defined crimes against humanity.[623] Article 5 of the ICTY Statute[624] regurgitated the Nuremberg precedent which declared that crimes against humanity had to be linked to a state of war to be invoked. On the contrary, Article 3 of the ICTR Statute[625] adopted the patchwork of Control Council Law No. 10 which stated that crimes against humanity did not necessarily need to have a nexus with the state of war. Rather, it focused on the fact that such a crime must have been committed in a widespread and systematic manner against any civilian population on national, political, ethnic, racial or religious grounds.[626] In the *Prosecutor v. Jean Paul Akayesu*,[627] the Appeal Chamber of the ICTR applied the definition of crimes against humanity used in the *Barbie case*[628] which stated that;[629]

> The specific intent necessary to establish a crime against humanity was the intention to take part in the execution of a common plan by committing, in a systematic manner, inhuman acts or persecutions in the name of a State practicing a policy of ideological supremacy.

Therefore, the ICTR Statute clearly enforced the legal position that the presence of an armed conflict or a state of war was not and could not be a prerequisite condition to invoke crimes against humanity. This jurisprudence of the tribunal practically shaped and informed the development of international criminal law and was subsequently

---

622 Marler 1999 *DLJ*

623 See *The Prosecutor v. Tadic,* IT-94-1-AR72; See also *The Prosecutor v. Kanyabashi,* ICTR-96-15-T.

624 Article 5 of the ICTY Statute stipulates that "the International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds and other inhumane acts".

625 Article 3 of the ICTR Statute remark that, "the International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

626 *The Prosecutor v. Erdemovic,* IT-96-22-A, Sentencing Appeal, 7 October 1997, (1998) 111 ILR 298

627 See *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T. para. 572

628 See *The Prosecutor v. Klaus Barbie*, 87-84240 1988

629 Viout 1999 *HLPS.*; See also, Binder 1989 *YLJ*

adopted by the Rome Statute that established the ICC.[630] In advancing international criminal justice, the Rome Statute considered the question of superior orders and sovereign immunity to be immaterial as it provided for equality before the law under Article 27.[631] The period that marks the evolution and progressive development of international criminal justice culminated in the establishment of the Rome Statute in 1998. The Statute in 2002, established the ICC which signified the highest watermark in the evolution of the embryonic system of international criminal justice.[632]

Nonetheless, it is instructive within the context of this study to point out that the Yugoslavia and Rwanda tribunals also promoted the culture of selectivity in the prosecution of serious crimes. Due to constrained availability of funds, including the challenge of insufficient resources to comply with the necessary legal processes, Goldstone developed a new model to identify and select suspects at the ICTY and referred to as the 'pyramidal' approach.[633]

By the 'pyramidal' approach, the ICTY focused on middle and low level suspects with the intension of bringing them to justice at a lower cost given that the UN had threatened to cut off funds had the ICTY not indict any suspect by November 1994.[634] Goldstone applied a bottom-top approach with the conviction that once low level suspects are apprehended and brought before the law, they will not hesitate to expose their superiors.[635] He intended to minimize cost by using middle and low level defendants to prosecute high caliber officials (top government officials and state personnel's). However, this was not the case as some high caliber officials of the Bosnian Serb Forces were never brought to justice despite being identified as the principal perpetrators.[636] During the reign of Carla Del Ponte as Prosecutor, five high calibre officials were left unaccounted for despite the fact that 53 defendants were summoned to appear before the Court.[637] In essence, the prosecution processes

---

630 Robinson 1999 AJIL 43-57
631 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). See Article 27
632 Schabas An introduction 5
633 DeGuzman 2012 *MJIL*
634 DeGuzman 2012 *MJIL*
635 See DeGuzman 2012 *MJIL*
636 See Doc. A/54/35 (1999) 505
637 See DeGuzman 2012 *MJIL*

adopted a selective approach for the purposes of compliance with the necessary logistics and financial demands.[638]

2.8.5 Hybrid Courts

Besides the *ad hoc* tribunals, a new form of transitional justice emerged in a number of states.[639] They were often referred to as national *ad hoc* tribunals, working with international assistance and partly applying the principles of international criminal law.[640] Such *hybrid* courts were created to perform the role of an international criminal court at the national level. They were established in countries like Cambodia, East Timor and Sierra Leone.[641] They were commonly referred to as "internationalized domestic tribunals", grafted onto judicial structures of a nation where massive violations of human rights and humanitarian law took place, or created as a treaty-based organ, separate from that structure.[642]

These new species of UN internationalised tribunals were a half-way house, a *hybrid* containing elements of domestic prosecutions and an international process.[643] The concept envisaged international standards applying across domestic jurisdictions and full respect for due legal process and the right of the accused, while at the same time honoured a state's need to retain sovereignty through adequate involvement in the process.[644] The process began when a group of experts appointed by the UN was commissioned to investigate atrocities that were committed in Cambodia with a view to assessing the competence of the judiciary to handle such issues.[645] According to the Group of Experts' report, the Cambodian national judicial system was defective in various domains: a trained, but professionally unqualified cadre of judges, lawyers and

---

638 See DeGuzman 2012 *MJIL*
639 See Dickinson 2003 *NELR*
640 See Linton "Cambodia, East Timor and Sierra Leone: Experiments in international justice"
641 See Linton "Cambodia, East Timor and Sierra Leone: Experiments in international justice"
642 Burke-White 2003 http://scholarship.law.upenn.edu/faculty_scholarship/959
643 See Geib and Bulinckx 2006 *IRRC*
644 See Williams Hybrid and internationalised criminal tribunals 2
645 See United Nations General Assembly Resolution 52/135

investigators, and also, inadequate infrastructures and a culture of disrespect for due process of the law.[646]

Therefore, the UN and the Cambodian government entered into a negotiated agreement for which the UN stressed the importance of bringing the Cambodian Khmer Rouge culprits to justice. The UN insisted that in bringing the perpetrators to book, international standards of justice, fairness and due process of law had to be observed.[647] The agreement therefore gave birth to a tribunal controlled by Cambodians, but with international participation, a blend of national and international characteristics that brought about the *hybrid* nature of the Court. These genetic traits were transferred to subsequent *hybrid* courts, including the SCSL that was established for the trial of Charles Taylor, the former President of Liberia.[648] The SCSL had jurisdiction over crimes against humanity, serious violations of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II, serious violations of international humanitarian law and selected provisions of Sierra Leone Law.[649]

Whereas the *hybrid* courts made a significant impact on the judicial system of their respective countries, their jurisdictions remained temporary as they were created to

---

646 See Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135 ("Group of Experts Report"), transmitted by the Secretary-General along with his own Report ("Secretary-General Report"), U.N. Doc. A/53/850, S/199/231. The Group of Experts further comments; "[Two] obstacles make the task complex. First, the sources on Cambodian law are extremely scarce. The primary source of criminal law prior to the Khmer Rouge period is the 1956 Code Pénal et Lois Pénales, published by the Ministry of Justice of the Kingdom of Cambodia, though it appears that no sources reliably and comprehensively update this law through 1975. As for subsequent law that might govern the Khmer Rouge years, Democratic Kampuchea appears to have published none. No secondary sources on Cambodian criminal law appear extant. Second, because Cambodia has seen at least six legal regimes since independence, the extent to which the law of the prior regimes has remained in force is simply undetermined in many cases". See Group of Experts Report, paras. 84, 85

647 See Tribunal Memorandum of Understanding between the United Nations and the Royal Government of Cambodia 2000 <http://www.yale.edu/cgp/tribunal/mou_v3.htm>

648 See Press Briefing by Deputy Legal Adviser 2000 <http://www.un.org/peace/etimor/DB/DB20000419.htm>:
"The credibility of these trials would be insured because the model under consideration for Cambodia was being used in East Timor." According to Minister Sok An, who introduced the Law on Extraordinary Chambers to Cambodia's National Assembly on 29 December 2000 and 2 January 2001, the Cambodia model is the basis for the Sierra Leone Special Court, http://www.camnet.com.kh/ocm/government60.htm.

649 See Statute of the Special Court for Sierra Leone (2000). Article 2-5

respond to specific situations within defined geographical locations. They were as good as the *ad hoc* tribunals that had temporary jurisdiction over specific regions.[650]

Moreover, the *hybrid* courts were criticized for their focus on international criminal prosecution rather than building vital domestic capacity. Of course, the UN's role was not to substitute international tribunals with national structures, but to assist domestic capacities.[651] The capacity-building rationale became the driving force behind the development of *hybrid* courts.[652] Unfortunately, the perceived capacity building of domestic capacity was not accomplished as international courts remained the *Maecenas of international law*.[653]

International courts formulated, clarified and enforced international norms, yet the difficulty of them being infused into domestic circumstances was a question that called for global attention.[654] The question evoked the problem of infusion as justice done at the international level was not considered as justice according to domestic standards, which explained some of the difficulties that faced the *hybrid* courts.[655] Also, domestic trials were commonly unable to investigate and prosecute complex international crimes and therefore the emphasis on domestic rather than international crimes did not serve the interest of international justice, coupled with the fact that domestic courts often faced difficulties in meeting the international human rights' standards of fair trial.[656] These among other factors challenged the operational efficacy of the *hybrid* courts. Therefore, the quest for a permanent international criminal tribunal to govern the conduct of warfare was still a matter of concern as will be discussed in subsequent chapters.[657]

---

650 See Linton "Cambodia, East Timor and Sierra Leone: Experiments in international justice"

651 See Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. UN Doc. S/2004/616 (2004)

652 See for example Kleffner J et al., The Relationship, C. Romano et al. (eds.) 359-378

653 See Linton "Cambodia, East Timor and Sierra Leone: Experiments in international justice"

654 Nouwen 2006 *ULR*

655 Nouwen 2006 *ULR*

656 Nouwen 2006 *ULR*

657 Nouwen 2006 *ULR*

2.9 SUMMARY

The evolution of international criminal law has been closely linked to the establishment of international courts and the punishment of serious crimes under international law. In the process, the establishment of individual criminal responsibility under international law faced two main obstacles.[658] First, states, not individuals, were the exclusive subjects under classical international law and therefore, the evolutionary process promoted criminal norms which in the first place recognised the individual as a subject under international law and secondly, the necessity to overcome the state's defensive attitude towards outside interference, which was rooted in the concept of state sovereignty.[659]

The Hagenbach trial was only a hint of what symbolised individual criminal responsibility in international law. The Versailles Peace Treaty became the first legal document to recognise individual criminal responsibility under international law and to set up international criminal courts.[660] The quest for such a tribunal became a reality when the London Agreement of 8 August 1945 provided for the creation of the Nuremberg Tribunal to try *Goering et al*.[661] The Court's judgments that were announced on 30 September and 1 October 1946 became the first events in the history of international criminal law where individual criminal responsibility was invoked and enforced.[662] The category of international crimes tried before the Court was clearly defined under Article 6 of the LIMT Charter. The Charter, which became the footprint of international criminal

---

658 See Gerhard *Principles of International Criminal Law,* Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) 134

659 Gerhard *Principles of International Criminal Law,* Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) 134

660 See Treaty of Peace between the Allied and Associated Powers and Germany *('Treaty of Versailles'),* (1919) Article 227-230

661 Zeck 1948 *NCLR*

662 See London Charter, Agreement for the Prosecution and Punishment of Major War *Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) 82 UNTS 279* (1951). Justice Jackson comment: "May it please Your Honour, the privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated".

law, provided the foundation upon which the IMTFE was established, including its provisions and offences punishable by the tribunal.[663]

From the above discourse, many fronts can be identified with different legal instruments that influenced the progressive development of the international criminal justice system. The system can be traced from the early periods that witnessed the Hagenbach trial to the UN era, the Nuremberg and Tokyo Trials that became the cornerstones upon which the criminal justice system has been erected.[664] The combined effects of the Nuremberg and Tokyo trials promoted what has been commonly referred to as victor's justice. Such trials took the form of an organised plot by the victorious allies against their defeated opponents, thereby raising the question as to why Japan and not the USA?[665] It is for this reason that the tribunal at Tokyo was considered to be more of a revenge mechanism than an institution to deliver justice.[666]

The Yugoslavia and Rwanda tribunals created to address regional conflicts were also of great significance. Whereas the Yugoslavia Tribunal was considered a war crimes tribunal that invoked the principles applied at Nuremberg, the Rwandan Tribunal dealt with an internal armed conflict; hence it invoked the principles applicable to internal conflicts as stipulated under Article 3 common to the Geneva Conventions of 1949. It is instructive to point out that although the tribunals stated above made significant strides towards addressing issues arising from international and non-international armed conflicts, their jurisdictions were neither universal nor were they permanent.

The *hybrid* courts emerged to strengthen international law through domestic mechanisms. Even though their jurisdictions were temporary, their presence was evidently significant as they attempted the enforcement of both domestic and international laws, thereby creating a link between national judicial structures and the international legal framework. This relationship created a pipeline through which the

---

663 See Gerhard *Principles of International Criminal Law,* Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) 134

664 Bachmann Today's Quest for International Criminal Justice, Quénivet N. and Shah-Davis S. eds. 13.

665 Bikundo International Criminal Law 6

666 Bikundo International Criminal Law 6

principle of complementarity gained recognition in international criminal law.[667] These were a few among other legacies considered by the ILC in the subsequent development of international law and many of which were infused into the Rome Statute that established the ICC.[668]

The historical sequence that marked the evolution and progressive development of international criminal law has been discussed there by bringing this chapter to a close. The next chapter will further the research by exploring the creation of the ICC. In doing so, the researcher will analyse the political debates through which the Court came into existence. Also, the principle of complementarity and the question of jurisdiction will be discussed in line with the Rome Statute. Generally, the chapter will give an appraisal of the ICC and its role in a contemporary international community.

---

667 See Antonio C *et al, The Rome Statute* 34

668 Antonio C *et al, The Rome Statute* 34

CHAPTER THREE
THE CREATION OF THE INTERNATIONAL CRIMINAL COURT

3.1 INTRODUCTION

This chapter explores the creation of the ICC and the commitment by States Parties towards enhancing the functions of the Court. It unpacks the debates and discourse by state actors from different regions of the world through which the Rome Statute became a reality in 1998. Furthermore, the chapter elaborates on the jurisdiction of the Court, defining and discussing the categories of serious crimes over which the court may exercise its jurisdiction. The trigger mechanisms and/or pre-conditions upon which the Court may exercise jurisdiction are also dealt with. The ICC is designed as an international Court to respond to complex issues and challenges that emerge within the international criminal justice system. Given the diverse nature of criminal justice systems across the world, many questions relating to jurisdiction, competence and modes of operation were brought to the fore during its creation. Such questions provoked serious debates through which states like the USA that initially advocated for the creation of the ICC ended up not ratifying the Rome Statute. Therefore, it is important to unveil these debates before getting into the Court's jurisdiction. This chapter plays a crucial role in this study by engaging political debates that guided the processes through which the ICC came into being.

3.2 TOWARDS THE DRAFTING OF THE ROME STATUTE

In its decision towards the establishment of an international criminal court, the UN General Assembly in 1994 used the ILC's draft Statute as a base document for this project.[669] An *Ad Hoc* Committee was convened for this purpose and the Committee met twice in 1995. Debates within the Committee exposed fundamental differences among states about the complexity of the future court.[670] Occasioned by this intricacy, states continued to dispute the overall feasibility of the project even though such voices

---

669 All documents relevant to the drafting history of the Rome Statute have been reproduced in Bassiouni *The Statute of the International Criminal Court* 9

670 See Bassiouni 1999 CILJ.; Adriaan Bos, *From the International Law Commission,* Antonio Cassese, Paola Gaeta and John R. W. D. Jones, (eds.) 35–64

became more and more suppressed as the negotiations progressed.[671] The draft Statute of the ILC conceived of a Court with 'primacy' over national courts just like the experience of the tribunals for the Former Yugoslavia and Rwanda.[672] Admittedly, the draft Statute provided that states were in no position to intervene once the Court's prosecutor chose to proceed with a case.[673] This position was not favourably received and subsequently the *Ad Hoc* Committee designed a new concept, 'complementarity' to address the situation.[674] By the principle of complementarity, the Court could only exercise jurisdiction where states were unwilling or unable genuinely to prosecute.[675]

Another point of contention between the *Ad Hoc* Committee and the ILC's draft was the Committee's insistence that crimes falling within the jurisdiction of the ICC must be defined in some detail as opposed to what the ILC presented.[676] According to the Committee, the ILC's draft was limited to crimes subject to the jurisdiction of the ICC, including war crimes, crimes against humanity, genocide and aggression, probably because the draft code of crimes through which the Draft Statute was developed provided more comprehensive definitional aspects regarding such crimes.[677] As disputes regarding the ILC's draft statute continued, the Committee's work was inhibited.[678]

It was hoped that the *Ad Hoc* Committee would pave the way for a diplomatic conference where the ICC Statute would be adopted.[679] Unfortunately, it became evident within a short while that such an effort was premature.[680] Therefore, the General Assembly decided in its 1995 session to convene a 'Preparatory Committee' (PrepCom) in which member states, non-governmental organisations and international organisations of various sorts were invited. After three weeks of intensive deliberations, the PrepCom presented to the General Assembly in 1996, a bulky report comprising a

---

671 Schabas *An introduction* 14
672 Schabas *An introduction* 14
673 See Bassiouni 1999 *CILJ*.; Adriaan Bos, *From the International Law Commission,* Antonio Cassese, Paola Gaeta and John R. W. D. Jones, (eds.) 35–64
674 Bassiouni 1999 *CILJ*
675 Bassiouni 1999 *CILJ*.; Adriaan Bos, *From the International Law Commission,* Antonio Cassese, Paola Gaeta and John R. W. D. Jones, (eds.) 35–64
676 Bassiouni 1999 *CILJ*
677 Schabas *An introduction* 15
678 Schabas *An introduction* 15
679 Schabas *An introduction* 15
680 Schabas *An introduction* 15

hefty list of proposed amendments to the ILC's draft.[681] Among the numerous sessions held by the PrepCom, the most important international meeting was held in Zutphen, in the Netherlands, in 1998, with the aim of consolidating different proposals into a more coherent text.[682] At the final session of the PrepCom, the Zutphen draft was modified and submitted for consideration by the Diplomatic Conference.[683]

At this point, only few provisions of the ILC's original proposal manage to sail through.[684] Most of the Articles in the final draft had been accompanied with alternatives, circumvented with square brackets to indicate a lack of consensus and thereby invoking negotiations at the Rome Conference.[685] Whereas some issues were left unresolved, others were largely addressed, including the application of the principle of complementarity as used in the context of international criminal justice.[686] The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held on 15 June 1998 in Rome. The conference brought together 160 delegates from different countries across the world, including a number of international organisations and hundreds of non-governmental organisations.[687]

In line with the dynamics of the Rome Conference, an unlikely situation arose where two new constituencies emerged: "a heterogeneous caucus of states known as 'like-minded' and a well-coordinated alliance of non-governmental organisations".[688] The "like-minded caucus had been active from the early stages of the PrepCom".[689] It gradually amalgamated its position while expanding its membership.[690] By the onset of the Rome Conference, the 'like-minded caucus' included more than 60 of the 160

---

681 Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/22

682 Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc. A/AC.249/1998/L.13. (1998)

683 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum' UN Doc. A/CONF.183/2/Add.1

684 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum' UN Doc. A/CONF.183/2/Add.1

685 See Bassiouni 1997 *DJIL*

686 Bassiouni 1997 *DJIL*

687 Schabas *An introduction* 15

688 Schabas *An introduction* 15

689 Schabas *An introduction* 15

690 Schabas *An introduction* 15

participating states.[691] The 'like-minded' states held key propositions that were substantially at odds with the propositions of the ILC's draft of 1994, and more generally in conflict with the concept of the Court as perceived by the permanent members of the Security Council.[692]

The propositions of the 'like minded' argued for the inclusion of Security Council veto on prosecutions which was among the most favourable points raised by the permanent members of the UN Security Council.[693] These hurdles between the 'like minded caucus' and particularly the permanent members of the Security Council created the scenario in which the USA and Allies opted to stay away from the jurisdiction of the ICC.[694] The role of the USA in the overall struggle to fine-tune the jurisdiction of the ICC was significant given that it stands as a global hegemon in the 21st century.[695] The USA initially advocated for the creation of an international criminal court to ease the administration of global justice. Upon arrival, the USA chose not to subscribe to this long-awaited mechanism.[696] What went wrong? It is our duty to find out in preceding sections of this chapter.

3.2.1 Challenges from the USA and Allies

After the Nuremberg and Tokyo trials, the USA continually advocated for the creation of *ad hoc* tribunals in the Former Yugoslavia and Rwanda, all in an effort to support the quest for global peace and security.[697] Also, it supported the creation of a strong international criminal tribunal for the promotion and protection of fundamental human rights.[698] The quest for a strong international criminal tribunal was motivated by the fact that the USA played and still continues to play an important role in the general quest to maintain international peace and security.[699] The USA made remarkable contributions towards the success of UN-led operations, including operations carried out by regional

---

691 Schabas *An introduction* 15
692 For more details, see Schabas *An introduction* 15
693 Schabas *An introduction* 15
694 Schabas *An introduction* 15
695 Schabas *An introduction* 15
696 Schabas *An introduction* 15
697 Bosco *Rough Justice* 35
698 Bosco *Rough Justice* 35
699 See Charter of the United Nation and Statute of the International Court of Justice (1945) Chapter 7

organisations like the Stabilisation Force (SFOR) in the Former Yugoslavia.[700] Also, it remains a strong source of support and provides crucial logistics for operations in which the armed forces of other states are unable to defeat the enemy or are unwilling to do so.[701]

The 1994 United Nations Operation in Somalia (UNOSOM II) was unsuccessful because the USA withdrew its combat forces and the bulk of its logistics supports.[702] In the words of the UN Secretary General, "UNOSOM II was particularly dependent on the forces of the United States".[703] Besides, a large portion of the expenses of multinational peace-keeping operations around the world is covered by the USA.[704] In 2015 for instance, the USA contributed $621.9 million, an amount calculated to be more than a quarter of the total budget per year, of the UN peace-keeping operation.[705] By implication, one can reasonably affirm that UN peace-keeping operations can hardly be sustained without the massive support from the USA in cash or in kind.[706] For the USA to sustain its continuous support for UN peace-keeping operations, it relied on the Status of Force Agreements (SOFA) also referred to as (Participation Agreement) entered into between the UN and troop-contributing states.[707] The Agreement grants privileges to members of the force and thereby exempts them from the criminal jurisdiction of the host state or, clearly stated; they are 'immune from legal process.'[708]

---

700 Grimmett 2011 *CRS*

701 Orzag 2010 http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/us_contributions_to_the_un_06112010.pdf

702 Portman 2006, http://www.eyeontheun.org/assets/attachments/documents/OMB_report_on_US_contributions_to_UN.pdf

703 See Zwanenburg 1999 *EJIL*

704 Portman 2006, http://www.eyeontheun.org/assets/attachments/documents/OMB_report_on_US_contributions_to_UN.pdf

705 Goodenough http://www.cnsnews.com/news/article/patrick-goodenough/us-pays-3b-un-more-185-other- countries-combined

706 McCoubrey International Humanitarian Law 45

707 Status of Forces Agreement for Peacekeeping Operations. UN Doc. A/45/594 (1990). para. 46

708 See for example ONUC SOFA, reproduced in Higgins *UN Peacekeeping 1946-1967* 9. See also Status of Forces Agreement for Peacekeeping Operations. UN Doc. A/45/594 (1990). para. 46

In the opinion of the then UN Secretary General, 'such immunity is essential to the preservation of the independent exercise of the functions of the force.'[709] Such specific arrangements also gained favour from the provisions of the Convention on the Privileges and Immunities of the United Nations in which immunity from legal processes are conferred on officials of the UN.[710] In the absence of a host state jurisdiction, the responsibility to prosecute UN peace-keepers shifts not to the UN, but to the contributing states, as the UN lacks the necessary judicial capability to assume such a responsibility.[711] According to the Agreement between the UN and troop-contributing states, it is the responsibility of troop-contributing states to exercise criminal jurisdiction over the troops they contribute.[712] The 'Participating Agreements' was criticised for granting criminal jurisdiction on troop-contributing states over forces controlled by the UN.[713] Another pitfall is concerned with the fact that states may express different views with respect to the criminal offence in question and in doing so they may reach different conclusions with no uniform impact on international criminal jurisprudence.[714] In 1952, the Legal Counsel of the UN maintained that the issue would be revisited and discussed in the light of the establishment of an international criminal court.[715]

Therefore, the Rome Diplomatic Conference created a treaty that grants prosecutorial discretion to the ICC over peace-keepers involved in UN peace-keeping operations.[716] This mandate conferred upon the ICC became a nightmare for the USA as the ICC by implication had the authority to prosecute USA peace-keepers for crimes committed in UN peace-keeping operations.[717] Because the USA is one among other states contributing troops to UN peace-keeping operations around the world, the USA felt

---

709 See Summary study on the experience derived from the establishment of UNEF I, UN Doc. A/3943 of 9 October (1958)

710 Convention on the Privileges and Immunities of the United Nations, UN Doc. A/64 of 1 July (1949). Article V, Section 18(a)

711 McCoubrey International Humanitarian Law 45

712 See for example UNEF I SOFA, annex to the Report of the Secretary-General on arrangements concerning the status of the UN Emergency Force in Egypt, UN Doc. A/3526 (1957). para. 11 and Model Agreement between the United Nations and Member States contributing personel and equipment to United Nation peacekeeping operations, UN Doc. A/46/185 of 23 May (1991). para. 25

713 Zwanenburg 1999 *EJIL*

714 See Zwanenburg 1998 *LJIL*

715 Corell 1995 *MLR*

716 Zwanenburg 1999 *EJIL*

717 Reeves 2000 *HRB*

victimised by the fact that such prosecutions would be targeting USA citizens involved in such peace-keeping operations, a tendency the USA government referred to as 'politicised prosecutions.'[718]

Therefore, the USA reacted negatively towards the Rome Treaty on the grounds that it made politically motivated prosecution of peace-keepers possible, whereas, such was not the case with the traditional arrangements as discussed above. As a matter of fact, the head of the USA's delegation to the Rome Conference stated as follows: "we have to see a document that provides us with the assurance that this court will not be a politically motivated court, will not . . . create the bizarre consequence that our soldiers in multinational peace-keeping operations on the soil of a rogue state could be prosecuted".[719] Despite the USA's grave insistence on protecting its citizens, the Rome Statute portrayed a clear manifestation in favour of a wider trend towards the acceptance of international criminal jurisdiction for certain serious crimes.[720]

3.2.2 Post-Nuremberg developments and the United States hegemony

Even though the US strongly advocated for the creation of an international criminal tribunal to hold accountable the perpetrators of serious crimes in international law, it did so, not to be subject to the ICC, but to advance its hegemonic influence as a global superpower.[721] Historically, the USA has been noted for contradicting or rejecting the authority of international tribunals.[722] Among others, the *Nicaragua case* presents a good example.[723] In 1984, Nicaragua accused the USA government under the Reagan administration of trying to overthrow the Sandinista government and subsequently, the case was reported to the International Court of Justice (ICJ). In response, the ICJ issued an injunction, restraining the USA from invading Nicaragua and halting the

---

718 Reeves 2000 *HRB*

719 See Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference".

720 Zwanenburg 1999 *EJIL*

721 See Kuehn 2000 *PLR*

722 Kuehn 2000 *PLR*

723 Kuehn 2000 *PLR*. The ICJ also known as the World Court is based in The Hague, The Netherlands, and is the principal judicial body of the UN. The ICJ was formed in 1946, and since then has presided over more than 96 cases, 60 judgments, 23 advisory opinions, and 290 orders. It is distinguished from the ICC in that the ICC hears only the gravest of all international criminal violations, whereas the ICJ's jurisdiction is much less confined. The ICJ currently deals mostly with civil compensatory suits between nations

mining of its harbours.[724] Unfortunately, Washington announced a year later that it was their decision not to obey the ICJ and such a decision, they said, continued to be effective unless they chose to make a reversal.[725] 'We don't want to play by the rules of everyone else,' says the USA government.[726]

With regards to the decision above, the Executive Director of Human Rights Watch, Ken Roth, comments that the USA was not just arrogant but too bossy in a world of sovereign equality.[727] Furthermore, the ICJ established in 1986 that the USA had been in support of Contra-rebels, thereby violating international law. Hence, the Court ordered the USA to pay reparations to Nicaragua which it never did.[728] In like manner, the Rome Diplomatic Conference leading to the creation of the ICC assembled delegates from across the globe, including representatives from the USA who portrayed the image of being in favour of the Court, with the general impression that they will support a "strong" court, but contrary to this position, the USA took measures to weaken it.[729] The USA representatives advanced a series of points in the hope that such points would be included in the Rome Statute.[730] Unfortunately, such points were not adopted and incorporated in to the Statute which is why the USA resolved not to ratify the Statute after its entry into force. For clarification purposes, some of the points are discussed below.[731]

---

724 See Wouters http://www.abcnews.com/sections/world/DailyNews/ICC980715.html. Accessed 10/08/2016.

725 Kuehn 2000 *PLR*

726 Kuehn 2000 *PLR*

727 Kuehn 2000 *PLR*

728 Kuehn 2000 *PLR*

729 See general Statement of Scheffer D, Ambassador-at-large for War Crimes Issues and Head of the US Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court before the Committee on Foreign Relations of the US Senate [hereinafter, Scheffer's Statement], 23 July (1998), (Stating that the word has a "responsibility to confront . . . assaults on humankind" but advocating a Court which allows permanent members of the UN Security Council, the United States included-to veto any action taken by the ICC), Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"

730 See Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"

731 Kuehn 2000 *PLR*

3.2.3 United States proposed model of an International Criminal Court

After the adoption of the Rome Statute in 1998, David Scheffer, the head of the USA delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court, appeared before the USA Senate, to report on the events that unfolded during the Rome Conference.[732] He started by highlighting USA's position in favour of a superior international criminal tribunal. Scheffer pointed out; "we live in a world where entire populations can still be terrorised and slaughtered by nationalistic butchers and undisciplined armies," and went on to affirm the USA, "as the most powerful nation committed to the rule of law, …. [has] a responsibility to confront these assaults on humankind".[733] He continued to elaborate that the perpetrators of "genocide, crimes against humanity and war crimes" can be brought to justice if accountability is ensured.[734]

Scheffer admitted the difficulty of "fusing the diverse criminal law systems of nations and the laws of war into one functioning courtroom in which the USA and others had confidence criminal justice would be rendered fairly and effectively."[735] He judged the creation of a treaty based tribunal as "daunting" and highlighted that disagreements with regards to jurisdiction and other areas would pose an obvious challenge among sovereign governments.[736] Further, Scheffer called for a cautious approach and specific objectives followed by the USA government as opposed to other governments.[737] He laid claim to the following objectives: a structure of the ICC not conforming to the concept of complementarity to national jurisdictions; the possibility of veto power conferred upon members of the UN Security Council;[738] and sovereign protection of

---

732 Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"

733 Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"

734 Kuehn 2000 *PLR*

735 Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"

736 Kuehn 2000 *PLR*

737 Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"

738 This is perhaps the most crucial of the United States' gripes with the ICC: the fact that it is still powerful and independent of an institution, despite efforts to weaken and disperse that power by Scheffer and his staff. For more detail, see Lilley F, The Superpower the World loves to hate. http://www.sovereignty.net/p/gov/rome7-6.htm.

national security information which may become relevant in a prosecution and many more.[739] The proposed list included concepts framed by the USA's delegates with the aim of promoting the objectives of the USA government.[740] The USA further portrayed its political intent by refusing the trials of its nationals involved in UN peace-keeping operations.[741] The critical nature of these objectives became a pointer to the fact that USA voted "no" against the Rome Statute.[742]

The principle of command responsibility was one of the contentious issues.[743] In the opinion of the USA Delegates to the Rome Conference, military commanders were to be held accountable with sufficient rigour as prescribed by international law while civilian commanders, the delegates argued, were not to be subject to the same standards as their military counterparts.[744] In essence, the delegates implied that the rules of criminal law applicable to military commanders should not affect civilian commanders, not even when such rules were backed by the principle of command responsibility.[745] This argument was raised to foster the USA's objectives given the fact that the USA's Constitution provides for the control of the military by civilians, a policy in which the Court was to be informed and driven by the jurisprudence of the USA's Constitution and in turn be favourable to its nationals.[746] The majority of the delegates refused to apply

---

739 Some of the objectives submitted by the US delegates include: acknowledgment by the court of national judicial procedure; ICC treatment of internal domestic conflicts; extensive due process protections for defendants and suspects; incorporation of elements into the definition of crimes which the court will prosecute; ICC treatment of gender issues; provisions in the Rome Statute that deals with command responsibility and superior orders in an acceptable fashion; rigorous qualification requirements for judges; allowance for state party funding of the ICC; a panel of state parties whose function it will be to oversee the workings of the ICC; reasonable amendment procedures; and a high number ratifications necessary to gain full entry into force of the Rome Statute.

740 Kuehn 2000 *PLR*

741 See Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference". Scheffer warned that a scheme that "ignored [the] responsibilities" of US peacekeeping forces "is not going to serve the vital interest of the [ICC]"

742 Kuehn 2000 *PLR*

743 Kuehn 2000 *PLR*

744 Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"

745 See Boyle F, Reversing the Gains of Nuremberg. http://www.atlantic.net/-odin/netline/hypocrisy.html.

746 Kuehn 2000 *PLR*

the USA's Constitution as a measuring rod for a global judicial institution; hence, the idea was brought to a stalemate.[747]

Additionally, the USA contested the model of the International Committee of the Red Cross (ICRC) represented in the proposals put forth by the governments of New Zealand and Switzerland regarding the content of what could constitute genocide and crimes against humanity.[748] In the opinion of the ICRC, rape as a crime under international law, was to be considered a grave breach of the Geneva Conventions and thus be considered within the ICC's contemplation.[749] Contrary to this novel proposition, the USA urged that the Rome Statute should regurgitate the provisions of the Hague Conventions of 1907 regarding the offence of rape.[750] Also, the USA proposed the inclusion of a provision in the Rome Statute which would restrict the jurisdiction of the court with respect to crimes against humanity to offences "committed as part of a systematic plan or policy or as part of a large-scale commission of such offences."[751] This proposition contradicted the view of the ICRC which related the definition of crimes against humanity to "serious breaches."[752] In conclusion, the Rome Conference included wordings from both proposals in to the Rome Statute.[753] However, delegates at the Rome Conference resolved that the USA's demands were not grounded in the principles of universal equality and thereby failed to address the concerns that prompted the creation of the ICC.[754]

Adding to the USA's resistance, the Peoples' Republic of China (PRC) advanced five points as reasons for voting against the Rome Statute. To begin with, PRC alleged that the jurisdiction of the ICC as prescribed by the Rome Statute was too broad, generating

---

747 Kuehn 2000 *PLR*
748 Kuehn 2000 *PLR*
749 Kuehn 2000 *PLR*
750 In the regulations attached to the Hague Convention, Article 46 states: Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected. While there is no specific mention of rape, this provision was long relied on as the prohibition.
751 Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"
752 Kuehn 2000 *PLR*
753 Kuehn 2000 *PLR*
754 Kuehn 2000 *PLR*

impositions rather than propositions for the approval of non-Party States.[755] In her view, such jurisdictional powers violated the principle of state sovereignty and the Vienna Convention on the Law of Treaties.[756] Secondly, the PRC had issues with the jurisdiction of the ICC over War Crimes committed in internal armed conflicts. She argued that such crimes were to be handled by capable national courts and also that adding the definition of war crimes under the Statute went beyond that of customary international law.[757] On a third point, China expressed discontent over the *proprio motu* power of the Prosecutor to investigate, which in her view, amounted to the right to judge and rule on state conduct.[758] On the fourth instance, the PRC argued that crimes against humanity should be invoked only in times of war, adding that most of the conducts mentioned under the Rome Statute were human rights inclined rather than portraying aspects of international criminal law. Lastly, the PRC viewed the jurisdiction of the ICC over the crime of aggression as an obstacle to the progress of the UN Security Council whom in her view, should act in respect of cases of aggression.[759]

Whereas the USA was concerned mostly about the ICC's possible reach to its enormous number of troops deployed in various war-torn areas across the globe,[760] and Russia and India were concerned mostly about the ICC's possible intervention into the Chechnya and Kashmir conflicts,[761] the Taiwan issue offered the most delicate conflict between the PRC and the ICC.[762] The Court's jurisdiction over war crimes in internal armed conflicts seemed to create the possibility of interference into the PRC's internal affairs and distort situations that could have already been placed under control. From this juncture, one can identify the PRC's position and subsequent abstention from the adoption of the Rome Statute.

---

755 See Official Records, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 1998 ("Official Records" hereinafter), vol.ii, Summary Records of the plenary meetings of the conference and of the Committee of the Whole, A/CONF.183/13 (Vol. II). For details, see Becker 2010 *RIDP*

756 See Vienna Convention on the Law of Treaties, 1115 U.N.T.S. 331. (1968). Article 34 on the general rules regarding third States provides that, "A treaty does not create either obligations or rights for a third State without its consent".

757 See A/CONF.183/SR.3, para. 35

758 A/CONF.183/SR.10, para. 9. For details, see Guan 2010 *PSILR*

759 A/CONF.183/C.1/SR.7, para. 9

760 A/CONF.183/C.1/SR.7, para. 9

761 A/CONF.183/C.1/SR.7, para. 9

762 Chan China, State Sovereignty 272

3.2.4 The challenge of a 'Proprio Motu' prosecutor

One of the most contested issues at the Rome Conference was that of granting the Prosecutor of the ICC the power to initiate investigations and indict alleged perpetrators of serious crimes at his or her own initiative. A Prosecutor with the power to initiate investigations was never anticipated by the Draft Statute of the International Law Commission (ILC). Rather, the Statute provided that a prosecution was to be triggered either by a state's complaint or the Security Council, acting in accordance with its Chapter VII mandate.[763] This position concurred with the USA's argument that a Prosecutor with the right of initiative would soon become a 'human rights ombudsman' and be over-crowded with complaints in a disproportionate manner.[764] Even though the USA's Delegates at the Rome Conference aligned themselves with the ILC's Draft Statute, their agenda did not reflect what the Statute had initially anticipated. Whereas the primary concern of the ICC was to inform and promote the positive development of international criminal law, the USA's concerns were crafted from the fear that an independent prosecutor might single out USA military personnel's or officials involved in UN multinational peace-keeping operations.[765]

The Rome Statute provides for a *proprio motu* prosecutor who initiates investigations regarding crimes that fall within the jurisdiction of the Court.[766] The Statute requires the prosecutor to analyze the seriousness of the information received and possibly seek additional information from the states, organs of the UN, inter-governmental or non-governmental organizations, or other reliable sources that he or she deems appropriate. The fact that the Statute mentions the phrase "other reliable sources" means it is limited in scope regarding the powers conferred on the prosecutor in the exercise of his or her *proprio motu powers*.[767] This creates a vacuum which, Scheffer pointed out will:

---

763 See Draft Statute of the International Law Commission and commentary found in the Report of the International Law Commission on the work of its Forty-Sixth Session, 49 UN GAOR Supp. (No. 10), UN Doc. A/49/10. paras. 23-91

764 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998)

765 Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"

766 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 15(2)

767 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 15(2)

"encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the Court in controversy, political decision-making and confusion."[768]

In the opinion of legal experts, including Justice Richard Goldstone, the powers granted to a *proprio motu* prosecutor opens the possibility for investigations and indictments that fail to utilize a great deal of sophisticated legal reasoning, hence failing to canvass in a legal fashion, the challenges confronting the international criminal justice system.[769] However, this position has not been shared by all given the fact that the Statute provides useful guidelines to direct the prosecutor. Among others, the Statute provides that any investigation by the prosecutor must be subject to an authorization by the Pre-Trial Chamber of the Court, consisting of three judges, which shall determine if there is a reasonable basis to proceed with an investigation, prioritizing the fact that the case falls within the jurisdiction of the Court.[770]

Therefore, the arguments that the prosecutor might initiate flawed investigations are weakened by the fact that such powers granted to the prosecutor have statutory limits. For instance, independent 'on site' investigations are possible without the cooperation of the state concerned only if the Pre-Trial Chamber has determined that "the state is clearly unable to execute a request for cooperation due to the lack of a defined authority or component in its judicial system competent to execute the request for cooperation".[771] Contained under the Statute is also the protection of national security information which may in turn limit the prosecutor in the course of his or her investigation.[772] With these defences, the USA's decision to abstain from the adoption of the Statute is attributed more to a political rather than a legal agenda. By not signing the Statute, it has barred itself from exercising influence on a number of issues which could decrease the possibility of the said politicized prosecutions.

---

768 Scheffer "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference"

769 Meng 2011 *BCICLR*

770 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 15(4)

771 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 57(3)(d)

772 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 72

3.3 TOWARDS AN IDEAL INTERNATIONAL CRIMINAL TRIBUNAL

Even though the USA alliance with like-minded states resulted in an attempt to divert the noble objectives of the ICC, a vast majority of the UN member states adopted a strict approach against the USA's hegemonic tendencies and pledged their overwhelming support towards the establishment of a strong ICC.[773] This critical approach of UN member states has been echoed since 1948 when the General Assembly of the UN stated that "[r]ecognising that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required."[774] Therefore, the General Assembly of the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide and following thereafter, the International Law Commission (ILC) was invited "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide. . . ."[775] Nonetheless, the task was kept in abeyance until 1994 when the General Assembly received a draft statute for the proposed ICC from the ILC. The draft statute gained strength and support from the General Assembly as a stepping stone towards humanity's aspiration for universal justice.[776] In his summary statement, the former Secretary General of the UN Koffi Annan, highlighted the ideals of the ICC as follows:

> In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realisation. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no state, no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice: that they, too, have rights and that those who violate those rights will be punished."[777]

---

773 See Pace W http://www.igc.apc.org/icc/html/monitor.htm. Accessed 11/08/2016

774 See ICC Background Information http://www.un.org/icc/overview.htm. Accessed 11/08/2016

775 See ICC Background Information http://www.un.org/icc/overview.htm. Accessed 11/08/2016

776 Kuehn 2000 *PLR*

777 ICC Background Information http://www.un.org/icc/overview.htm. Accessed 11/08/2016

The majority of delegates at the Rome Conference held the general opinion that the ICC exemplified the proverbial "missing link" in the international legal system as the jurisdiction of the ICJ covered states and not individuals who breached international law. This visible gap was the sole reason for which acts of genocide and crimes against humanity went unpunished by international law.[778] In Cambodia, for example, an estimated two million people were slaughtered by the Khmer Rouge in the 1970's.[779] Likewise, disputes in countries like Mozambique, Liberia and El Salvador recorded huge numbers of lives lost.[780] A repetition of such offences against humanity pointed to the fact that there was indeed, a missing link in international law.[781] This idea was re-echoed when Benjamin Ferencz said, "There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance."[782] Therefore, it was without doubt that the creation of an independent international criminal court would occupy the missing link in international law.

3.3.1 The principle of complementarity

The Rome Statute lays down the principle of complementarity under paragraph 10 of the Preamble, and in Articles 1, 17 and 18 of the main text. By this complementarity principle, national courts have primacy over the ICC. The Court only intervenes when domestic courts or prosecutors fail to act due to unwillingness or inability to do so.[783] By implication, the Statute empowers domestic courts to take the primary responsibility over serious crimes under international law where and when necessary. The principle of complementarity was designed for obvious reasons. First, national institutions are well placed to do justice in such circumstances, given that they provide a convenient forum where both evidence and the alleged culprits are to be found. Secondly, there is an obligation under international law to try and punish international crimes by national courts in their respective territories.[784] If the ICC were to try all sorts of international

778 Kuehn 2000 *PLR*
779 ICC Background Information http://www.un.org/icc/overview.htm. Accessed 11/08/2016
780 ICC Background Information http://www.un.org/icc/overview.htm. Accessed 11/08/2016
781 ICC Background Information http://www.un.org/icc/overview.htm. Accessed 11/08/2016
782 Kuehn 2000 *PLR*
783 Cassese 1999 *EJIL*
784 Cassese 1999 *EJIL*

crimes, including those with lesser gravity, the Court will soon be swamped with cases and become inefficient due to an unwieldy workload. This situation had been presented at the ICTY, necessitating the withdrawal of indictments against minority individuals in the political hierarchy.[785] Therefore, the principle of complementarity provides that the ICC should only intervene when national courts fail to discharge their duties.

The principle stated above provides for positive complementarity as well as setbacks that might be used by the prosecuting state to the disadvantage of victims. The fact that judgment is in the hands of national authorities might create a situation where perpetrators are shielded especially with respect to crimes that occur with the connivance or acquiescence of national authorities.[786] In such cases, state authorities may pretend to investigate and try crimes or possibly conduct proceedings, but only for the sole purpose of protecting the alleged state officials responsible for the said crimes.[787] The situation becomes more problematic given that the complementarity principle applies to non-party states.

The above discourse simply entails that third states having jurisdiction over such crimes may invoke the principle of complementarity for which the prosecutor will be obliged to defer to the Statute's authority. Article 17 of the Rome Statute conceives of a range of safeguards designed to quash any attempt made by national authorities to cover the suspects. Despite such safeguards, most states still shield potential perpetrators of massive crimes committed within their territories.[788] Under these circumstances, one may be tempted to raise the question as to whether Article 18(6) will suffice to cater for such situations where states insist on shunning international jurisdiction and are therefore unwilling to cooperate in the search for and collection of evidence so as to evade justice? Whatever the case may be, the fact remains; the principle of complementarity has been designed to encourage national authorities to bringing

---

785 See, for example, the ICTY case, order granting leave for withdrawal of charges against *Govedarica, Gruban, Janjic´, Kostic´, Paspalj, Pavlic´, Popovic´, Predojevic´, Savic´, Babic´ and Spaonja* issued by Judge Riad on 8 May 1998.

786 Cassese 1999 *EJIL*

787 Cassese 1999 *EJIL*

788 Cassese 1999 *EJIL*

alleged perpetrators of international crimes to justice, in the process reducing the workload of the Court. [789]

3.4 COMMITMENT BY STATES PARTIES TO THE ROME STATUTE

On 14 January 1999, the National Assembly of the Republic of Senegal gave authority for its government to ratify the Statute thereby making Senegal the first state from Africa and the world at large to show support for the newly created international criminal court.[790] The Court has its seat at The Hague and as of 2015, the Assembly of States Parties (ASP), has 123 members of which Africa has 34, the largest majority in the house compared to other continents. Latin America and Caribbean States hosts 27 while 19 are from Asian-Pacific States, 18 from Eastern Europe and 25 are from Western Europe and other states.[791]

Some 30 countries have signed but not ratified the Rome Statute while the USA have unsigned the Treaty and by virtue of the Vienna Convention on the Law of Treaties 1969, these states bear the responsibility to refrain from acts which by their very nature defeat the purpose for which the treaty came into force.[792] Of the 30 countries that have signed but not ratify the Rome Statute, Israel and Sudan have informed the UN Secretary General that they no longer intend to be identified as states parties to the treaty[793] while Burundi has formally withdrew from the Statute.[794] This means the states mentioned herein have no legal obligations arising from their former

---

789 Cassese 1999 *EJIL*

790 Bensouda F, "International Media Conference on the Battle against Impunity: Chinks in the Armor – Does the ICC Target Africa: Is the ICC Selectively Prosecuting Cases?" Suzuki 2010 *WGI;* See also, Southern African Litigation Center 2013 http://www.southernafricalitigationcentre.org/1/wp-ontent/uploads/2013/05/International-Criminal-Justice-and-Africa.pdf Accessed 11 August 2016

791 United Nations Treaty Series, Vol. 2187, p, 3; depository notification…… C,N.439. 2015. TREATIES-XVIII.10 of 30 July 2015 (proposal of amendment by Norway to the Statute)

792 Vienna Convention on the Law of Treaties. (1969). United Nations Treaty Series, Vol. 1155. See Article 18. Among the 31 countries that have signed but not ratified the Rome Statute, GW Bush of the USA later "unsigned" the Statute and therefore bringing the number of non-ratified signatories to 30.

793 ICC Background Information http://www.un.org/icc/overview.htm. Accessed 11 August 2016

794 See Situation in the Republic of Burundi, ICC-01/17 http://www.icc-cpi.int/burundi Accesses 29 October 2017

representative's signature on the Statute.[795] Also, 41 UN member states of the UN, including the Russian Federation and PRC have neither signed nor have they ratified the Statute.[796] However, they are bound by Article 13(b) of the Rome Statute to refrain from acts that defeat the maintenance of international peace and security.[797]

3.4.1 States Parties Cooperation towards enforcement

Unlike the ICTY and the ICTR which were products of the UN Security Council, the cooperation of states in enforcing judicial processes is of paramount importance to the success of the ICC. The decisions of the Court, including orders and requests can only be enforced through agencies, namely national authorities and international organisations. While it seem easier for domestic courts to enforce judicial decisions through law-enforcement agencies like the police and other security agents, such privileges are not enjoyed by the ICC for the simple reason that no internationally instituted enforcement agency is placed at the Court's disposal.[798] In the absence of intermediaries like national authorities, the Court cannot execute arrest warrants; it cannot seize material evidence nor can it compel witnesses to give testimony in circumstances where crimes have allegedly been committed. Occasioned by these circumstances, the ICC made it a priority to request the assistance of national authorities in the processes of investigations, execution of arrest warrants, witness appearances and testimonies in the course of judicial proceedings etc.[799] Also, it lobbies states to lend their support towards realising the processes as listed above.

---

795 Omer-Men 2015 http://972mag.com/palestines-icc-bid-is-only-as-threatening-as-israel-makes-it/100882/

796 The sum of State Parties that are members of the UN including signatories and non-signatories of the Rome Statute is 194. The is one more than the number of the UN member states which is 193 due to the Cook Island being a state party but not a member of the UN member states.

797 Article 13(b) of the Rome Statute provides that the UN Security Council acting in accordance with its Article 39 mandate under the UN Charter, may refer a case to the ICC if the case threatens the peace and security of the international community. In fulfilling this legal obligation, the Security Council does not take into consideration the question as to whether the State in whose territory the crime has been committed is a party to the Rome Statute or not.

798 Cassese 1999 *EJIL*

799 For general information on the obligation to cooperate, see Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Part IX

The ICC is vested with judicial authority not only against individual subjects of sovereign states, but also over the states themselves. Through this model, the ICC is authorised to issue binding orders upon states and may set in motion enforcement measures in cases of non-compliance.[800] Also, it is forbidden for states to withhold evidence based on national interest or to refuse the execution of arrest warrants or related court orders. This coercive approach is not a new model to international criminal jurisprudence as the ICTY and ICTR were subjected to the same authority under the Security Council's mandate arising from Chapter VII of the UN Charter.[801]

During the 25th Summit of the AU, South Africa was caught on the horns of a dilemma when faced with competing obligations from the ICC to arrest the Sudanese President, Omar Al Bashir on the one hand and the AU's quest to protect sitting Heads of State on the other hand.[802] Omar Al Bashir stands accused by the ICC of being the mastermind of a campaign of terror that has resulted in the death of more than 400,000 people in the Darfur region of the Sudan.[803] Following this accusation, the UN Security Council, acting in accordance with Article 13(b) of the Rome Statute and Article 39 of the UN Charter adopted, Resolution 1593 to refer the Darfur situation to the ICC.[804] So far, the Sudanese President has defied two warrants of arrests issued by the ICC.[805] Therefore, it was hoped that South Africa would live up to its obligations arising from the Rome Statute to arrest Omar Al Bashir on the occasion of the 25th Summit of the AU held in Johannesburg, South Africa. Unfortunately, South Africa failed to deliver due to its commitment to the AU to protect sitting Heads of State. As a consequence, South Africa was summoned to appear before the ICC on 7 April 2017 for failing to arrest Omar Al Bashir.[806] The Court actually blamed South Africa for failing to enforce its obligation arising from the Rome Statute.

---

800 Cassese 1999 *EJIL*

801 Cassese 1999 *EJIL*.

802 Du Plessis 2017 http://ewn.co.za/2017/04/07/sa-govt-appears-in-icc-over-al-bashir-case Accessed 16/04/17

803 Udombana 2005 *HRQ*

804 See United Nations Security Council Resolution 1593, S/RES/1593 (2005)

805 See The Prosecutor v. Omar Hassan Ahmad Al Bashire, ICC-02/05-01/09.; The Prosecutor v. Omar Hassan Ahmad Al Bashire, ICC-02/05-01/09-94

806 See Madhomu 2017 http://www.news24.com/Africa/News/live-sa-appears-before-icc-over-failure-to-arrest-sudans-bashir-20170407 Accessed 16/04/2017

The finding of the ICC upon which South Africa was blamed was based on the fact that domestic courts had already issued an order for the arrest of Al Bashir. Following the request from the Southern African Litigation Center, the North Gauteng High Court ruled on 15 June 2015 that Al Bashir should be arrested and detained until he is transferred to The Hague.[807] The Court also found that the South Africa's Implementation Act removes head of states immunity for the crimes stated under the Rome Statute. The Court held that "the immunity that might have attached to President Bashir as Head of State is excluded or waived in respect of crimes and obligations under the Rome Statute".[808]

At the level of the Supreme Court of Appeal (SCA), the Court acknowledged the statement of the Former Director General at the Department of Justice and Constitutional Development, Nonkululeko Sindane who mentioned that after South Africa agreed to host the AU Summit in June 2015, it entered into an agreement as the host State with the Commissioner of the AU relating to organization of different meetings schedule to take place at the Summit including the 25th Assembly of the AU.[809] Based on the hosting agreement, President Al Bashir had been invited to attend the Summit by the AU and not by the government. The Former Director General then referred to Article VIII of the hosting agreement, guided "Privileges and Immunities":[810]

> The Government shall afford the members of the Commission and Staff Members, delegates and other representatives of the Inter-Governmental Organizations attending the meeting the privileges and immunities set forth in sections C and D, Article VI of the General

---

807 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* at http://www.southernafricalitigationcentre.org/1/wp- /uploads/2015/06/ Judgement-2.pdf (last accessed *of Justice and Constitutional Development and Others* content ZAGPPHC 402, Case No. 27740/2015 (2015) para. 2

808 *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* at http://www.southernafricalitigationcentre.org/1/wp- /uploads/2015/06/ Judgement-2.pdf (last accessed *of Justice and Constitutional Development and Others* content ZAGPPHC 402, Case No. 27740/2015 (2015) para. 2

809 See *The Mister of Justice and Constitutional Development v. The Southern African Litigation Center* 9867/15)[2016]ZASCA17, judgment of the Supreme Court of Appeal, Case No. 867/15 of 15 March 2016

810 See Hosting Agreement between the Commission of the African Union (AUC) and the Government of the Republic of South Africa on the material and technical organization of the Summit on the African Diaspora, Sandton Convention Center, Johannesburg, South Africa. No. 35376 https://www.gov.za/sites/default/files/35376_gon409.pdf Accessed 10 November 2018

> Conventions on the Privileges and Immunities of the [Organization of the Africa Unity (OAU)].

Whereas South Africa was blamed for non-compliance with its obligation arising from the Rome Statute, the country actually incurred no liability from the ICC for failing to arrest and surrender Al Bashir. Although the government was faced with competing obligations between the ICC and the AU, it chose to respect the position of the AU stated under the Unions Convention on the Privileges and Immunities.[811]

With regards to the *ad hoc* tribunals, in case of non-compliance it was left to the discretion of the judges to decide whether or not judicial sanctions arose as a remedy for failure to act.[812] In contrast to the ICTY and ICTR, the ICC Statute provides an opportunity for states to express themselves clearly about the manner of operation for international criminal justice. In this regard, three points are relevant.

First, in the event of failure to cooperate on the part of states, Article 87(7) of the Rome Statute provides for a pronounced remedy as opposed to the ICTY in the Appeals Chamber decision in *Blaskic* (*subpoena*), namely, "the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or where the Security Council referred the matter to the Court, to the Security Council." Secondly, in a case where there is competing request to arrest and surrender by a State Party or to extradite by a non-party State, the Court's request does not automatically prevail. Article 90(6)[813] and (7)[814] of the Rome Statute provides that it is the decision of the State to choose either between compliance with the request from the Court or compliance with the request from a non-party State with which the State Party is bound by an extradition treaty.

Thirdly, the Rome Statute invokes national security concerns by creating a national security exception to request for assistance. Article 93(4) stipulates that "a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any document or disclosure of evidence which relates to its national

---

811 See Tladi 2015 *JICJ*

812 Cassese 1999 *EJIL*

813 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Art. 90(6)

814 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 90(7)

security." This provision is linked to Article 72 of the Statute, which conceives of a system designed to induce a state raising national security concerns to invoke as much as possible the information it wishes to withhold. This system is directly based on the *Blaskic* decision of the ICTY Appeals Chamber. Additionally, the *Blaskic* decision emphasised the obligation of states to disclose information. However, exceptions prevailed where states were allowed to adopt special measures for the purposes of shielding that information from undue disclosure to entities other than the Court. Article 72 therefore emphasised the right of states to deny the Court's request for assistance.[815]

3.5 COOPERATION BY NON- STATES PARTIES

One of the cardinal principles of international law is that a treaty does not create either obligations or rights upon states without their consent as enshrined under the 1969 Vienna Convention on the Law of Treaties.[816] Likewise, the co-operation of non-party states as envisioned by the Rome Statute is of a voluntary nature. However, even states that have not acceded to the Rome Statute might still be subject to an obligation to co-operate with the ICC in certain circumstances where a case is referred to the ICC by the UN Security Council which all UN members are obliged to cooperate since its decisions are binding on all of them.[817] Also, there is an obligation to respect and show respect for obligations of International Humanitarian Law which stem from the Geneva Conventions of 1949 and the two Additional Protocols of 1977.[818]

Although the wordings of the Statute might not be precise as to what steps have to be taken, it has been argued by legal professionals like Goldstone and Smith that "it at least requires non-party states to make an effort not to block actions of the ICC's response to serious violations of those conventions in relation to co-operation, investigation and evidence-gathering".[819] It is implied from the Rome Statute that the consent of a non-party state is a prerequisite for the prosecutor to conduct an

---

815 Cassese 1999 *EJIL*

816 See Vienna Convention on the Law of Treaties, (1969). Article 26

817 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998).

818 See Geneva Conventions for the Amelioration of the Condition of the wounded and sick in armed forces in the field (1949). International Committee of the Red Cross, Geneva, Swizerland. Article 1

819 Goldstone and Smith, International Judicial Institutions 11

investigation within a territory and more necessary for him/her to observe any reasonable conditions raised by the state in question, since such restrictions exist for States Parties to the Statute.[820] Taking into account the experiences of the ICTY in relation to cooperation, some scholars have expressed pessimism regarding the ICC's ability to obtain the co-operation of non-party states.[821]

The Statute provides for actions the Court can adopt should non-party states fail to cooperate including informing the Assembly of States Parties (ASP) or report to the Security Council provided the referral was made by the Council.[822] In like manner, when a non-party state refuses to cooperate after it has entered into an *ad hoc* agreement with the ICC, the Court may report to the ASP or the Security Council.[823]

Article 16 of the Statute provides for Security Council deferrals in cases where further investigations and prosecutions jeopardise the peace and security of the region. Article 53 of the Statute also allows the prosecutor the discretion not to initiate an investigation if he or she believes such a process will not serve the interest of justice.

According to the UN High Commissioner for Human Rights 2006, some limited amnesties may be compatible with the country's obligation genuinely to investigate or prosecute under the Statute.[824] Sometimes it is argued that amnesties are necessary to allow the peaceful transfer of power from abusive regimes.[825] Advocates of amnesty also argue that prioritising retribution in the face of turbulence will worsen rather than ease the situation.[826] Depending on the prevailing dynamics, amnesty might become the biggest tool at the disposal of national authorities to maintain stability.[827] By denying states the right to offer amnesty for human rights abuses, the ICC may make it

---

820 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 88.

821 Goldstone and Smith, International Judicial Institutions 11

822 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 87.

823 Rome Statute of the International Criminal Court. Article 87(5)(a)

824 See Louise Amnesty, Human rights and political transition 279

825 Louise Amnesty, Human rights and political transition 279

826 Louise Amnesty, Human rights and political transition 279

827 The most clear example is that of South Africa, where the Promotion of National Unity and Reconciliation Act 34 of 1995 sets up a mechanism to grant a broad amnesty for those who had committed politically motivated crimes during the apartheid regime. See *The Azanian Peoples Organization (AZAPO) v. The President of the Republic of South Africa and others*., Case CCT 17/96, (1996) (hereinafter the AZAPO case), para. 22. See also, Henham *The Philosophical Foundation* 27

more difficult to negotiate an end to conflict and transition to democracy.[828] For example, the four outstanding arrest warrants against the leaders of the Lord's Resistance Army (LRA) are perceived by many as an obstacle to ending the insurgencies in Uganda.[829] However, the UN maintains that granting amnesty to those accused of war crimes and serious violations of IHL constitutes a violation of international law.[830]

The Rome Statute does not address the question of amnesty. Rather, the Statute provide a lists of due process including the presumption of innocence, the right to Counsel, the right to present evidence and to confront witnesses, the rights to remain silent, the right to be present at trial, the right to have charges proved beyond reasonable doubt and protection against double jeopardy.[831] Although the USA voted against the adoption of the Rome Treaty, the USA delegation to the Rome Conference maintained: "When we were negotiating the Rome Treaty, we always kept very close tabs on 'does this USA led constitutional text the formation of the scot and the due process right that a recorded defendant…..' and we were very confident that at the end of the Rome Conference, those due process rights were in fact protected, and that the treaty thus met the constitutional test".[832]

3.6 PRECONDITIONS TO THE EXERCISE OF JURISDICTION

Article 12 of the Rome Statute provides for the preconditions necessary to the exercise of the ICC's jurisdiction.[833] Just like other portions of the Rome Statute, Article 12 went through intense negotiations and compromises to become a reality. First of all, the provision provides an opportunity for the nationals of non-party States to be prosecuted by the ICC. By virtue of this provision, for instance, troops of one country committing mischief in other countries can be brought to justice.[834] While this provision was particularly important for creating a universal system of accountability, it received

---

828 Louise Amnesty, Human rights and political transition 279
829 Louise Amnesty, Human rights and political transition 279
830 See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, General Assembly Res. 2391, 26 November (1968)
831 See Part VI of the Rome Statute with particular reference to Articles 66, 67 and 68
832 Ruth 1999 *EJIL*
833 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 12(1)-(3)
834 Cassese 1999 *EJIL*

objections from countries like the USA and the Peoples' Republic of China (PRC) who expressed discontentment subjecting themselves to a universal system of accountability.[835]

Even though such prosecutions may seem impossible in cases where nationals of a non-party state commit a crime in the territory of a non-party state due to the absence of a nexus between the Rome Treaty and the state in question, such will not be the case where the crime is committed in the territory of a state party by nationals of a non-party state and/or contrariwise, for the presence of a treaty obligation that binds the contracting states to the ICC.[836] Article 12 is interpreted to the understanding that the Rome Statute does not impose obligations upon third states. Rather, it empowers the Court to exercise its jurisdiction with regards to nationals of third states provided such persons have committed crimes in the territory of a state party or in the territory of a state that has accepted the jurisdiction of the Court pursuant to Article 12(3) of the Rome Statute.

However, problems may arise where third states enter into an agreement with a state party or a state that has accepted on an *ad hoc* basis the jurisdiction of the ICC if the latter waives its responsibility over crimes committed on its territory by nationals of the former state or undertakes to extradite such nationals to other states. In such situations, conflict of inconsistent international obligations may arise for states parties or states that have accepted the ICC's jurisdiction pursuant to Article 12(3).[837] Even though the Statute does not properly address such situations, Article 90(4-6) envisages the possibility of extradition at the request of a non-party state through an agreement which may nevertheless conflict with a request from ICC for the perpetrator to surrender him or herself.[838] Where this is the case, the Statute refrains from imposing upon states parties to prioritise the Court's request for surrender over the non-party state's request for extradition. Rather, Article 90(6) outlines a number of factors to be considered by the requested State when deciding on such matters which are; the

---

835 Cassese 1999 *EJIL*
836 Cassese 1999 *EJIL*
837 Cassese 1999 *EJIL*
838 Cassese 1999 *EJIL*

respective dates of the requests, the interests of the requesting State and the possibility of subsequent surrender between the Court and the requesting State.

Whereas the above approach is used by the Rome Statute to remedy the challenge of competing request, the Statute fails to consider three exceptional possibilities that may arise. First, a non-party state may have a national obligation to waive the jurisdiction of the Court without triggering the process of extradition. Secondly, it does not impose upon the requested state the obligation to give priority to the Court's request for surrender and thirdly, it did not anticipate the situation of a requested state that, while not a party to the Rome Statute accept the jurisdiction of the Court pursuant to Article 12(3).[839] These are some of the inherent weaknesses that cloud the trigger mechanisms in terms of extradition.

Another problematic area is Article 12(2) in respect of crimes like genocide and war crimes committed in civil wars and also crimes against humanity which in most cases are being instigated by national authorities.[840] If such crimes have been committed by nationals in the territory of a state that has not accepted the jurisdiction of the Court at the time the crimes were committed, the ICC will be rendered impotent.[841] Faced with such circumstances, the Statute provides for UN Security Council referrals under Article 13(b) which in effect does not require states' approval for the exercise of jurisdiction. Article 13(b) has become the 'sledgehammer' of the ICC through which the Security Council's power to establish the ICTY and ICTR has been imported into the ICC by virtue of its trigger mechanism.[842] In effect, the ICC's operations may be similar to those of the ICTY and ICTR which where creations of the UN Security Council.

3.7 TERRITORIAL AND CRIMINAL JURISDICTION OF THE ICC

The ICC's jurisdiction under the Rome Statute has been structured into two categories. First, there is territorial jurisdiction dealing with the geographical territory over which the Court may exercise jurisdiction for the crime/s in question. This position may apply to states parties and non-party states alike provided the later accept the jurisdiction of

839 Cassese 1999 *EJIL*
840 Matanga 2009 *AI*
841 Matanga 2009 *AI*
842 Cassese 1999 *EJIL*

the Court pursuant to Article 12(2) of the Rome Statute, or where the case is being referred to the Court by the UN Security Council in accordance with Article 13(b) of the Rome Statute on the account that it constitute a threat to international peace and security.[843] The second stratum deals with the category of serious crimes over which the Court has the mandate to prosecute.[844] These are the characterizations of the ICC's jurisdiction under the Rome Statute. Detailed explanations are provided below for further clarifications.

3.7.1 Territorial jurisdiction

The territorial jurisdiction of the ICC has been well elaborated under part 2 of the Rome Statute. It is sub-divided into two spheres which include the exercise of jurisdiction based on the referral mechanism stipulated under Article 13 and the conditions under which the Court may exercise jurisdiction as mentioned under Article 12.[845] Article 13 of the Rome Statute is further structured into three sub-categories. First, the Court may exercise jurisdiction over a situation referred to it by the state in whose territory the crime has been committed.[846] Secondly, the jurisdiction of the Court may be exercised where the crime under reference has been referred to it by the UN Security Council[847] and lastly, given that the first two options regarding states and the Security Council referrals fail to materialize, the Prosecutor may initiate a private investigation and invite the jurisdiction of the Court using *proprio motu* powers.[848]

With regards to the conditions over which the Court may exercise its jurisdiction, Article 12(1) makes it clear that a state which becomes a party to the Statute automatically accepts the jurisdiction of the Court with regards to the crimes mentioned under Article 5 of the Statute.[849] Both the provisions of Articles 12(3) and 13(b) quoted above govern

---

843 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 12(3) and 13(b). See also, Von Habel and Robinson *Crimes within the jurisdiction R.S. Lee* (ed.) 104

844 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 5

845 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 12

846 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 13(a)

847 Rome Statute of the International Criminal Court. Doc. A/CONF. 183/9, (1998). Art. 13(b)

848 Rome Statute of the International Criminal Court. Doc. A/CONF. 183/9, (1998). Art. 13(c)

849 Rome Statute of the International Criminal Court. Doc. A/CONF. 183/9, (1998). Art. 12(1)

the exercise of jurisdiction over nationals of non-party states. The 12(3) of the Statute particularly states that:[850]

> If the acceptance of a state which is not a party to this Statute is required under paragraph 2, that state may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with request to the crime in question. The accepting state shall cooperate with the Court without any delay or exception in accordance with Part 9.

Despite the provision of Article 12 under the Rome Statute, the USA has raised objections against the ICC's affirmation of jurisdiction over USA nationals in the territory of a state party to the Rome Statute without seeking consent from the USA government.[851] These objections have pushed the USA to adopt legal and political instruments that will limit the mandate of the Court.[852] The instruments include the adoption of legislation to limit the USA's cooperation with the ICC including states that are parties to the Rome Statute;[853] concluding agreements with other states to prohibit the transfer of USA nationals to the ICC;[854] and the vetoing of Security Council resolutions that prevent the Court from exercising jurisdiction over nationals of non-party states involved in authorized UN operations.[855]

Furthermore, the USA critique of the ICC's prosecution of non-party state nationals for crimes committed in the territory of ICC member states are wanting given that the state in whose territory the crime was committed already accepted the jurisdiction of the Court.[856] The Court is therefore empowered to exercise its jurisdiction by virtue of membership and/or state parties commitment which is a binding obligation required by the Rome Statute.[857] In like manner, a crime committed in the territory of a non-party

---

850 Rome Statute of the International Criminal Court. Doc. A/CONF. 183/9, (1998). Art. 12(3)

851 See Scheffer 1999 *AJIL*., See also United States' http://www.state.gov/s/wci/rls/fs/2002/9978.htm.

852 See Scheffer Address at the Annual meeting of the American Society of International law.

853 See The American Service Member's Protection Act, 2002, Pub. L. No. 107-206. For more detail, See Johnson 2003 *VJIL*

854 Akande 2003 *JICJ*

855 See Security Council Resolution 1422 of 2002 and also Security Council Resolution 1487 of (2003).

856 See Coban-Ozturk 2014 *ESJ*

857 Coban-Ozturk 2014 *ESJ*

state by a national from a state that has accepted the jurisdiction of the ICC should be prosecuted by the Court.[858]

The obligation to prosecute by the ICC is linked to a one way commitment to the Rome Statute by states that have accepted the jurisdiction of the Court.[859] Such a legal obligation rooted in the Rome Statute cannot be trampled upon by the politics of states that are not parties to the Statute in breach of the Vienna Convention on the Law of Treaties.[860] The Court's territorial jurisdiction can be limited only in circumstances where neither the accused nor the state in whose territory the crime was committed had any legal obligations whatsoever arising from the Statute.[861] For example, a situation in which, a national from Iraq which has not signed the Statute commits a crime within the territory of Israel, which has also not signed the Statute.[862] The fact that both countries owe no duty to the Rome Statute, legal obligations cannot arise unless invoked by a declaration under Article 12(3) of the Statute.[863]

It follows that the ICC cannot prosecute crimes committed by nationals of states parties in the territory of a state that is a party to the Rome Statute and ignores crimes committed in the same territory by nationals of non-party states.[864] Such actions would generate confusion that jeopardizes the whole intention of universal justice which the Court sets out to achieve. Moreover, the mandate conferred upon the UN Security Council to refer cases that pose a threat to international peace and security to the ICC disregards the question as to whether the crimes in question had materialized in the territory of a state that has accepted the jurisdiction of the Court or not.[865] It is for this reason that the Security Council referred the Darfur file to the ICC, and subsequently the Court issued a warrant of arrest in accordance with Article 58 of the Rome Statute against the Sudanese President with knowledge of the fact that Sudan is a non-party

---

858 Casey and Rivkin http://www.heritage.org/research/reports/1999/02/theinternational-criminal-court-vs-the-american-people
859 See Morris 1999 *JICL*
860 See Vienna Convention on the Law of Treaties (1969). Articles 53 and 64
861 Coban-Ozturk 2014 *ESJ*
862 Coban-Ozturk 2014 *ESJ*
863 Coban-Ozturk 2014 *ESJ*
864 See Scharf 2001 *LCP*
865 See Arnault 2003 *VJIL*

state to the Statute.[866] Whatever the case may be, the fact remains that the ICC has jurisdiction to prosecute international crimes committed in the territory of states parties and to a lesser extent, may still exercise such jurisdiction over crimes committed in third states in compliance with Article 12(3) of the Rome Statute.[867] Rather than giving in to critiques and reconciling with the political ideologies of non-party states, the ASP should work as a strong team to uphold this noble cause which strives to bring an end to impunity.

3.7.2 Criminal jurisdiction

The ICC was created with the core mandate of prosecuting serious crimes under international law and bringing to justice the perpetrators of such crimes irrespective of their official capacity.[868] This mandate of the Court was born out of the global outcry to end impunity as previous judicial institutions, including the ICJ, were not designed to perform such functions. The Rome Statute classified and clarified what were referred to as "serious crimes" under international law and has been considered the most evolved version of international criminal jurisprudence. Such crimes that evoke the ICCs' criminal jurisdiction have been stated in Article 5 of the Rome Statute to include the crime of genocide, crimes against humanity, war crimes and the crime of aggression. It is important to discuss the aforesaid crimes in detail so as to understand the progressive development of this nascent area of international law.

3.7.2.1 The crime of genocide

Although the proceedings at Nuremberg established the foundation of individual criminal responsibility in the international sphere, the trials faced serious challenges posed by the lack of a precise definition that could be used to qualify the atrocities committed against the Jews by the Nazi regime.[869] Such atrocities pushed the Jewish

---

866 See CRS Report, "International Criminal Court Cases in Africa: Status and Policy Issues." Congressional Research Service, 7-5700, RL34665, (2011)

867 See Regulations of the Office of the Prosecutor. Official Journal Publication Doc. ICC-BD/05-01-09. (2009). See also Gaeta and Jones *The Rome Statute* 1871-1874., Blaksley Jurisdiction Issue, Bassiouni M (ed.) 134-142

868 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 12

869 See Kegley *World Politics* 132

lawyer Lemkin to coin the term "Genocide" in 1944.[870] Lemkin borrowed from the Greek word "*geno*" which means tribe or nation and the Latin word "*cide*" which means killing.[871] By this combination, genocide according to Lemkin meant "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.[872]

Genocide was further described under paragraph 8 of the Nuremberg indictments of 1945 as a description of war crimes committed by the defendants being tried before the International Military Tribunal.[873] Thereafter, the UN General Assembly voted for resolution 96(1) of 1946 which described genocide as "denial of the right of existence of entire human group."[874] The resolution criminalised the act of genocide and paved the way for the Genocide Convention that came into force on 9 December 1948 with Article 1 imposing punishments under international law for acts that amount to genocide.[875] Article 2 of the Convention unpacked the conventional meaning of genocide. It provides as follows;[876]

> "…genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group".

The most important elements that qualify the crime of genocide under Article 2 of the Convention are the "*actus reus*" (the physical act) and the "*mens rea*" (the intention).[877] Therefore, an offence may amount to genocide only when there is evidence of a physical act and the required state of mind to accompany such an act. In *The*

---

870 See Kegley *World Politics* 132
871 See Lemkin 1947 *AJIL*.; Endoh 2014 *MJSS*
872 See Fowler Genocide in Darfur 6
873 The Charter and Judgement of the Nuremberg Tribunal-History and Analysis Memorandum Submitted by the Secretary General. Doc: A/CN.4/5
874 United Nations General Assembly Resolution 96(1) titled "The Crime of Genocide". (1946)
875 Convention on the Prevention and Punishment of the Crime of Genocide (1948)
876 Convention on the Prevention and Punishment of the Crime of Genocide (1948). Article 2
877 Convention on the Prevention and Punishment of the Crime of Genocide (1948). Article 2

Prosecutor v. Tihomir Blaskic[878] case, the Trial Chamber of the ICTY held that: "… the *mens rea* constitute all the violations of Article 2 of the Statute [containing the grave breaches] including both guilty intent and recklessness which may be likened to serious criminal negligence."

Article 6 of the Rome Statute is on par with Article 2 of the Genocide Convention and both provisions clearly affirm that "intention" is the principal element for which the crime of genocide can be invoked.[879] The Convention further expatiates that genocide, whether committed in time of peace or in time of war, is a crime under international law which states undertake to prevent and to punish.[880] The Trial Chamber of the ICTR held in *The Prosecutor v. Kayishema and Ruzindana*[881] that the crime of genocide is considered part of customary international law and punishable when committed whether in international or internal armed conflict. Likewise, the ICTR Trial Chamber stated in the case of *The Prosecutor v. Rutanganda*[882] that the Genocide Convention is undeniably considered part of customary international law. The ICTR Trial Chamber's decision in both cases clarifies the context of Article 1 of the Genocide Convention which stipulates that the crime of genocide is punishable under international law.[883] Generally speaking, the ICTR considered the nature of systematic patterns employed including rape, in perpetrating the offence and labelled genocide "the crime of crimes".[884]

3.7.2.2 Crimes against humanity

Whereas the term genocide defined above have been covered by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity

---

878 See *The Prosecutor v. Tihomir Blaskic,* ICTY Judgement, IT-95-14-T. para. 152
879 Endoh 2014 *MJSS*
880 Endoh 2014 *MJSS*
881 See The Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-96-1-A 2001
882 See *The Prosecutor v. Rutanganda,* Case No. ICTR-96-03-T 1999
883 Endoh 2014 *MJSS*
884 *The Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), 1998. para. 16;
The Prosecutor v. *Serashugo* (Case No. ICTR-98-39-S), 1999, para. 15;
The Prosecutor v. *Jelisic* (Case No. IT-95-10-A), Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 1; *The Prosecutor v. Stakic* (Case No. IT-97-29-T), Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 2002, para. 22

have no such conventional definition.[885] However, the notion of crimes against humanity has developed in the context of evolving norms of international criminal jurisprudence.[886] Crimes against humanity were invoked during the proceedings at Nuremberg to constitute the basis upon which German soldiers were charged for waging a war that resulted in global catastrophe.[887] Therefore, the foundation of crimes against humanity according to the Nuremberg trials was the fact that a war erupted for which humanity was made the victim.[888]

The judgment at Nuremberg regarding crimes against humanity has been criticised on the basis that the alleged acts committed against the Jews and the disabled were committed in time of peace and the perpetrators where tried and convicted, yet the Statute of the Tribunal created a nexus between crimes against humanity and a state of war.[889] Also, such crimes were committed before the Nuremberg proceedings commenced and the perpetrators were held accountable for breaching international norms in time of peace.[890] Therefore, the elements upon which the Tribunal at Nuremberg invoked "crimes against humanity" were not justified by the elements of the crime itself.[891] The judgment of the Tribunal resulted in debates in the years that followed.[892]

The first attempt to legally challenge the position at Nuremberg was documented in the Allied Control Council Law No. 10.[893] The Council cited from the Nuremberg judgment that criminalised acts of violence perpetrated against the Jews and the disabled in time of peace and maintained that crimes against humanity must not have a nexus with a state of war to have materialised.[894] The ICTY failed to adopt this emerging norm for one simple reason; at the time of its creation, it was considered a war crimes tribunal as its establishment was based on the war that was raging in the territory of the Former

---

885 Hwang 1998 *FILJ*
886 Hwang 1998 *FILJ*
887 Matas 1989 *FILJ*
888 Damplo *More than Murder* 1-63
889 Jalloh 2013 *AUILR*
890 Jalloh 2013 *AUILR*
891 See Sadat 2012 http://papers.ssrn.com/so13/papers.cfm?abstract_id=2013254
892 Sadat 2012 http://papers.ssrn.com/so13/papers.cfm?abstract_id=2013254
893 McCormack and Blumenthal *The Legacy of Nuremberg* 140
894 Agbor Instigation to Crimes against Humanity 50

Yugoslavia.[895] Therefore, its Statute was designed on the basis of a state of war, and subsequently its definition of crimes against humanity contained under Article 5 merely reflected the position at Nuremberg.[896]

Even though the ICTY and the ICTR were both created to achieve similar goals, it is important to note that their statutes provided for different definitions on what actually constituted crimes against humanity.[897] Whereas the ICTY was considered a war crimes tribunal on the one hand, the ICTR on the other hand was considered a genocide tribunal as it was set up to try and convict those who masterminded the perpetration of organised crimes to target and eliminate the Tutsis.[898] The Statute of the ICTR recalled the jurisprudence of Control Council Law No. 10 and maintained in Article 3 that crimes against humanity could be invoked in times of peace or in times of war provided there was evidence of a widespread and systematic attack directed against a civilian population.[899]

In *The Prosecutor v. Kupreskic et al,* the Trial Chamber of the ICTY held that the prosecution of an act as a crime against humanity belonged to the same genus as the crime of genocide.[900] In both categories of crimes, what mattered was the intent to exterminate persons on account of their ethnic, racial or religious characteristics as well as their political affiliations.[901] The Genocide Convention further stipulates that the contracting parties agree to punish such crimes under international law whether committed in time of war or in time of peace.[902] The Genocide Convention is *pari materiae* with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[903] Article 1 of the latter provides that "[n]o statutory limitation shall apply to war crimes…. [and] [c]rimes against humanity whether committed in time of war or in time of peace."[904] From the above analysis, it is

---

895 Simonovic 1998 *FILJ*
896 Statute of the International Criminal Tribunal for the Former Yugoslavia (1991). Article 5
897 Barria and Roper 2005 *IJHR*
898 Barria and Roper 2005 *IJHR*
899 Barria and Roper 2005 *IJHR*
900 *The Prosecutor v. Kupreskic et al.* IT-95-16-T. 2000. para. 636
901 The Prosecutor v. Kupreskic et al. IT-95-16-T. 2000. para. 636
902 Convention on the Prevention and Punishment of the Crime of Genocide (1948). Article 1
903 Hwang 1998 *FILJ*
904 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, (1968).; United Nations General Assembly Resolution 2391, U.N. GAOR,

reasonable to affirm that crimes against humanity can be invoked both in times of peace or in times of war.

Whereas the crime of genocide is governed by the Genocide Convention, crimes against humanity have no such treaty. However, it is covered by Article 5 of the Statute of the ICC and well elaborated under Article 7 of the same Statute. Article 7 of the Rome Statute defines crimes against humanity to mean any inhumane act committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[905] This definition is *pari materiae* to that in Article 3 of the ICTR Statute. Both provisions affirm that crimes against humanity will be invoked if there is evidence of a widespread and systematic attack directed against a civilian population.

3.7.2.3 War crimes

Just like genocide and crimes against humanity, war crimes have also been listed under Article 5 of the Rome Statute.[906] Article 8 of the Statute identifies four categories of war crimes over which the Court may exercise its jurisdiction.[907] The first category deals with grave breaches of the four Geneva Conventions of 1949.[908] The Statute simply reiterates the provisions of Article 50 of Convention I,[909] Article 51 of Convention II[910], Article 130 of Convention III[911] and Article 147 of Convention IV[912]. The acts enumerated under these Conventions characterize what constitute grave breaches of

---

23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968)

905 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article. 7

906 Barrat Statute of NGOs 301

907 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Refer to Articles 8(2)(a-d)

908 See Article 8(2)(a) of the Rome Statute. For more clarity, see also the Geneva Conventions of 1949, designed after WW II as standards of international law for humanitarian treatment in war. The conventions extensively defined the basic rights of wartime prisoners, civilians and military personnel; establish protection for the wounded and sick; and establish protection for civilians in and around a war-zone.

909 See Geneva Convention (I) for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, (1949). Article 50

910 See Geneva Convention (II) for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (1949). Article 51

911 See Geneva Convention (III) relative to the Treatment of Prisoners of War, (1949). Article 130

912 See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949, Article 147

the Geneva Conventions. These are forbidden behaviours, including conducts such as willful killing, torture, inhumane treatment, hostage-taking or extensive destruction and appropriation of property.[913]

Grave breaches mentioned under the Conventions must be acts committed within the confines of an armed conflict against persons or properties protected by the Conventions through contracting states parties.[914] In effect, the Conventions impose obligations on states to enact laws that guarantee penal sanctions against individuals who commit or order the commission of acts that constitute grave breaches as defined by the Conventions.[915] Such laws are independent from the Rome Statute but designed to punish those who violate the norms protecting international humanitarian law.[916]

In a second category of war crimes, the Statute provides for other serious violations of the laws and customs applicable to international armed conflicts.[917] Such crimes have been developed from various sources that protect international humanitarian law. They include, among others;

- The 1899 Hague Declaration (IV,3) dealing with expanding bullets,[918]
- The 1907 Hague Convention respecting the laws and customs of war on land,[919]
- The 1925 General Gas Protocol,[920] and
- The 1977 Protocol I Additional to the Geneva Conventions of 1949.[921]

In the third category of war crimes, the Statute introduces serious violations of Article 3 common to the four Geneva Conventions applicable in non-international armed

---

913 See Dormann *War Crimes under the Rome Statute.* A von Bogdandy and R. Wolfrum (eds.), 341-407

914 Bassiouni Crimes against Humanity 355

915 Bassiouni Crimes against Humanity 355

916 Bassiouni Crimes against Humanity 355

917 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 8(2)(b)

918 Hague Declaration (IV,3) Concerning Expanding Bullets. (1899)

919 Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of Land. (1907)

920 See Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, (1925)

921 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977)

conflicts.[922] This provision includes the prohibition of acts of violence to life and person, with specific reference to murder of all kinds, mutilation, cruel treatment and torture. The Rome Statute reinforces these provisions of the Geneva Conventions by way of an express guarantee to protect and prevent such acts from ever being committed.[923]

The fourth and last category deals with other serious violations of the laws and customs applicable in armed conflicts not of an international character.[924] These categories of crimes have also been deduced from other sources, including the 1907 Hague Regulations, and Additional Protocol II to the Geneva Conventions.[925] The Statute therefore contains an impressive list of war crimes which have been selected based on two distinct but interdependent considerations. First, the norm under protection should be part of customary international law and secondly, a violation of the norm will give rise to individual criminal responsibility under customary international law.[926]

Because civilian populations are the primary subjects of consideration under customary international law, their protection is of paramount importance. A breach of this obligation automatically generates liability for war crimes under international humanitarian law.[927] This view tallies with the approach of the ICJ, when it equated the use of indiscriminate weapons with a deliberate attack on civilians in stating that:[928]

> The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following; the first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilians and military targets.

---

922 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 8(2)(c)

923 See Dormann *War Crimes under the Rome Statute.* A von Bogdandy and R. Wolfrum (eds.), 341-407

924 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 8(2)(d)

925 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977

926 Von Hebel and Robinson *Crimes within the jurisdiction of the Court*, R.S. Lee (ed.), 104.

927 Dormann *War Crimes under the Rome Statute.* A von Bogdandy and R. Wolfrum (eds.), 341-407.

928 See Report of the ICJ on Legality of the Use by a State of Nuclear Weapons (1996), 226 et esq.(257, para. 78)., See also Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects, (1980)

Even though the Rome Statute outlines serious violations that amount to war crimes, not all such violations codified under the body of international humanitarian law have been included in the Statute.[929] For example, there is no provision in the Statute that covers the prohibition of intentionally starving the civilian population in internal conflicts, a duty that was clearly highlighted in the ICTY judgment of the *The Prosecutor v. Dusko Tadic*.[930]

The consequences of failing to include all serious violations of international humanitarian law into the Rome Statute simply means that states parties must be reminded of such obligations when the need arises. For instance, states parties to Additional Protocol I to the Geneva Conventions must provide for the repression of those grave breaches in Articles 11 and 85 of the Protocol which are not included in the Statute.[931] The likely implication of this legal position is that, whenever customary international law or international treaties contain more complex definitions of certain crimes than those in the Statute, such complex definitions must be incorporated into the legal framework of national legislations.[932] In this way, all serious violations under customary international law and international humanitarian law would have been covered within the legal framework of national laws.[933]

3.7.2.4 The crime of aggression

Except for the crime of aggression, all other serious crimes under international law mentioned under the Rome Statute have been clearly defined and discussed to suit the functioning of the ICC. The Statute provides that the exercise of jurisdiction by the Court shall be enforced once a provision is adopted in accordance with articles 121 and

---

929 Dormann *War Crimes under the Rome Statute.* A von Bogdandy and R. Wolfrum (eds.), 341-407

930 Considering the effects of Civilian Starvation and the devastating consequences in internal conflicts, the ICTY stated that: "What is inhuman and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife." Refer to *The Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, Decision on the defence Motion for Interlocutory Appeal on Jurisdiction. Case No. IT-94-1-AR72, para. 119

931 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Art. 85 provides for the repression of breach of Protocol I while Article 11 deals with the protection of persons

932 Dormann *War Crimes under the Rome Statute.* A von Bogdandy and R. Wolfrum (eds.), 341-407.

933 Dormann *War Crimes under the Rome Statute.* A von Bogdandy and R. Wolfrum (eds.), 341-407.

123 of the Rome Statute, defining the crime of aggression and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.[934] The Statute further provides that "such a provision shall be consistent with the relevant provisions of the Charter of the United Nations". However, before the coming into force of the Statute, discussions regarding aggression as a crime under international law had already begun.[935]

While it was important at the time of the adoption of the Rome Statute to set aside crimes like terrorism and drug trafficking which are best investigated and prosecuted at the national level, one may question the inclusion of the crime of aggression under this category of crimes.[936] It goes without saying that at the outbreak of war, all the horrors and mischiefs of war are unleashed. The Versailles Peace Treaty of 1919 condemned aggressive war as "a supreme offence against international morality and sanctity of treaties".[937] The Kellogg-Briand Pact of 1928 took a step further, "condemn[ing] recourse to war for the solution to international controversies, and renounc[ing] it, as an instrument of national policy in their relations with one another".[938] The United Nations War Crimes Commission (UNWCC) was created in 1943 with strong emphasis on the need to stop aggressive wars and bring their perpetrators to justice through a competent international tribunal.[939] The Commission was however challenged in deciding whether the act of aggression amounts to a state offence or individual responsibility. Subsequently, it failed to reach a conclusive definition of what constituted aggression under international law.[940]

During the Nuremberg trials, aggression was considered the "Supreme international crime differing only from other crimes in that it contains within itself the accumulated evil of the whole."[941] Therefore, WW II was considered a war of aggression between defeated Nazi Germany and the Allied Nations. Given that none of the Allied Nations

---

934 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 5(2)
935 See Trahan 2011 *ICLR*
936 Trahan 2011 *ICLR*
937 The Treaty of Versailles, signed 28 June 1919 (entered into force 21 October 1919), Part VII Penalties, Article 227
938 Kellogg-Briand Pact, (1928). Article. 1
939 See United Nations War Crimes Commission, (1943)
940 Keith 2008 *HICLR*
941 See *United states of America et al. v. Goering et al*., 1946

with permanent seats at the Security Council have ever been accused of aggression by the UN despite their aggressive operations, caution must be applied when treating the Security Council as "the mouth of the oracle" in the determination of what may constitute aggression under international law.[942]

The definition of the crime of aggression as a state's wrongful act was still not achieved despite the adoption of General Assembly Resolution 3314(xxix) of 14 December 1974.[943] Article 1 of the Resolution defines aggression as: "the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations." Also, Article 4 of the Resolution is not exhaustive. It states that "The Security Council may determine that other acts [than those listed in Article 2 and 3 as amounting to aggression] constitute aggression under the provisions of the Charter". The fact that the definition was consciously designed to be incomplete evokes the contention as to whether pre-emptive self-defence is lawful under the Charter or should instead be regarded as a form of aggression? In this circumstance, the aggressors might exploit the definition to their advantage knowing full well that the provision is not clearly defined.[944] This explains the difficulties encountered before the process of adopting Article 5(2) of the Rome Statute in accordance with Articles 121 and 123.[945] As this was the case, the ICC started on a wrong footing by failing to define what Article 5 of the Rome Statute considered to be one among other serious crimes under international law. However, the fact that the crime of aggression was mentioned under Article 5(1)(d) of the Rome Statute as falling within the jurisdiction of the ICC created the expectation of a general effort by states parties towards finding an acceptable definition of the crime.[946]

Article 15*bis* of Resolution RC/Res.6 provides for the exercise of jurisdiction by the ICC in accordance with Article 13, paragraphs (a) and (c) of the Rome Statute, that is, where the case is referred to the Court by a state or the prosecutor using *proprio motu*

---

942 Cassese 1999 *EJIL*

943 Definition of Aggression, United Nations Resolution 3314 (XXIX), Annex, UN GAOR, 29th Sess., Supp. No. 31, at 142, UN Doc. A/9631 (1974).

944 Guan 2010 *PSILR*

945 Guan 2010 *PSILR*

946 Cassese 1999 *EJIL*

powers. Admittedly, the UN Security Council referrals under Article 13(b) of the Statute have not been included in relation to the determination as to what may constitute aggression over which the Court may exercise its jurisdiction.[947] Whereas Resolution RC/Res.6 delivered the definition of aggression in 2010, Article 15*bis* further provided that "the exercise of jurisdiction by the ICC over the crime of aggression should be subject to a decision to be taken after 1 January 2017 by the same majority of states parties required for the amendment of the Statute". By virtue of progressive realization, Resolution RC/Res.6 in effect deleted Article 5(2) of the Rome Statute which initially anticipated a definition to be concluded by the ASP.[948]

3.8 DEGREE OF PARTICIPATION IN THE COMMISSION OF SERIOUS CRIMES

The degrees of participation in the commission of the crimes stated under Article 5 of the Rome Statute have been elaborated upon under Article 25 of the Statute.[949] The Article deals with the extent to which individuals can be held criminally responsible for actions either as perpetrators, co-perpetrators, instigators or more, in the commission of crimes falling under the jurisdiction of the ICC. Article 30 of the Statute further clarifies the requirement of intent as a necessity for an offence to be considered a crime.

In the absence of an effective response from either the Security Council or the ICC, a Malaysian War Crimes Tribunal based in Kuala Lumpur brought war crimes charges against ex-President George Bush and Former Prime Minister Tony Blair in line with the war crimes criteria listed under Article 8 of the Rome Statute.[950] The War Crimes Commission found that both Bush and Blair had participated in the adoption of executive orders and directives to exclude the 1949 Geneva Conventions, the Convention Against Torture, the Universal Declaration of Human Rights and the United Nations Charter in relation to the wars launched by the USA and Britain in Iraq and

---

947 Guan 2010 *PSILR*.

948 Resolution RC/Res.6 on the Crime of Aggression. Resolution adopted by consensus at the 13th plenary meeting of the Assembly of State Parties. (2010).

949 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Art. 25

950 Chief Prosecutor of the Kuala Lumpur War Crimes Commission v. George Bush and Anthony L Blair, criminal proceeding No. 1-CP-2011

Afghanistan.[951] So far, the Tribunal remains the first war crimes commission to make judicial pronouncements based on the facts and evidence gathered from the situation that obtained in Iraq and Afghanistan.[952] In accordance with the Tribunal's decision, the acts of inhumanity perpetrated against Iraqi people and Afghanistan's by the USA and British forces under the Bush and Blair administrations could be compared to what the Nuremberg Tribunal referred to as the waging of war against peace or crimes against peace in short.[953]

Perhaps the AU is reluctant to cooperate with the Court for the fact that it focuses primarily on Africa under the directives of States that are themselves not committed to the jurisdiction of the Court.[954] Article 13(b) of the Rome Statute "hijacks" the supposed independence of the ICC by bestowing upon the UN Security Council the authority to exercise jurisdiction that otherwise would not have existed given that the Rome Statute was established on the basis of voluntary consent by States Parties.[955]

3.8.1 Planning

With regards to planning, the *actus reus* on the one hand demands that one or more persons formulate the criminal conduct constituting one or more statutory crimes that are later executed. It is enough to demonstrate that the planning was a factor, substantially contributing to such criminal conduct.[956] On the other hand, the *mens rea* for planning is established when the perpetrator acted with direct intent in relation to planning. A person, who plans an act or fails to take action with knowledge of the possibility that a crime will be committed in the execution of that plan, has the requisite *mens rea* for planning. Overall, planning can be defined by implication to mean, "a situation in which one or several persons contemplate designing the commission of a

---

951 Chief Prosecutor of the Kuala Lumpur War Crimes Commission v. George Bush and Anthony L Blair, criminal proceeding No. 1-CP-2011

952 See Ramakrishnan http://www.globalresearch.ca/war-crimes-tribunal-finds-bush-and-blair-guilty/5478367[Accessed 14 March 2018]

953 In Afghanistan, the USA claimed it war was in "self-defence", in Iraq, it claimed the authority of the Security Council of the United Nations. Likewise, In Kosovo, the US claimed its war was a "humanitarian intervention", Yet each of these wars was illegal according to established rules of international law. See Mandel *How* America gets away with murder 207

954 Jalloh 2010 *CLF*

955 Jalloh 2009 *ICLR*

956 *The Prosecutor v. Kordic and Cerkez,* IT- 95-14/2-A, 2004. para. 26

crime of both the preparatory and execution phases."[957] An accused person cannot be found guilty of having committed a crime and at the same time convicted for having planned the commission of the same crime even though his involvement in the planning may be considered an aggravation factor.[958]

Planning as a mode of liability is enshrined under Article 25 of the Rome Statute. Article 30 of the Statute is to the effect that an individual actually meant to commit a crime when s/he is aware that his/her actions [by way of planning or otherwise], will bring about the criminal results. The Pre-Trial Chamber in the *Lubanga case*[959] held that when an individual is aware of the possibility of the commission of crime and reconciles with the possibility by going ahead with the plan, the individual is considered to have the requisite *mens rea* stated under Article 30 of the Rome Statute and will be charged with planning in accordance with Article 25(3)(c) of the Rome Statute.[960]

In the *Bemba case*,[961] the Pre-Trial Chamber extended the scope of liability for planning by stating that merely foreseeing the possibility does not suffice. The prosecutor bears the burden to prove that the individual was virtually certain that the commission of the crime would occur and reconciled himself or herself to that possibility.[962] In a case involving more than one person, the individual and the other members of the group "must be mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime".[963] Once the requirement of awareness is established, the individual will be held accountable in

---

957 *The Prosecutor v. Kordic and Cerkez*, IT- 95-14/2-A, 2004. para. 31

958 *The Prosecutor v. Stakic*, IT-97-24-T, T, 2003. para. 443; *The Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, T. Ch. I, 2003, para. 59; *The Prosecutor v. Brdanin*, IT-99-36-T, T. Ch. II, 2004. para. 268

959 In the *Prosecutor v. Thomas Lubanga,* Decision on the Confirmation of Charges, ICC-01/04-01/06-803 5/157, (2007). para 330, the Pre-Trial Chamber held that "Principals to a crime are not limited to those who physically carry out the objective elements of the crime but also includes those who despite being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed".

960 Article 22(2) of the Rome Statute forbids that the definition of a crime be modified by analogy. Where there appears to be ambiguity in interpretation, the definition shall be reasoned in favor of the person being investigated, prosecuted or convicted

961 See *Prosecutor v. Jean Pierre Bemba*, ICC-01/05/01/08, (2009). para. 366-369

962 *Prosecutor v. Jean Pierre Bemba*, ICC-01/05/01/08, (2009). para. 366-369

963 *Prosecutor v. Jean Pierre Bemba*, ICC-01/05/01/08, (2009). para. 360

accordance with Article 25(3)(c) of the Rome Statute.[964] Therefore, planning as a mode of participation has become an important element towards advancing the ICC's jurisprudence.

3.8.2 Instigating

The *actus reus* of instigating means encouraging another person to commit an offence (which in fact materialised). It is enough to show that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[965] It is not relevant to emphasis the fact that the crime would not have materialised without the accused's involvement.[966] Therefore, the presence of the accused at the time the instigated crime is committed is of no relevance.[967] The *mens rea* for instigation is linked to the fact that the accused intended to provoke or induce the commission of the crime, or had knowledge of the possibility that the commission of a crime would be a probable consequence of his/her act.[968]

Unlike the requirement of facilitating necessary to prove aiding and abetting, instigation goes beyond facilitation to include influencing the principal perpetrator such as inciting, soliciting or otherwise inducing him to commit the crime. It is important to note that the original idea must not come from the instigator. However, the fact that the instigator pondered the commission of such a crime, the final determination to do so can be brought about by persuasion or strong encouragement of the instigator. In a case where the principal perpetrator has made up his/her mind to commit the crime, further encouragement or moral support may only qualify as aiding or abetting.[969] Another distinction between instigation and incitement to commit genocide lies in the fact that

---

964 *Prosecutor v. Thomas Lubanga,* ICC-01/04-01/06-803 5/157, (2007). para. 366

965 *The Prosecutor v. Gacumbitsi,* ICTR-2001-64-A, App. Ch., 2006. para. 129

966 *The Prosecutor v. Gacumbitsi,* ICTR-2001-64-A, App. Ch., 2006. para. 129; *The Prosecutor v. Kordic and Cerkez,* IT- 95-14/2-A, App. Ch., 2004. para. 27; *The Prosecutor v. Oric,* IT-03-68-T, T. Ch. II, 2006. paras. 274-276, where the Trial Chamber held the view that if the instigation was not a *substantially contributing factor* to the commission of the crime, the accused may still be found liable for aiding and abetting.

967 *The Prosecutor v. Nahimana, Barayagwiza and Ngeze,* ICTR-99-52-A, App. Ch., 2007. para. 660

968 *The Prosecutor v. Kordic and Cerkez*, IT- 95-14/2-A, App. Ch., 2004. paras. 29 and 32; *The Prosecutor v. Brdanin*, Judgment, Case No. IT-99-36-T, T. Ch. II, 1 September 2004, para. 269; *The Prosecutor v. Naletilic and Martinovic,* IT-98-34-T, T. Ch. 1, 2003. para. 60. But see *The Prosecutor v. Oric,* IT-03-68-T, T. Ch. II, 2006, paras. 277-279

969 *The Prosecutor v. Rutaganda*, ICTR-96-3-T, T. Ch. I, 1999. para. 38

instigation is not required when the perpetrator is directly involved or his/her presence required at the scene of the crime. Therefore, the influence brought about by instigation can be generated both face to face and/or by intermediaries.[970]

3.8.3 Ordering

The *actus reus* of ordering means a person in a position of authority, instructing another person to commit an offence.[971] The idea of instructing requires an action by the person in a position of authority.[972] The fact that an order cannot be given in the absence of an act simply means the omission of such an act cannot amount to ordering. In essence, it would be wrong to speak of ordering by omission.[973] The fact that an omission cannot amount to ordering is different from the fact that a superior may be criminally liable if s/he orders his or her subordinate not to act. A person who orders an act or instructs another person not to act with awareness of the possibility that a crime will materialise in the execution of that order has the requisite *mens rea* for ordering.[974] It is actually not necessary to prove the existence of a formal superior-subordinate relationship between the accused and the perpetrator; it is rather sufficient that the accused possessed the authority to order the commission of an offence and that the said authority can be reasonably implied.[975] S/he must have the required *mens rea* for the crime with which he is charged and he must also have had knowledge of the possibility that the crime committed would be the consequence of the execution or implementation of the order.[976]

Ordering has been established as a mode of liability under Article 25(3)(b) of the Rome Statute. In the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,[977] the Court

---

970 *The Prosecutor v. Oric,* IT-03-68-T, T. Ch. II, 2006. para. 273

971 *The Prosecutor v. Kordic and Cerkez*, IT- 95-14/2-A, App. Ch., 2004. para. 28; *The Prosecutor v. Galic*, IT-98-29-T, T. Ch. I, 2003, para. 168; *The Prosecutor v. Krstic*, IT-98-33-T, T. Ch. I, 2001. para. 601; *The Prosecutor v. Akayesu,* ICTR-96-4-T, T. Ch. I, 1998. para. 483; *The Prosecutor v. Rutaganda*, ICTR-96-3-T, T. Ch. I, 1999. para. 39

972 *The Prosecutor v. Blaskic*, IT-95-14-A, App. Ch., 2004. para. 660

973 *The Prosecutor v. Galic,* IT-98-29-A, App. Ch., 2006, para.176.

974 *The Prosecutor v. Blaskic*, IT-95-14-A, App. Ch., 2004. para. 42; *The Prosecutor v. Kordic and Cerkez*, IT- 95-14/2-A, App. Ch., 2004. para.30

975 *The Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, App. Ch., 2006. para. 181-183

976 *The Prosecutor v. Brdanin*, IT-99-36-T, T. Ch. II, 2004. para 270. For the *mens rea* requirement see *The Prosecutor v. Blaskic*, IT-95-14-A, App. Ch., 29 July 2004. para. 42

977 See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the

held that the two defendants were guilty of the allege crimes as co-perpetrators and "acted as accessories by *ordering* their subordinates to attack the civilian population of Bogoro," in accordance with Article 25(3)(b) of the Rome Statute.[978] By the Court's pronouncement, it affirmed the jurisprudence of ordering as a mode of liability arising from the Rome Statute. Therefore, the Statute provides the legislative framework upon which military commanders and superior government officials can be held responsible for their actions that results in the death of civilians.[979]

3.8.4 Committing

The *actus reus* of committing requires an elevated degree of "concrete influence".[980] Committing an offence requires the person, or physical, direct or indirect participation of the accused in the relevant criminal act, or an omission with the same knowledge. An accused is held accountable if he carries out the *actus reus* of the enumerated crimes. The required *mens rea* is that the accused intended that a criminal offence would occur as a consequence of his/her conduct. The ICTR Trial Chamber held that to hold an accused criminally liable for an omission as a principal perpetrator the following elements must be established:

> (a) the accused must have had a duty to act, mandated by a rule of criminal law; (b) the accused must have had the ability to act; (c) the accused failed to act, intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime.[981]

Committing as a mode of liability has been dealt with under Article 25 of the Rome Statute.[982] In the *Prosecutor v. Jean-Pierre Bemba Gombo*,[983] the defendant was convicted as a military commander whose actions fulfilled the *mens rea* requirements of committing on two counts of crimes against humanity, namely; murder under Article

---

Confirmation of Charges, ICC-01/04-01/07 (Pre-Trial Chamber I, 30 September 2008)

978 Rome Statute of the International Criminal Court, 1998. Art. 25(3)(b)

979 Rome Statute of the International Criminal Court, 1998. Art. 25(3)(b)

980 *The Prosecutor v. Blaskic*, Judgment, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 664; *The Prosecutor v. Oric*, IT-03-68-A, App. Ch., 2008. para. 41

981 *The Prosecutor v. Galic*, IT-98-29-A, App. Ch., 2006. paras.177-178

982 Rome Statute of the International Criminal Court, 1998. Art. 25

983 See *Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, (2016)

7(1)(a) of the Rome Statute and rape under Article 7(1)(g) of the Statute.[984] *Bemba's* conviction was also based on three counts of war crimes, namely; murder under Article 8(2)(c)(i) of the Statute; rape under Article 8(2)(e)(vi) of the Statute and pillaging under Article 8(2)(e)(v) of the Statute.[985] The Court held that the defendant's participation in the commission of the crimes stated therein fulfilled the ingredient act of a well-established mode of liability stated under Article 25(3)(a) of the Rome Statute.[986]

4.8.5 Aiding and abetting

Among the series of documents mentioned by Strydom is the Rome Statute that established the ICC.[987] So far, discussions concerning the Statute touches on the challenges that impact on the smooth functioning of the Court and such challenges have occupied the forefront of the debate concerning the ICC. This study will therefore be limited to targeting this debate with specific reference to double standards and selective morality in the referrals. Also, the study will avoid any attempt that pushes the research into an area not justified by the research objectives, for such attempts will lead to ambiguity of facts and poor outcome in terms of research findings. Lastly, the study will be limited to ICC operations within the African continent; it will only source information from outside this continent for reasons of comparative analysis.[988]

Owing to the demand of accountability for serious crimes in international law, The ICC was created as foresighted by the drafters of the Torture Convention[989] and reaffirmed at the 32 meeting of the UN General Assembly.[990] The Court was created as a complementary institution with the mandate to punish the perpetrators of serious crimes stated under Article 5 of the Rome Statute in circumstances where states parties are unwilling or unable to do so. The ratification of the Rome Statute by a huge number of states indicates their acknowledgment of the duty to prosecute and punish these

---

984 Rome Statute of the International Criminal Court, 1998
985 Rome Statute of the International Criminal Court, 1998
986 *Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, (2016)
987 Strydom et al, International Human Rights Standards 29
988 *The Prosecutor v. Blagojevic and Jokic*, IT-02-60-A, App. Ch., 2007. para. 127; The Prosecutor v. Blaskic, IT-95-14-A, App. Ch., 2004, para. 48; The Prosecutor v. Naletilic *and Martinovic,* IT-98-34-T, T. Ch. I, 2003. para. 63
989 See Torture Convention, Art. 5(2)
990 See UN General Assembly 32 meeting, Doc. E/CN4/1984/5R. para. 85

crimes.[991] In actual fact, the Rome Statute makes no provision for amnesty and therefore justifies the ICC's commitment to prosecute and punish the perpetrators of serious crimes.[992] The relevance of the ICC within the framework of international criminal justice is that it acts as a last resort[993] with regards to serious crimes stated under Article 5 of the Rome Statute. Therefore, perpetrators cannot evade justice by virtue of their geographic location, official capacity or nationality or still, justice cannot be impeded for the mere fact that a state is unable or unwilling to prosecute.[994]

This study adopts the comparative historical research approach to examine the historical events and legal phenomenon that impacts on the different international criminal tribunals including the ICC. The focus on legal phenomenon's and historical events is to provide explanations that analyze and justify current debates with regards to international criminal justice and more specifically the functioning of the ICC.[995] In this regard, analysis is based on three sub approaches which include; direct comparison of historical and contemporary events based on the application of international criminal justice, a theoretical conceptualization based on universal jurisdiction and a balance between competing political and legal claims in the application of international criminal justice.[996] Also, contextual analysis of the relevant materials focused on historical antecedents in a chronological manner to discuss how legal phenomenon's impact on the functioning of the ICC.[997] From a comparative legal perspective, the study utilized Karl Max capitalist theory of class struggle to analyze and discuss the phenomenon of selectivity through which African states, including the AU have raised the issue of bias prosecutions by the ICC.[998]

The Rome Statute provides a more coherent text regarding aiding and abetting by stressing that a person is to be held liable if he or she facilitates, aids, abets or

---

991 The Rome Statute requires states to either prosecute and punish the enshrined crimes domestically or submit the suspects to ICC prosecution. See Rome Statute of the International Criminal Court 1998. Art. 17(1)(a)–(b).

992 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11

993 See Rome Statute of the International Criminal Court 1998. Art. 27.

994 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11

995 Bennett 2009 *IJCACJ*

996 Savage, Bennett and Danner 2008 *EJC*

997 Bennett 2009 *IJCACJ*

998 Max cited in Smith, 2002 http://www.merxists.org/arcchive/marx/works/1845/theses/index.htm

otherwise assists the commission of a crime that is about to, that is being or has been committed.[999] Equally, liability arises when an individual contributes to the commission of such an act of violence by a group of individuals acting with a common purpose.[1000] For the offence to fully materialize, there must be justification that the aider and/or abettor had the aim to foster the criminal activity involving the commission of a violent act of the group[1001] while in knowledge of the culpable intent of it.[1002] The Statute further differentiates between two categories of support which are; aiding and abetting or otherwise assisting[1003] and contribution to the commission of an illicit act of a group.[1004] These provisions grounded in the Rome Statute provide justification for the act of aiding and abetting the commission of a crime as a mode of liability falling within the jurisdiction of the ICC.

3.8.6 Joint criminal enterprise

The joint criminal enterprise doctrine has been elaborated upon by seven major decisions of the Appeals Chamber of the ICTY and ICTR.[1005] Despite available legal framework mandating the Security Council to ensure global peace and security, it has continued to ignore conflicts that threaten international peace. Article 24 of the UN Charter authorises the Council to maintain international peace and security on behalf of all UN Member states.[1006] By virtue of Article 25 of the UN Charter, all UN Member states are bound by the Council's decision when it acts on their behalf.[1007] Article 39 of the Charter confers upon the Council the mandate to determine threats to international peace and decide what measures should be taken in accordance with Articles 41 and 42

---

999 Rome Statute of the International Criminal Court 1998. Art. 25(3)(c)

1000 Rome Statute of the International Criminal Court 1998. Art. 25(3)(d)

1001 Rome Statute of the International Criminal Court 1998. Art. 25(3)(d)(1)

1002 Rome Statute of the International Criminal Court 1998. Art. 25(3)(d)(2). With regards to the crime of genocide, there must be prove of direct and public incitement by the aider and/or abettor. See Art. 25(3)(e)

1003 Art. 25(3)(c)

1004 Art. 25(3)(d)

1005 See (a) *The Prosecutor v. Tadic,* IT-94-1-A, App. Ch., 1999; (b) *The Prosecutor v. Krnojelac*, IT-97-25-A, App. Ch., 2003.; (c) *The Prosecutor v. Vasiljevic*, IT-98-32-A, App. Ch., 2004.; (d) *The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, App.Ch., 2004; (e) The Prosecutor v. Stakic, IT-97-24-A, App. Ch., 2006; (f) *The Prosecutor v. Brdanin*, IT-99-36-A, App. Ch. 2007; (g) The *Prosecutor v. Martic*, IT--95-11-A, Ap. Ch., 2008

1006 See Charter of the United Nations and Statute of the International Court of Justice 1945

1007 Charter of the United Nations and Statute of the International Court of Justice 1945

of the Charter.[1008] Given that such legal obligations exist within the Council's primary responsibility as provided for by the UN Charter, Article 13(b) of the Rome Statute provides the basis upon which the Council can make determinations in accordance with its Chapter VII mandate and refer such situations to the ICC for prosecution.[1009] So far the Council has referred two cases from Africa (Sudan and Libya) to the ICC and ignored situations in countries like Iraq and Afghanistan involving the use of drones to launch airstrikes which actually resulted in massive deaths.

In the absence of an effective response from either the Security Council or the ICC, a Malaysian War Crimes Tribunal based in Kuala Lumpur brought war crimes charges against ex-President George Bush and Former Prime Minister Tony Blair in line with the war crimes criteria listed under Article 8 of the Rome Statute.[1010] The War Crimes Commission found that both Bush and Blair had participated in the adoption of executive orders and directives to exclude the 1949 Geneva Conventions, the Convention Against Torture, the Universal Declaration of Human Rights and the United Nations Charter in relation to the wars launched by the USA and Britain in Iraq and Afghanistan.[1011] So far, the Tribunal remains the first war crimes commission to make judicial pronouncements based on the facts and evidence gathered from the situation that obtained in Iraq and Afghanistan.[1012] In accordance with the Tribunal's decision, the acts of inhumanity perpetrated against Iraqi people and Afghanistan's by the USA and British forces under the Bush and Blair administrations could be compared to what the Nuremberg Tribunal referred to as the waging of war against peace or crimes against peace in short.[1013]

1008 Charter of the United Nations and Statute of the International Court of Justice 1945

1009 See Rome Statute of the International Criminal Court 1998

1010 Chief Prosecutor of the Kuala Lumpur War Crimes Commission v. George Bush and Anthony L Blair, criminal proceeding No. 1-CP-2011

1011 Chief Prosecutor of the Kuala Lumpur War Crimes Commission v. George Bush and Anthony L Blair, criminal proceeding No. 1-CP-2011

1012 See Ramakrishnan http://www.globalresearch.ca/war-crimes-tribunal-finds-bush-and-blair-guilty/5478367[Accessed 14 March 2018]

1013 In Afghanistan, the USA claimed it war was in "self-defence", in Iraq, it claimed the authority of the Security Council of the United Nations. Likewise, In Kosovo, the US claimed its war was a "humanitarian intervention", Yet each of these wars was illegal according to established rules of international law. See Mandel *How* America gets away with murder 207

In establishing the Joint criminal enterprise mode of liability, the ICTY Appeals Chamber in the *Tadic* case referred to the International Covenant for the Suppression of Terrorist Bombing adopted by the UN General Assembly in 1997.[1014] Article 2(3)(c) of the Convention provides liability for individuals for acts carried out by group of persons acting with a common purpose.[1015] The Chamber further opined that support for the joint criminal enterprise mode of liability could be found under Article 25(3)(d) of the Rome Statute[1016] which provides liability for contribution to the commission of a crime by a group of persons acting with common purpose.[1017] Therefore, previous judgments, including precedents from international criminal jurisprudence have established the legislative framework for the ICC to hold co-perpetrators accountable under the scheme of joint criminal enterprise for their involvement in a common plan to perpetrate mass atrocities. In the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,[1018] the Prosecution alleged that the two defendants were responsible as co-perpetrators in accordance with the joint criminal enterprise scheme under Article 25(3)(a) of the Rome Statute.

3.9 SUMMARY

The creation of the ICC was premised upon the draft Statute of the ILC. The Statute's proposed model of an international criminal court was met with serious debates from member states. These debates were born out of perceived weaknesses in the structural frame-work and their implications for the smooth functioning of the Court as an independent judicial institution. The UN PrepCom was set up to improve the ILC's draft

---

1014 *The Prosecutor v. Duško Tadić*, ICTY, judgment, Case No. IT-94-1-A, (1999) (Appeals Chamber), para. 220; The International Covenant for the Suppression of Terrorist Bombing adopted by the UN General Assembly on 15 December 1997

1015 Article 2(3)(c) provides: "In any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned".

1016 See Rome Statute of the International Criminal Court, 1998. Art. 25(3)(d)

1017 See *The Prosecutor v. Duško Tadić*, ICTY, judgment, Case No. IT-94-1-A, 1999 (Appeals Chamber), para. 222

1018 See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges, ICC-01/04-01/07 (Pre-Trial Chamber I, 2008)

Statute. It was hoped that the PrepCom would resolve issues that emanated from the ILC's draft and hence, set the stage for the adoption of the Rome Statute. The PrepCom engaged in meaningful dialogue with member states in a series of international meetings, including the Zutphen meeting in the Netherlands, in 1998. While such initiatives paved the way for the adoption of the Rome Statute, the process encountered difficulties resulting in many states choosing to withdraw themselves from the jurisdiction of the ICC.

The negotiation process sought to develop a unified system of global accountability as opposed to the *ad hoc* tribunals which had limited jurisdiction in terms of territorial limits.[1019] The works of the PrepCom, supported by member states challenged many criminal justice systems across the world which was why divergent views conflicted at the Rome Diplomatic Conference. However, the ICC finally came into existence with the core mandate to prosecute international crimes. This chapter continued to analyse the pre-conditions necessary for the exercise of the Court's jurisdiction and furthermore, it defined and discussed the different categories of international crimes, including the crime of aggression over which the Court may exercise jurisdiction. Unlike Article 5(2) of the Rome Statute, this portion of the research provides for a comprehensive definition of aggression as a crime in accordance with Article 8*bis* of Resolution RC/Res.6 amending the Rome Statute. In the last part of this chapter, the degree of participation in the commission of international crimes has been discussed in relation to planning, instigating, ordering, committing, aiding and abetting and joint criminal enterprise.

Overall, the chapter outlined the challenges faced by drafters of the Rome Statute and how such challenges were resolved to bring forth the ICC. The chapter discussed in detail the reasons why principal architects like the USA and the PRC failed to ratify the Rome Statute. The Statute provides unique characteristics that justify the novel and improved nature of an evolving international criminal justice system.[1020] In the next chapter, a new debate will be established to conceptualise the sources and principles governing the ICC. The essence of the chapter is to develop a conceptual frame upon

---

1019 Olasolo *The Triggering* 135
1020 Olasolo *The Triggering* 135

which the research will be based. The chapter will discuss in a theoretical fashion how challenges can be addressed to enhance the functioning of the ICC.

CHAPTER FOUR
THEORETICAL CONCEPTUALIZATION OF THE SOURCES AND PRINCIPLES OF LAW UNDERPINNING THE INTERNATIONAL CRIMINAL COURT

4.1 INTRODUCTION

After examining and interrogating the historical antecedents leading to the creation of the ICC, the study continues to analyze the legal framework governing the international criminal justice system. In this chapter, the researcher analyses relevant sources and principles of criminal law to conceptualize a theoretical framework that informs the functioning of the ICC. Furthermore, the chapter introduces the theory of universal jurisdiction to justify the mandate and operations of the Court. Additionally, relevant international law treaties, including case law would be analyzed to clarify the principle of individual criminal responsibility *vis-à-vis* the theory of universal jurisdiction in international law. The chapter identifies and discusses relevant sources and principles of international criminal law establishing the foundation upon which the ICC operates and also to introduce a theoretical model that can improve the Court's performance.

Occasioned by the lacunae in international law dating back to the Cold War era, the Nuremberg tribunal was instituted as the foundation stone of individual criminal responsibility in international law. However, the tribunal's jurisdiction was limited to targeting Axis powers accused of atrocities committed during WW II.[1021] Subsequent international courts, including the Tokyo Tribunal and the UN *ad hoc* tribunals were also limited in terms of jurisdiction as they were designed to respond to disputes within specific geographic regions. The ICC was created to address these concerns by way of exercising jurisdiction over the broader international community in situations where domestic courts fail to live up to such legal obligations.[1022] Article 4(1) of the Rome Statute, for example, provides that the Court shall have international legal personality. Whereas the Statute provides for such international recognition, it further aligns the Court with the principle of complementarity such that it exercises its jurisdiction only when domestic courts fail to act due to unwillingness or inability to prosecute. In this part of the study, the researcher unpacks the synergy between relevant sources,

---

1021 See Schabas *An Introduction* 9
1022 Schabas *An Introduction* 9

principles and concepts of international law that provide the necessary support through which the ICC exercises its jurisdiction as an independent international criminal court. Before delving into the main discussion, it is important to understand the meaning of the phrase "international criminal law."

4.2 THE MEANING OF INTERNATIONAL CRIMINAL LAW

What do we mean when we talk about international criminal law? Several approaches are connected to this question. First, one might consider the concept of international criminal law to include crimes that are subject to universal jurisdiction with the understanding that such crimes are of general concern to the broader international community and can be prosecuted by any national court.[1023] The doctrine of universal jurisdiction will therefore constitute one among the salient features to be addressed in this chapter. In the interim, it is important to note that a number of crimes of international concern are subject to universal jurisdiction and of course, they go beyond crimes that occupy the international criminal law debate.[1024] These include, for example, crimes covered by treaty law where there is jurisdiction arising from the duty to prosecute even if they are committed in a foreign territory. The crimes in question may be directed to atrocities committed in foreign territories; torture and the historic crime of piracy being classic examples.[1025]

Another possible consideration might also involve offences covered by general treaty obligations. These may include minor offences like intentional damage to submarine cables as well as conventions designed to suppress terrorism like the Convention on the Hijacking of Aircraft.[1026]

The usual approach often adopted in respect of international criminal law is focused on crimes that can be prosecuted by international criminal courts. This results in what is commonly considered to be the core crimes or the most serious crimes of concern to the international community as a whole, including the crime of genocide, crimes against

---

1023 Boas What's in a Word, Gideon Boas, William A. Schabas and Michael P. Scharf (eds.) 1-24

1024 See Cerone and SaCouto *International Criminal Law* 4

1025 Cerone and SaCouto International Criminal Law 4

1026 Cerone and SaCouto International Criminal Law 4

humanity and war crimes.[1027] Therefore, how does international criminal law function in scope and practice is a question to be addressed in the course of our discussion.

A good starting point in our debate will be to consider the crime of piracy, which invokes the principle of universal jurisdiction as every state has the power to prosecute any person accused of piracy.[1028] While the crime of piracy is subject to universal jurisdiction, it is considered a transnational crime occurring across national borders rather than a serious crime in international law.[1029] By this consideration, one may pose the question as to how different are serious crimes from transnational crimes? Whereas transnational organised crimes fall under the jurisdiction of domestic courts,[1030] serious crimes in international law go beyond domestic limits to violate the norms of *jus cogens* and are covered by the jurisdiction of international criminal tribunals.[1031] Such crimes sometimes engage the interest of all human beings as their occurrence breaches the moral substratum upon which contemporary human civilisation is founded.[1032] The crime of piracy is limited to occasional kidnapping for ransom on the high seas and occurs outside the state's jurisdiction.[1033] According to the UN Convention on the Law of the Sea 1982, piracy means;

> (a) "Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

1027 Boas What's in a Word, Gideon Boas, William A. Schabas and Michael P. Scharf (eds.) 1-24

1028 For instance "If piracy is a universal crime, then it should merit a universal response". See Murphy *Piracy and UNCLOS,* (Peter Lehr, ed.,), 44

1029 Murphy *Piracy and UNCLOS,* (Peter Lehr, ed.,), 44

1030 Transnational organized crimes like piracy, money laundering and corruption may be punished by any state in accordance with the necessary domestic legislative framework but without prejudice to the sovereignty of other states. It is the duty each state to adopt such measures as may be necessary to establish its jurisdiction over transnational organised crimes. See United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (UNTOC), General Assembly resolution 55/25, 2000. Arts 4,5,6, and 15

1031 For more clarifications see Guymon 2000 *BJIL.* See also Boas What's in a Word, Gideon Boas, William A. Schabas and Michael P. Scharf (eds.) 1-24

1032 Human Rights Watch, 2004 The International Criminal Court: How Nongovernmental Organization can contribute to the prosecution of war criminals. https://www.hrw.org/legacy/backgrounder/africa/icc0904/icc0904.pdf Accessed 20/06/2016

1033 See Bento 2011 *BJIL*

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State";

(b) "Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of the facts making it a pirate ship or aircraft";

(c) "any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)".[1034]

Therefore, piracy is simply a crime that occurs beyond national borders and subject to the jurisdiction of domestic courts.[1035] Because a ship on the high seas is subject to the jurisdiction of its flag state, and piracy involves an attack directed against a ship on the high seas from another ship, the act of crossing over from one ship to another to launch an attack forms what is referred to as the crime of piracy.[1036] While piracy is well established as a crime under international law, it as well attracts universal jurisdiction for its occurrence.[1037] Likewise, serious crimes in international law also attracts universal jurisdiction as will be discussed in subsequent sections.

There are a number of historical examples for the prosecution of serious crimes in international law, including the Leipzig trials that targeted German war crime suspects after World War I.[1038] However, preference is usually given in history to the Nuremberg tribunal of 1945 and the Tokyo tribunal of 1946.[1039] As pointed out in previous chapters, these tribunals often reflect a pivotal turning point when international law reached directly to the rights and obligations, including the consequences of individual actions rather than prioritising the responsibility of states.[1040] Although the tribunals represent historical antecedents, they show little significance in the subsequent development of

---

1034 United Nations Convention on the Law of the Sea, 1833 UNTS. (1982). Article 101, [hereinafter UNCLOS]).

1035 Guymon 2000 *BJIL*

1036 See United Nations Security Council Resolution 1918, UN Doc S/RES/1918 (2010). The resolution affirming that "the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community".

1037 Kelly 2013 *CWRJIL*

1038 Norman and Spencer *Peace Magazine* Anon.

1039 McDonald, Gabrielle Kirk and Olivia Swaak-Goldman, (eds.), *Substantive and Procedural Aspects* 38.

1040 London Charter, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and establishing the Charter of the International Military Tribunal (IMT), Annex, 82 UNTS 279. (1951)

international criminal law.[1041] The Nuremberg trials, for example, were not widely considered as fair trials and an exhaustive examination of the tribunal did not engage a great deal of sophisticated legal reasoning.[1042] Also, one of the principal crimes of the Nazi regime now being universally acknowledged as the Holocaust, and actions taken to exterminate the Jewish population of Germany, and also the liquidation of the disabled and the elderly, were not properly addressed for reasons of an infant international criminal justice system.[1043]

Genocide was not classified among the crimes within the jurisdiction of the Nuremberg tribunal but was only referred to in passing.[1044] The Tribunal also had a peculiar limitation in its Statute with regards to crimes against humanity that were prosecuted in connection with the war in Europe.[1045] There was a linkage between the state of the war and crimes against humanity for which crimes against humanity was brought to the forefront of the international criminal law debate. In other words, no precedent of crimes against humanity was ever recorded throughout the period that precedes the Nuremberg trials.[1046]

Therefore, crimes against humanity stood out principally as referred to by Robert Jackson, the USA's lead prosecutor for the Allied forces at Nuremberg, as a practical precedent in the sense that future international criminal tribunals could be established

---

1041 See Assembly of State Parties to the Rome Statute of the International Criminal Court's First Session, U.N. Doc. ICC-ASP/1/3, 2002, [hereinafter ICC-ASP: First Session]. During the special tribunals, the Judges would have to determine the elements of the crime in each case based on customary law. The elements were never known until the judgment was rendered AND approved by the Appeals Court. See Daryl A. Mundis, Knut Dörman, with Contributions by Louise Doswald-Beck and Robert Kalb 2004 *JICJ.* See also Roger Clark, *The Mental Element* 291. The forum discussed the highly difficult task of assigning mental states to the ICC offenses).

1042 See Kuehn 2007 *PLR*

1043 During the summer of 1941, British intelligence began intercepting radio reports from Nazi mobile killing squads in Poland about mass exterminations taking place there in the wake of the German invasion. Not wanting to give away the fact that the British were intercepting these communiqués -- and still not aware of the full dimensions of the Final Solution -- Winston Churchill referred to the information only cryptically in his now-famous August 1941 radio speech when he said, "We are in the presence of a crime without a name." See Lamb S, Genocide since 1945: Never again? http://www.spiegel.de/international/genocide-since-1945-never-again-a-338612.html Accessed 20/06/2016. For further discussion see Zuppi 2006 *LLR*

1044 See Sellars 2010 *EJIL*

1045 Sellars 2010 *EJIL*

1046 See Boister and Cryer The Tokyo International Military Tribunal 358

with similar jurisprudence.[1047] From the reference point at Nuremberg, new international criminal tribunals have emerged, including the ICTY and ICTR which were established by the Security Council in response to the ethnic conflict that erupted in the former Yugoslavia and the genocide in Rwanda.[1048]

The jurisprudence of the Trial and Appeal Chambers of the UN *ad hoc* tribunals mentioned above has contributed greatly in the development of international criminal law.[1049] Also, there is a special role attributed to the Rome Statute. The Statute is considered both as a treaty that gave birth to the ICC and a source of definition for the crimes prosecuted by the Court.[1050]

Whereas 148 states were involved in the negotiation of the treaty, the final text was adopted with 120 votes in favour, 21 votes against and 7 abstentions.[1051] Admittedly, one can look into the Statute for *opinio juris*, the opinion of states with regards to the content of international criminal law and also the definition of crimes and significant details to defences.[1052] While the Statute seems important in directing the functions of the ICC, it also serves as the main source of international criminal law.[1053] Notwithstanding, there are subsidiary means other than the Rome Statute for determining international criminal law Hence, the question emerges: How do we identify the sources and principles of international criminal law?

It is important to be cautious in identifying and discussing the sources and relevant principles involved in international criminal law. For example, it can be argued that war crimes involve the core of customary international law or the prohibition of genocide constitutes a peremptory norm or *jus cogens*.[1054] Whatever the link between a particular crime and a universally accepted principle may be, the question remains: How does such a connection assist in a criminal court? The court will be interested in finding

---

1047 See Totani The Tokyo War Crimes Trial 355
1048 Payam, *et al,* 1998 *UILR*
1049 Payam, *et al,* 1998 *UILR*
1050 Schabas 2008 *JCLC*
1051 Schabas 2008 *JCLC*
1052 Schabas 2008 *JCLC*
1053 Donovan 2012 http://intpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/ Accessed 20/06/2016
1054 Raimondo General principles of law in the decision of international courts and tribunals 62

precise rules capable of being applied in criminal proceedings. In essence, criminal law requires precision backed by the underlined principle of *Nullum Crimen Sine Lege*.[1055]

The Geneva Conventions of 1949 laid down the laws applicable in time of war. However, the Conventions were not originally designed as crime-creating treaties.[1056] Rather, they were designed to simply lay the rules of conduct in times of war and only a few provisions envisaged criminal sanctions for their breach. Also, international criminal law is drawn from different branches of law, including public international law and of course, such diversity might invoke competing imperatives.[1057]

The international criminal law system involves engagements with laws and principles drawn from criminal law, human rights law, the laws applicable in armed conflicts and general principles of public international law.[1058] It may not be easy to reconcile all of these different standards as criminal law requires a degree of precision not accommodated by the law of armed conflict or human rights law which is protective of individuals. This leaves us with competing norms and value systems to be reconciled.[1059]

In terms of the classic sources of Public International Law, treaty law seems more important as it is often considered a source of reference in terms of legal definitions.[1060] Therefore, the Rome Statute will be an important source of international law, but looking at the treaty as a source of general principles of international law or customary rules will be a bit problematic for obvious reasons. The Rome Statute attempts both the codification of pre-existing laws and the progressive development of the laws. This means the treaty is neither static nor subject to a particular customary rule.[1061] Rather, it is open for propositions and modification where necessary, thereby generating the notion that not every provision in the document was intended to reflect pre-existing laws.[1062] Nonetheless, the treaty may in some circumstances be considered not only as a

---

1055 Degan 2005 *CJIL*
1056 See Fischer 2006 *FILJ*
1057 Fischer 2006 *FILJ*
1058 See Brown International Criminal Law 3
1059 Cerone 2005 http://ssrn.com/abstract=1647218 Accessed 21/06/2016
1060 Cerone 2005 http://ssrn.com/abstract=1647218 Accessed 21/06/2016
1061 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 122
1062 Clark 2010 *GJIL*

norm-generating document, but also a norm-discerning piece of legislation.[1063] For example, where the tribunal for Yugoslavia or Rwanda interprets customary law and the interpretation is being infused into the Rome Statute, it might be evident as cases where the international community concludes the acceptance of a new customary law.[1064] In this regard, the Rome Statute is said to have become the main source of international criminal law.

4.3 SOURCES OF LAW RELEVANT TO INTERNATIONAL CRIMINAL JUSTICE

After the adoption of the Rome Statute, questions as to whether the rules of international criminal law in fact satisfy the requirements of clarity and transparency under the principle of legality have lost credibility.[1065] So far, international criminal law rules set forth in the Rome Statute have been presented with much clarity and in a similar manner to those of civil systems. For example, provisions of the Statute have been clarified by the Rules of Procedure and Evidence.[1066] In this way, the sources which previously were described as a mixture of customary international law and partial codification by treaty have attained a new and precise level of codification. For instance, the identification and codification of international customary norms to advance the realm of customary international law has greatly improved the scope of international criminal law;[1067] for example, improved definitions of serious crimes under international law as provided for by Articles 6, 7 and 8 of the Rome Statute.[1068]

1063 Clark 2010 *GJIL*

1064 Clark 2010 *GJIL*

1065 Malekian Jurisprudence of international criminal justice 7

1066 See Rules of Procedure and Evidence of the International Criminal Court, Doc. ICC-PIDS-LT-02-002/13_Eng, (2013). The Rules of Procedure and Evidence is a subordinate document design to assist the application and proper implementation of the Rome Statute. In the process of elaborating the Rules of Procedure and Evidence, the architects applied much caution such that the provisions of the Rome Statute were not rephrased and reproduced in the text. However, the document still contains direct references purposefully included "to emphasize the relationship between the Rules and the Rome Statute, as stipulated under Art. 51 in particular, paragraphs 4 and 5. In all cases, the Rules of Procedure and Evidence is read in conjunction with and subject to the provisions of the Statute". They do not affect the procedural rules for any national court or legal system for the purpose of national proceedings.

1067 Malekian Jurisprudence of international criminal justice 45

1068 The Articles define and discuss with mush clarity the statutory meanings of Genocide, Crimes against Humanity and War Crimes. Article 8*bis* of the amendments to the Rome Statute adopted in Kampala further defines with much clarity the full meaning of

However, the nature of international criminal law reflects a close connection between treaty law and customary law. In fact, many international criminal law treaties expressly or incidentally codify customary law.[1069] In the Rome Statute, the classification of crimes in different categories, depending on their mode of occurrence, clarifies the configuration of customary legal rules. Therefore, international treaties can be referred to as the starting point for the formation of international customary law norms by virtue of codification.[1070] To justify this assertion, see, for example, Common Article 3 of the Geneva Conventions of 1949.[1071] In circumstances where the criminal law application becomes a necessity, the relationship between treaty law and customary law as sources of law must be closely observed such that the full meaning of the applicable law is established. For purposes of clarification, the role of customary international law in the development of international criminal law will constitute our next point of focus.

4.3.1 Customary international law

Customary international law, among others, has continuously played an important role in the development of international criminal law before and after the entry into force of the Rome Statute. Classically, customary international law exists if actual state practice can be found, coupled with a sense of legal obligation (*opinio juris*).[1072] The objective component for the emergence of customary law is state practice determined from the totality of the states' official behaviour.[1073] How this determination can be achieved is our question to answer. Legislative measures must be considered, along with the decisions of courts and official acts and declarations by state representatives, including relevant treaty practices that are uniform and widespread. Decisions of international

---

Aggression as a crime under international Law as opposed to Article 5(2) of the Rome Statute.

1069 See Schabas and Bernaz *Routledge Handbook* 175

1070 See Bassiouni International Criminal Law 137

1071 See *The Prosecutor v. Tadic*, ICTY App. Ch. 1995. para. 98

1072 See Statute of the International Court of Justice annexed to the Charter of the United Nations. Art. 38(1)(b).

1073 See *The Prosecutor v. Tadic*, ICTY App. Ch. 1995. para. 108

courts and prohibitions commonly imposed by international organizations also provide indirect evidence of customary international law observed by states.[1074]

Additionally, Article 38(b) of the Statute of the ICJ considers international custom to be evidence of a general practice accepted as law. In this regard, the ICJ acknowledged that the scope of Article 38(b) of the Statute encompassed bi-lateral and regional international customary norms as well as general customary norms in much the same way as it encompassed bi-lateral and multi-lateral treaties.[1075] Also, the Court clarified that for customs to be definitively proven, they must be continuously and uniformly observed.[1076]

In the Case of *Colombia v. Peru (Asylum case)*, the issue before the court was what constituted sufficient state practice for the establishment of local custom? The ICJ stated that in the normal course of granting diplomatic asylum, a diplomatic representative has the competence to make a provisional qualification of the offence (for example, as a political offence) and the territorial state has the right to give consent to this qualification.[1077] In this case, Colombia, as the state granting asylum, asserted that it was competent to qualify the nature of the offence in a unilateral and definitive manner that was binding on Peru.[1078] The court had to decide if such a decision was binding on Peru either because of treaty law (in particular the Havana Convention of 1928 and the Montevideo Convention of 1933),[1079] other principles of international law or by way of regional or local custom.

1074 On this note, the Yugoslavia Tribunal stated that: "Of great relevance to the formation of *opinion juris* . . . are certain resolutions unanimously adopted by the Security Council." See *Prosecutor v. Tadic*, ICTY App. Ch. 1995. para. 133

1075 See *Columbia v. Peru (Asylum Case),* ICJ Rep 266, (1950). paras. 276-78. See also Statute of the International Court of Justice annex to the Charter of the United Nations of 1945. Article 38(b).

1076 See *Columbia v. Peru (Asylum Case),* ICJ Rep 266, (1950). paras. 276-78

1077 See *Columbia v. Peru (Asylum Case),* ICJ Rep 266, (1950). paras. 276-78

1078 See *Colombia v. Peru (Asylum Case),* ICJ Rep 266, (1950). paras. 276-78

1079 See the Havana Convention adopted in the Havana Conference held in Havana from 16 January to 20 February (1928).; Montevideo Convention on the Rights and Duties of States Signed at Montevideo (1933) and entered into force, 26 December 1943. The Montevideo Convention on the Rights and Duties of States is a treaty signed at Montevideo, Uruguay, on December 26, 1933, during the Seventh International Conference of American States. The Convention codifies the declarative theory of statehood as accepted as part of customary international law.

The Court held that the burden of proof on the existence of an alleged customary law rested with the party making the allegation:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party… (that) it is in accordance with a (1) constant and uniform usage (2) practiced by the States in question, and that this usage is (3) the expression of a right appertaining to the State granting asylum (Colombia) and (4) a duty incumbent on the territorial State (in this case, Peru). This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law….[1080]

In addition, state practice must be linked to a corresponding sense of legal obligation (*opinio juris*).[1081] The margin between *opinio juris* and state practice has been minimized to the extent that the state conduct in most cases might be seen as a reflection of both practices. Hence, the objective and subjective components of state practice will merge to form what the state considers to be *opinio juris*.[1082] This corresponding obligation generates a binding effect that is in turn observed and enforced as a customary rule. Judicial practice, including verbal acts of states expressed in official pronouncements also have great significance towards the formation of customary law in the realm of international criminal law. In the landmark decision in the *Tadic case*,[1083] the Appeals Chamber of the Yugoslavia Tribunal held that;

> In appraising the formation of customary rules or general principles, one should therefore be aware that, on account of the inherent nature of this subject matter, reliance must primarily be placed on such elements as official pronouncement of States, military manuals and judicial decisions.

A verification procedure for determining the customary character of international criminal law has been outlined in the Yugoslavia Tribunal's decision in the *Krstic case*.[1084] The starting point of the Chamber's decision was the codification of customary law principles in international treaties followed by the consultation of international case

---

1080 See *Colombia v. Peru (Asylum Case)*, ICJ Rep 266, (1950). paras. 276-78
1081 See *The Prosecutor v. Tadic*, ICTY App. Ch. 1995. para. 83
1082 Dixit et al, International Criminal Jurisprudence 39
1083 See *The Prosecutor v. Tadic*, ICTY App. Ch. 1995. para. 99
1084 See *The Prosecutor v. Krstic*, ICTY App. Ch. 2001. para. 541

law.[1085] In subsequent cases, the Rwandan tribunal utilised relevant ILC's drafts code "particularly relevant sources for the interpretation of Article 4 [of the ICTY Statute]", the reports of other international instruments, such as the UN Human Rights Commission, the Elements of Crimes of the Rome Statute and finally, relevant domestic legislation.[1086] Other than customary international law being the source of international criminal law, one may also look into the general principles of law recognized by civilised nations as discussed below.

4.3.2 General principles of law recognized by civilized nations

General principles of law are important to the development of international criminal law. The principles are drawn from the worlds' most recognized and major legal systems.[1087] However, not every law found in several or all legal systems will automatically be qualified as a general principle of law and thereby constitute a component of the international legal order.[1088] For a law to be classified under the category of general principles of international law, two conditional requirements must be met.[1089] First, the law in question must represent a legal principle and secondly, the legal character contained in the said principle must be transferable to the international legal order. The Yugoslavia Tribunal stated the following in this regard:

> Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) . . . international courts must draw upon the general concepts and legal concepts and legal institutions common to all the major legal systems of the world [not only common-law or civil-law states] . . . ; (ii) . . . account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transportation from national law into international criminal proceedings is avoided.[1090]

Therefore, elements of international criminal law are not only determined by all the legal norms upon which major legal systems agree or have been established as such,

---

1085 The *Prosecutor v. Krstic*, ICTY App. Ch. 2001. para. 541
1086 See Bisongo *et al,* 2015 *EJC*
1087 Statute of the International Court of Justice. Article 38(c). See also *The Prosecutor v.Furundzija*, ICTY Tr. Ch. 1998. para. 177
1088 Dixit et al, International Criminal Jurisprudence 39
1089 Mantovani 2003 *JICJ*
1090 See *The Prosecutor v. Furundzija*, ICTY Tr. Ch. 1998. para. 178

but are solely dependent on the general principles upon which other norms are based.[1091] It is difficult therefore to differentiate between customary international law and general principles of law, as the development of state practice is in constant flux between the two over-riding imperatives.[1092]

International criminal tribunals use general principles of law to bridge a gap in the applicable law when there is no applicable treaty rule and no applicable customary principle. This means that general principles of law can only be invoked after the exhaustion of treaties and customs.[1093] For example, rape is generally acknowledged as a crime, but to prosecute rape as a war crime, you need a comprehensive definition of rape to suit the purpose of international criminal law. In the *Furundzija case*,[1094] the ICTY undertook a survey of the law of rape in various national legal systems. The Tribunal did so not to deduce a general rule of customary international law, but as an exercise in discerning common general principles available to determine the *actus reus* and *mens rea* of the crime of rape.[1095]

Except for customary international law and the general principles of laws recognized by civilized nations as mentioned above, other subsidiary means can also be used to determine international criminal law as will be discussed in the section below.

4.3.3 Subsidiary sources for determining international criminal law

Subsidiary means through which international criminal law principles can be determined are primarily the decisions of international courts and legal scholarships. Information on the "teaching of the most highly qualified publicists' may be obtained mainly from the reports and statements of international law associations (such as the Institute du Droit International and International Law Association) and the UN International Law Commission.[1096] Decisions of national courts may also be consulted in deserving circumstances.[1097] Through the above stated means used for determining international

---

1091 Mantovani 2003 *JICJ*.
1092 Mantovani 2003 *JICJ.*
1093 See Hague Institute for the Internationalisation of law, *General rules and principles* 4
1094 See *The Prosecutor v. Furundzija*, IT-95-17/1. 1998
1095 Marzen 2010 *CLR*
1096 Werle and Jessberger Principles of International Criminal Law 156
1097 Werle and Jessberger Principles of International Criminal Law 156

criminal law, rules of procedure and case law jurisprudence applicable to domestic legal systems have been transferred into the Rome Statute and such transfers have enhanced the functioning of the ICC.[1098] For a proper understanding as to how such subsidiary means support the Rome Statute, the section that follow will introduce the most important sources of law and how their application influences criminal jurisprudence internationally.

4.3.3.1 Rome Statute, Elements of Crimes and the Rules of Procedure and Evidence

The Rome Statute acts as the main source of law applicable before the ICC and clarifying the criminal law principles that exist under customary international law.[1099] The Statute goes beyond simply reflecting customary law to make its own contributions to the development of international criminal law.[1100] Above all, its role in the development of contemporary international criminal law has been significant. Even before its entry into force, the significance of the Rome Statute has been summarized by the Yugoslavia Tribunal as follows:

> In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding Article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not 'limited' or 'prejudiced' by the Statute's provisions, resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of states.[1101]

The Statute emerged to become the main source of international criminal law with a constituent international treaty based framework through which the general rules of interpretation apply.[1102] Provisions of the Rome Statute are supplemented by the

---

1098 Viebig DOI 10.1007/978-94-6265-093-0_2. Accessed 28/04/2017
1099 Grover 2010 *EJIL*
1100 See Verhoeven 2002 *NYIL*
1101 See *The Prosecutor v. Furundzija*, ICTY Tr. Ch. 1998, para. 227
1102 Werle and Jessberger Principles of International Criminal Law 156

Elements of Crimes and the Rules of Procedure and Evidence.[1103] The ICC's provision on applicable law under Article 21 of the Rome Statute contains three paragraphs: paragraph (1) establishes a tripartite regime of applicable norms.[1104] Its sub-paragraph (a) refers to the proper law of the ICC,[1105] namely the Court's Statute, its Elements of Crimes[1106] and its Rules of Procedure and Evidence.[1107] Subparagraph (b) sets forth the applicability of a number of external sources, in particular "applicable treaties and the principles and rules of international law". Subparagraph (c) mentions as a further external source "general principles of law derived by the Court from national laws of legal systems of the world". The two remaining paragraphs are not conceived as legal sources in the strict sense, but rather determine methodological parameters.[1108]

The Elements of Crimes clarify the definitions of crimes as stipulated under Articles 6 to 8 of the Rome Statute. Therefore, these Articles simply aid the ICC in interpreting and applying the aforesaid provisions.[1109] On its part, the Rules of Procedure and Evidence supplement and clarify the rules of procedure contained in the Statute itself. The Rules of Procedure and Evidence are binding on the Court, including all states parties.[1110] However, where the Elements of Crimes or the provisions of the Rules of Procedure and Evidence contradict the Statute, the Statute takes precedence.[1111]

The Rome Statute makes special provisions under Article 21 for the law to be determined through the ICC.[1112] The Article establishes the type and order of priority of the sources to be applied by the Court. Article 21 brings the legal sources of general international law into hierarchy with more precision. The Article contains a dual

---

1103 Olafsodottir and Bragadottir 2006 *EJC*

1104 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 21(1)

1105 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 21

1106 Elements of Crimes, Published by the International Criminal Court as Doc. ICC-PID-LT-03-002/11, (2011)

1107 See ICC Rules of Procedure and Evidence, (2002)

1108 Viebig DOI 10.1007/978-94-6265-093-0_2. Accessed 28/04/2017

1109 Elements of Crimes, Published by the International Criminal Court as Doc. ICC-PID-LT-03-002/11, (2011)

1110 See Rules of Procedure and Evidence of the International Criminal Court, Doc. ICC-PIDS-LT-02-002/13_Eng, (2013)

1111 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 51(3) and Art. 9(3) for procedural and evidentiary systems.

1112 Verhoeven 2002 *NYIL*

hierarchy. To begin with, in its instructions for application, the Article distinguishes between what "shall" and what "may" be used.[1113] Secondly, within subsection 1, three groups of legal sources are listed according to rank and finally, a general rule for interpretation and application is available in subsection 3.[1114]

According to the jurisprudence of Article 21, the Rome Statute itself is the main source of international criminal law supplemented by the Elements of Crimes and the Rules of Procedure and Evidence.[1115] Additional sources also include treaties and related principles and rules of international law,[1116] including the law of armed conflict which forms part of customary international law. In the few cases where the Rome Statute and other international treaties and customary international law prove unhelpful, Article 21(1)(c) allows reference to national law. Such references occur in the form of general principles of law derived by the Court from national laws of legal systems of the world.[1117]

With regards to such references, emphasis is placed on laws of states that would normally exercise jurisdiction over the crimes.[1118] A specification as to which particular state was meant to exercise such jurisdiction as mentioned in the preliminary draft is lacking in the text of Article 21. Therefore, according to generally recognised rules on criminal jurisdiction, the law of the state in whose territory the crimes occurred, as well as the laws of the states of nationality of the perpetrator and victim, are to be drawn upon as the basis for defining criminal jurisdiction.[1119] In this case, penal authority under

---

1113 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). 42. Art. 21 (1) and (2).

1114 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 21(3) provides that; "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

1115 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998)

1116 The principles of international law referred to must be distinguished from the "general principles of law recognised by all civilised nations" as meant by Art. 38(1)(c) of the Statute of the International Court of Justice.

1117 Werle and Jessberger Principles of International Criminal Law 156

1118 The inconsistency with the postulated "general nature" of the principles created by this addition is a typical example of the compromise character of the Rome Statute, which has thus far existed at the expense of logical and systematic stringency.

1119 Wessel 2006 *CJTL*

the principle of universal jurisdiction is not sufficient.[1120] Article 21(2) of the Rome Statute avoids the strict reliance on previous judgments that set precedent in most judicial systems. Rather, the Court may, but does not have to rely on earlier decisions to resolve an issue before the Court, as previous cases may present different political as well as legal challenges.[1121]

Above all, whether and to what extent the Statute's provisions generate treaty-based international law or are merely declarative determinations of pre-existing customary law[1122] is not merely of academic significance.[1123] If the norms of the Statute are inherent of customary law character, they may assume the force of general international law and of course apply even to non-parties.[1124] Here, a distinction must be made: In the event where the rules of the Rome Statute can be attributed to pre-existing customary international laws, it may be assumed that they are declaratory in character, reflecting the will of the contracting parties.[1125] The said provisions are mainly definitions of crimes and various aspects of general principles. The Statute's rules are evidence of what the parties believed to be customary international law.[1126] Otherwise, where no examples in customary international law exist, the Statute assumes a law creating charter which most often is common with the provisions on procedure.[1127]

4.3.4 Subsidiary means other than the Rome Statute

The Statutes of the Yugoslavia and Rwanda tribunals were also not determined by a particular treaty, but by the UN Security Council. Both Tribunals engaged in the promotion of customary international law, thereby advancing international criminal jurisprudence. Primarily, they are important as the basis for judicial decisions that

---

1120 Wessel 2006 *CJTL*
1121 For clarity, See Rome Statute, *Op. cite.*, note. 42. Art. 21(2)
1122 The fact that it is not unusual for an international treaty to adopt customary law norms, along with additional rules, is exemplified by the Hague Convention of 1899 and 1907 and the Geneva Conventions of 1949. These treaties codify and enforce norms that are applicable in armed conflict.
1123 Werle and Jessberger Principles of International Criminal Law 156
1124 Werle and Jessberger Principles of International Criminal Law 156
1125 Robinson 2008 *LJIL*
1126 Robinson 2008 *LJIL*
1127 Robinson 2008 *LJIL*

support the international criminal justice system.[1128] Also, their decisions can be expressed as evidence of *opinio juris* which in turn guides states towards their legal obligations vis-à-vis the UN Security Council and its primary responsibility to maintain international peace and security. Therefore, both *ad hoc* Tribunals are really innovative in nature and their contributions as law-making bodies have been significant in the realm of international criminal law.[1129]

The UN agreement with the government of Sierra Leone on the establishment of a Special Court for Sierra Leone was a bilateral treaty with international criminal law as its subject.[1130] Just like the Statute of the *ad hoc* tribunals and the ICC Statute, the Statute of the Special Court for Sierra Leone can be classified as partly confirming customary international law.[1131] Subsequent judgments of the *ad hoc* tribunals were mostly established on the foundation of precedents set by previous judgments and consequently, such judgments improved the *opinio juris* doctrine and contributed positively towards the development of customary international law.

However, the extent to which courts are bound by their own decisions varies. The ICC for instance, can base its decisions on "principles and rules of law as interpreted in its previous decisions"[1132] even though it is not required to do so. The Tribunals for Yugoslavia and Rwanda were strongly bound by precedent. The Appeal Chamber of the Yugoslavia Tribunal has determined that "[in] the interest of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice."[1133] The Chamber assumed a tendency among courts in all legal systems not to deviate, where possible, from their own earlier decisions.[1134] As a rule, the Appeal Chamber followed the *ratio decidendi* of

---

1128 Werle and Jessberger Principles of International Criminal Law 156

1129 Werle and Jessberger Principles of International Criminal Law 156

1130 See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000). Annex I

1131 This is mainly true for the definitions of crimes; see the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000).

1132 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 21(2)

1133 See *The Prosecutor v. Aleksovski*, ICTY App. Ch. 2000. para. 107

1134 The *Prosecutor v. Aleksovski*, ICTY App. Ch. 2000, para. 97: "a general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions."

its own earlier decisions which could also be binding on the Trial Chamber as a source of law.[1135] Except for the Appeal Chamber, the Trial Chamber was not bound by the decisions of other Trial Chambers.[1136] Broadly speaking, the decisions of other international courts, such as the International Military Tribunal at Nuremberg[1137] or the ICJ,[1138] did not have binding effects on the Yugoslavia and Rwanda Tribunals.

The Nuremberg and Tokyo Tribunals also invoked international law principles and established the foundation for future international criminal prosecutions. The provisions of the Statutes of both tribunals embodied norms of customary international law and were commonly referred to as "the Nuremberg Principles".[1139] Although Control Council Law No. 10 was largely considered to be founded on national legislation, it invoked and enforced specific jurisprudence that informed the subsequent development of international criminal law. For the fact that substantive international criminal law principles had been attributed to the Council's legislation, its jurisprudence was considered part of customary international law.[1140] Also, relevant provisions of The Hague Regulations of 18 October 1907, the Genocide Convention of 9 December 1948, and the Geneva Conventions of 12 August 1949, including Protocols Additional to the Conventions, are also relevant sources of international criminal law.[1141] Most of the laws contained in these treaties, are recognised today as customary international law.[1142]

1135 *The Prosecutor v. Aleksovski*, ICTY App. Ch. 2000, para. 113

1136 *The Prosecutor v. Aleksovski*, ICTY App. Ch. 2000. para. 113., *The Prosecutor v. Kordic and Cerkez*, ICTY Tr. Ch. 2001, para. 163

1137 See *The Prosecutor v. Kupreskic et al*, ICTY Tr. Ch. 2000. para. 540

1138 Here, the Court highlighted that, "Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion". See *The Prosecutor v. Mucic et al*, ICTY App. Ch. 2001. para.24

1139 The Yugoslavia Tribunal cites to the IMT Charter and the Tokyo Charter as "relevant practice," see *The Prosecutor v. Tadic,* ICTY App. Ch. 1999. para. 288., *The Prosecutor v. Furundzija*, ICTY Tr. Ch. 1998. para. 190. In the opinion of the Yugoslavia Tribunal, the Statute of the International Military Tribunal and Control Council Law No. 10 are "treaty provisions which are at the very origin of the customary process," see *The Prosecutor v. Tadic*, ICTY App. Ch. 1999, para. 290

1140 See *The Prosecutor v. Tadic*, ICTY App. Ch. 1999. para. 288., *The Prosecutor v. Furundzija*, ICTY Tr. Ch. 1998, para. 190

1141 Anthony 1962 http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/120 Accessed 28/06/2016

1142 Anthony 1962 http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/120 Accessed 28/06/2016

Decisions of international organisations also express the *opinio juris* of the participating states which, in turn, contribute to the emergence of customary international law. For example, UN General Assembly Resolution 95 of 11 December 1946 confirming the Nuremberg Principles was a decision based on the *opinio juris* of contracting states affirming that such principles had become customary international law.[1143] The UN Security Council also made significant contributions towards the affirmation of the *opinio juris* of states. It is worth noting that the creation of the ICTY and ICTR impacted significantly on the genesis and development of customary international law.[1144] Furthermore, reports of the UN Secretary-General connected with the creation of the *ad hoc* Tribunals[1145] are also considered authentic interpretations that clarify and qualify provisions of the founding documents of the *ad hoc* Tribunals as part of customary international law.[1146]

The reports and drafts of the UN International Law Commission also aid in determining international law and general principles of law, and consequently have a significant influence on the development of international criminal law.[1147] Revisions of the Draft Codes of Crimes against the Peace and Security of Mankind have proved particularly influential in the development of international criminal law.

National courts also play an important role in the determination of international law and their function is two-fold. First as an expression of *opinio juris* and as state practice, they may confirm or create customary law and contribute to the formation of general principles of law. Secondly, decisions of national courts can serve as aids in identifying the law, helping to determine the content of norms of international criminal law.[1148] Most important for the emergence of norms of international criminal law are the rare trials by national courts that explicitly refer to international criminal law. Among others,

---

1143 See Cassese et al, International Criminal Law (3rd ed.) 9

1144 Cassese et al, International Criminal Law (3rd ed.) 9

1145 See for example, Report of the Unite Nations Secretary General, UN Doc. S/25704. (1993)., and Report of the United Nations Secretary General, UN Doc. S/2000/915. (2000)

1146 For details, see *The Prosecutor v. Tadic*, ICTY App. Ch. 1999. para. 294

1147 Cassese et al, International Criminal Law 2

1148 See *The Prosecutor v. Furundzija*, ICTY Tr. Ch. 1998, para. 190. However, the Court does note that "one should constantly be mindful of the need for great caution in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter." (para. 194)

these include the decisions by occupation courts and the Supreme Court in the British Occupied Zone in the immediate post-war period on the basis of Control Council Law No. 10.[1149] Also, the later trials of *Eichmann, Barbie, Demjanjuk, Touvier* and *Finta*, are worth noting.[1150]

National legislative acts can also influence the development of international criminal law as expressions of *opinio juris* as well as state practice by way of adopting international norms as part of national law, such as the German Code of Crimes against International Law of 26 June 2002.[1151] These and many more, including the military manuals used in many countries, are important expressions of *opinio juris* as well as state practice, all of which have emerged to become relevant sources through which international criminal law principles have been developed.[1152] After exhausting the sources through which international criminal law can be determined, the section below continues to evaluate the relevant principles underpinning the international criminal law system.

4.4 PRINCIPLES OF INTERNATIONAL CRIMINAL LAW

Principles of international criminal law consist of a body of public international law rules designed to guide and possibly restrict certain categories of conduct commonly viewed as serious crimes under international law.[1153] The principles also aid in providing

---

1149 See Werle and Jessberger Principles of International Criminal Law 156

1150 The subjects of these trials were crimes committed during the Third Reich: *Attorney-General of the Government of Israel v. Eichmann,* Israel, District Court of Jerusalem, judgment of 12 December 1961, in 36 ILR (1968), p. 1., Supreme Court, judgment of 29 May 1962, in 36 ILR (1968), p.277., *Federation National des Deportes etInternes Resistants et al. v. Barbie*, France, Cour de Cassation, judgment of 6 October 1983, judgment of 26 January 1984, judgment of 20 December 1985 in 78 ILR (1988), p. 125., Cour de Cassation, judgment of 3 June 1988 in 100 ILR (1995), p. 330., *Petrovsky v. Demjanjuk,* USA, Court of Appeals decision of 31 October 1983 in 79 ILR (1989), p. 534., *Advocate General v. Touvier*, France, Cour d'Appel de Paris, judgment of 13 April 1992 in 100 ILR (1995), p. 338., Cour de Cassation, judgment of 27 November 1992 in 100 ILR (1995), p. 357., *Regina v. Finta*, Canada, Ontario Court of Appeal judgment of 29 April 1992 in98 ILR (1994), p. 520., Canada, Supreme Court, judgment of 24 March 1994 in 104 ILR (1997), p. 284

1151 See *The Prosecutor v. Tadic*, ICTY App. Ch. 1995. para. 132

1152 See *The Prosecutor v. Tadic*, ICTY App. Ch. 1995. para. 83

1153 See Greppi 1999 *IRRC*

guidelines through which perpetrators of the most egregious offences known to humanity can be brought to justice.[1154]

It is important to note that the principles of international law are clearly distinguished from the principles of international criminal law.[1155] On the one hand, the principles of international law are drawn from the general principles of law recognised by civilised nations and in turn constitute the norms inherent in the international legal system.[1156] On the other hand, the principles of international criminal law emerge from what Cassese refers to as 'general principles of criminal law recognised by a community of nations'.[1157] From the view point of criminal law jurisprudence, the values inherent in such international criminal law principles have been set out in the Rome Statute to guide the functions of the ICC.[1158] For the purpose of this study, some of the principles are discussed below.

4.4.1 The principle of legality

The principle of legality *nullum crimen sine lege* is necessary to affirm that a law has been breached and for reasons of such misconduct, legal sanctions can be invoked. The principle dictates that at the time a crime is alleged to have been committed, a written or unwritten norm must have existed upon which to base criminality under international law.[1159] In *Kokkinakis v. Greece,*[1160] the European Court of Human Rights clearly confirmed that only a law can define a crime and prescribe a punishment.

The Universal Declaration of Human Rights (UDHR) stated as follows:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor

---

1154 Greppi 1999 *IRRC*

1155 Greppi 1999 *IRRC*

1156 Cassese clearly stated that '[g]eneral principles of international law consist of principles inherent in the international legal system'. See Cassese and Gaeta *Cassese's international criminal law* 1

1157 See Cassese A, cited in Brown B, *International criminal law* 11

1158 More focus is place upon the identification and application of the general principles of international criminal law, in order to ensure consistency with fundamental principles of criminal law including the principle of legality set forth in the Rome Statute. See Ambos 2006 *JICJ*

1159 See Kenneth The Principle of Legality Chapter 7

1160 See *Kokkinakis v. Greece*, 3/1992/348/421 1993

> shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.[1161]

Specifically, the principle requires that the criminal behaviour be laid down as clearly as possible in the definition of the crime. Also, the principle extends to the principle of *nulla poena sine lege* (no punishment for a conduct not clearly defined by law) and forbids retroactivity as a basis for punishment.[1162] Here, international criminal law seems less restrictive than some domestic legal systems that require a fairly narrow framework of sanctions.[1163] This gives an opportunity for the provisions of the Rome Statute and relevant international criminal law provisions to be utilised.[1164]

The principle of legality played a major role in the Nuremberg Trials. The International Military Tribunal took the defence's *ex post facto* argument as an opportunity to examine and affirm the criminal nature of crimes against peace at the time the acts were committed by the defendants.[1165] The Yugoslavia and Rwanda Tribunals frequently affirmed the validity of the principle.[1166] The principle is now set out in Articles 22 to 24 of the Rome Statute and the norms correspond with customary international law. Article 22 which anchors the principle of legality states that a conduct is criminal only if, at the time of commission, the conduct in question fits the definition of a crime under Article 5 of the Rome Statute. Article 22(2) clarifies the principle and

---

1161 See The Universal Declaration on Human Rights, 1948. Art. 11(2). The treaty became a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 [General Assembly Resolution 217(III) A] as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected.

1162 See Dana 2009 *JCLC*

1163 See Dana 2009 *JCLC*

1164 For example, the Rome Statute provides imprisonment of up to 30 years or life in prison; in addition, the ICC can impose a fine or order the confiscation of property acquired from the crime, see Rome Statute, Article 77. However, Art. 23 of the Rome Statute rules out, for example, imposition of imprisonment of 40 years (as the ICTY imposed on *Jelisic*, see *The Prosecutor v. Jelisic*, ICTY App. Ch. 2001, or for other sanctions not provided for in the Rome Statute

1165 See judgment of 1 October 1946 in the Trial of the German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, p. 444 "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice".

1166 See for example, *The Prosecutor v. Tadic*, ICTY App. Ch. 1995, para. 92; *The Prosecutor v. Jelisic*, ICTY Tr. Ch. 1999, para. 61. For Summary, see Lamb, Cassese P, Gaeta and J.R.W.D. Jones (eds.) 734

forbids the use of analogy to define a crime by maintaining that the definitions of crime should be narrowly construed. Article 22(3) further provides that characterisation of international crimes outside the Statute, particularly crimes under customary international law, are not affected by the Statute's definition of crimes.

Whereas Article 23 of the Rome Statute covers the principle of *nulla poena sine lege*, Article 24 regulates the temporal limits of criminal responsibility, which is a segment of the *nullum crimen* principle. With respect to the *nullum crimen* principle, the decisive question is the date on which the Statute entered into force, to be determined under Articles 11 and 126 of the ICC Statute.[1167] For prosecution of an offense by the ICC, the relevant point in time is normally 1 July 2002. Under Article 24(2), if the legal situation changes between the time the crime is committed and the time due for punishment by the perpetrator, the law more favourable to the defendant (*lex mitior*) applies.[1168] These are characteristic traits of what constitutes the principles of legality under criminal law.

4.4.2 Presumption of innocence

The Rome Statute recognizes the presumption of innocence under Article 66. The Article provides that the prosecution bears the burden of proof to substantiate the case against the accused beyond reasonable doubt. This is a general rule common to criminal law proceedings stating that he/she who alleges must prove his or her case against the accused.[1169] The doctrine of presumption of innocent has different manifestations. For instance, in circumstances were an accused person is awaiting trial, the right of the accused to be detained is treated separately from those who have been convicted. Under such circumstances, the accused right is prioritized including their right to remain silent during the investigation and trial.[1170]

Contained in the Rome Statute are rules that guide the doctrine of presumption of innocence. During the process of investigation, the accused has the right to remain

---

[1167] Van Schaack 2011 http://digitalcommons.law.scu.edu/facpubs/634 Accessed 28/06/2016

[1168] See *The Prosecutor v. Deronjic*, ICTY Tr. Ch. 2004. para. 167. and *The Prosecutor v. Nikolic*, ICTY Tr. Ch. 2003. para. 157

[1169] See Galetta 2013 *EJLT*

[1170] See Bibas and Burke-White 2010 *DLJ*

silence but the silence in this case is not a determination of guilt or innocence.[1171] Also, the accused has the right to interim release,[1172] including his or her right to appeal.[1173] Besides the provisions of the Rome Statute other international instruments have explicitly defined the presumption of innocence doctrine.[1174]

The UN Human Rights Committee (UNHRC) stated under Article 14 of the General Comment on the International Covenant on Civil and Political Rights (ICCPR) that the presumption of innocence places a duty on public authorities to "refrain from prejudging the outcome of a trial".[1175] The UDHR adopts a similar approach in maintaining that all persons have the right to remain free without interference from public authorities or related officials until such a time when their guilt is established by a competent court through a trial process where they will have the necessary guarantees to prove their defence.[1176]

It has been affirmed by the European Commission on Human Rights that the principles contained in the "presumption of innocence" doctrine protects everybody from being presumed guilty by public officials of an offence before it is established by a competent court in accordance with the law.[1177] It is in breach of international law for public officials to declare an accused person guilty of an offence even before such a decision is made by a competent court.[1178] The Commission clarified that the application of this

---

1171 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 55(2)(b)

1172 Rome Statute of the International Criminal Court Doc. A/CONF.183/9 (1998). Articles 59(3)–(6), 60(2)–(4)

1173 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Art. 81(1). See Bassiouni and Peter Manikas *The Law of the International Criminal Tribunal* 961. See also the Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, Annex, and its 'Rules of Procedure and Evidence', UN Doc. IT/32

1174 Bassiouni and Peter Manikas *The Law of the International Criminal Tribunal* 961

1175 See General Comment 13/21', UN Doc. A/39/40. p. 143–7

1176 See The Universal Declaration of Human Rights 1948. Art. 11(1) provides "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

1177 See Ingraham 1996 *JCLC*

1178 See European Convention on Human Rights (ECHR) (1950). Article 6, paragraph 2. The Convention formally the Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty to protect human rights and fundamental freedoms in Europe, drafted in 1950 by the then newly formed Council of Europe. All Council of Europe

principle did not necessarily imply that the authorities may not inform the public about criminal investigations. Rather, they should operate in a manner that does not violate Article 6, paragraph 2 of the European Convention on Human Rights, provided there are suspicious circumstances to point out that people have been arrested and confessions have been made, etc. What is excluded, however, is a formal declaration that somebody is guilty.[1179]

It is indeed a challenge to transfer the notions obtained from domestic prosecutions to the international context. At the international scene official authorities will include bodies such as the Commission on Human Rights, the High Commissioner for Human Rights, the Security Council and the General Assembly.[1180] For instance, if the General Assembly alleges the commission of genocide by senior government officials of a particular regime, the accused can challenge such political accusation before the ICC on grounds that the presumption of innocence has been breached.[1181]

Although the accused right to be presumed innocence may be violated, it is instructive to point that such violation will hardly be instigated by the Court itself. The ICTR Appeals Chamber held that it is proper to grant a stay of proceedings in cases involving violation of the accused right by a national judicial system and not by the authorities of the tribunals themselves.[1182]

Given the seriousness of certain charges including the sentences imposed, the presumption of innocence doctrine often requires unanimity in terms of decisions from the Court. It is irrational for a tribunal to invoke a "reasonable doubt" determination based on the narrow judgement of one member of the jury especially where questions of facts are at issue.[1183] However, the question of unanimity in terms of decision making was highly debated at the Rome Conference and the Rome Statute provides

---

member states are party to the Convention and new members are expected to ratify the Convention at the earliest opportunity.

1179 *Krause v. Switzerland* (App. No. 7986/77), (1978) 13 DR 73. Also, from the Court, see *Allenet de Ribemont v. France,* Series A, No. 308, 1995. paras. 37 and 41. See Francis and Robin *The European Convention* 150.

1180 See Schabas *An introduction* 21

1181 See UN Doc. S/RES/1034 (1995)

1182 *The Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, 1999

1183 For such a suggestion, see Lawyers Committee for Human Rights, 'Fairness to Defendants at the International Criminal Court', (1996)

clearly that in case of division, a majority of the Court will suffice for a finding of guilt.[1184]

The presumption of innocence is a constitutional principle according to which a person is regarded as innocence until proven guilty by a competent court through a trial proceeding where the accused is given all necessary guarantees to prove his/her defence.[1185] The principle is considered one of the most powerful safeguards of human dignity and freedom.[1186] As a matter of precedent, it has been acknowledged that the presumption of innocence provides sufficient safeguards to ensure the procedural mechanisms necessary in a criminal trial.[1187] This principle imposes on the members of a court not to start with a preconception that the suspect or the accused committed the offence, the prosecution having the duty to prove anything, and the accused benefiting from the doubt. In essence, the presumption of innocence tends to protect the person suspected to have committed a crime against a verdict that has not been legally concluded.[1188]

4.4.3 The actus reus and mens rea

The proof of a criminal offence in international law is based on two main ingredients which are the *actus reus* and *mens rea*. The *actus reus* represents the physical act or material element that qualifies the criminal character of the accused's behaviour and the *mens rea* is the mental element (intention) that qualifies the *actus reus*, the fulfilment for which a crime is said to have occurred under international law.[1189] It follows that an act will amount to a crime under international law if there is sufficient proof that there was a necessary intention to commit such an act.[1190] Whereas it is a general rule that ignorance of the law is no defence, criminal law presents a unique

---

1184 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 73(3)

1185 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 66

1186 Davidson 2010 *AUILR*

1187 Davidson 2010 *AUILR*

1188 Davidson 2010 *AUILR*

1189 See Werle and Burghardt Establishing Degrees, Van Sliedregt, E./Vasiliev, S. (eds.) 17

1190 Werle and Burghardt Establishing Degrees, Van Sliedregt, E./Vasiliev, S. (eds.) 17

exception to this rule by providing for intention as the main requirement to qualify an offence as a crime under international law.[1191]

The *actus reus* include conduct, omission, consequences and any other accompanying circumstances contained in the definition of a crime under international law. For crimes against humanity and war crimes, attacks on a civilian population or armed conflict must be proven as essential elements.[1192] Conduct, consequences and circumstances also become the reference points for the mental element of the crime. The mental element demands that the perpetrator commits the material elements of the act "with intention and knowledge."[1193]

The definition of intent is often associated with the Latin expression *mens rea* or "guilty mind". This expression is taken from the phrase "*actus non facit reum nisi mens sit rea"* meaning, an act alone does not make the defender guilty except the act is accompanied by a guilty mind.[1194] Intent is often categorized into different degrees ranging from negligence to recklessness and full-blown intent involving premeditation.[1195] The Rome Statute stipulates under paragraph (1) of Article 30 that "[u]nless otherwise provided", an offence must be committed "with intent and knowledge" to meet the material elements of a crime.[1196] Article 20 of the Statute also provides that an accused has intent with respect to conduct when he or she means to engage in the conduct. Also, when a person means to cause a consequence or is aware of the fact that such a consequence will occur in the ordinary course of events, that person is said to have intent with respect to consequence.[1197] According to the definition of "knowledge" under Article 30 of the Rome Statute, "know and knowingly" shall be construed accordingly.[1198]

1191 Werle and Burghardt Establishing Degrees, Van Sliedregt, E./Vasiliev, S. (eds.) 17

1192 See Werle and Jessberger Principles of International Criminal Law 156

1193 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 30

1194 See Badar 2013 *JICJ*

1195 See Werle and Burghardt Establishing Degrees, Van Sliedregt, E./Vasiliev, S. (eds.) 17

1196 UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 4

1197 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 30(3)

1198 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 30(3)

The definitions of the crimes stated under Article 5 of the Rome Statute have their in-built *mens rea* requirements and therefore, the general rule involving intent or knowledge is not necessary for such crimes. According to Article 6 of the Rome Statute, genocide is defined as an act perpetrated "with the intent to destroy" a protected group.[1199] Also, Article 7 of the Statute defines Crimes against humanity as a widespread or systematic attack directed against a civilian population "with knowledge of the attack".[1200] Likewise, the material elements for most of the war crimes stated under Article 8 of the Rome Statute include words like "wilfully", "wantonly" or "treacherously". The inclusion of words like intent, knowledge, wilfully, wantonly or treacherously into the definitions of the crimes stated under the Rome Statute explains why concepts like recklessness and gross negligence were practically discharged by the Working Group.[1201] Given that recklessness did not fit into any of the material elements of the crimes listed under Article 5 of the Rome Statute, its definition and inclusion into the Rome Statute was considered unnecessary.[1202] Nonetheless, ICC Judges are expected to address their minds towards reconciling the general principles dealing with intent as stipulated under Article 30, and the specific definitions of crimes that speak to the same subject.[1203]

The words "unless otherwise provided" as stipulated under Article 30(1) of the Rome Statute qualifies the provisions of command responsibility stipulated under Article 28 of the Statute. Therefore, Article 28 simply establishes "a standard for guilt by command responsibility that falls below the knowledge and intent requirements of Article 30". The standard of guilt establish under Article 28 extend to the application of Article 25(3)(d)(ii) of the Rome Statute which imposes criminal liability for offences committed by a group of persons in a "common purpose" even though such persons may lack knowledge of the specific criminal intent of their co-perpetrators. Going by the

---

1199 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 6

1200 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 7

1201 UN Doc. A/CONF.183/C.1/WGGP/L.4/Corr.1; UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 4

1202 Commentary on Parts 2 and 3 of the Zutphen Intersessional Draft: General Principles of Criminal Law', (1998)

1203 On this, see the very thoughtful piece by Roger C, "The Mental Element in Interna-tional Criminal Law: The Rome Statute of the International Criminal Court and the Elements of the Offences,"

construction of Article 30 of the Rome Statute, the words "[u]nless otherwise provided by the Statute" leaves open the question of criminal responsibility accruing from intent. The Elements of Crimes listed under the Rome Statute provides exceptions to the provisions of Article 30 by referring to an offence committed against a person who the perpetrator "should have known" was under age,[1204] or in cases where the perpetrator "should have known" of the prohibited use of a flag of truce or the Red Cross emblem and similar insignia.[1205] The exceptions to Article 30 stated under the general introductions to the Elements of Crime are based on the criteria under Article 30 and the applicable law.[1206]

4.4.4 Individual criminal responsibility in international law

As mentioned earlier, serious crimes in international law are committed by men and abstract entities and the provisions of the law can be enforced only by punishing the perpetrators This philosophy is reflected in Article 25 of the Rome Statute. Like its predecessors, the ICC is created with the core mandate to target the major criminals responsible for serious crimes in international law. Most of its accused includes actual perpetrators and accomplices who organize, plan and incite genocide, crimes against humanity and war crimes.[1207] In activating the prosecution process, the Court considers the planners and organizers as principal offenders. In the *Prosecutor v. Kordic and Cerkez*,[1208] the ICTY held that the accused persons were principal offenders for ordering the commission of the respective crimes with the required *mens rea*. Alternatively, they could be tried as accomplices, who aided or abetted the principal offenders. The Trial Chamber of the ICTY stated that customary law provides for the prosecution and

---

1204 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 8(2)(b)(xxvi) provides; For the purpose of this Statute, 'war crimes' means: "Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities".

1205 Elements of Crimes, Published by the International Criminal Court as Doc. ICC-PID-LT-03-002/11. Article 8(2)(b)(vii)

1206 See General Introduction to the Elements of Crimes Published by the International Criminal Court as Doc. ICC-PID-LT-03-002/11

1207 Mark 2006 *BJIL*

1208 *The Prosecutor v. Kordic and Cerkez,* IT- 95-14/2-A, App. Ch.*,* 2004. para.30

punishment of accessories or participants.[1209] However, the Chamber cautioned that describing such persons only "as aiders and abettors might understate the level of their criminal responsibility".[1210]

Article 25(3) of the Rome Statute, precisely sub-paragraphs (b) and (c) elaborates on complicity. While sub-paragraph (b) discussed persons who "orders, solicits or induces" the crime, sub-paragraph (c) covers individuals who "aids, abets or otherwise assists".[1211] Whereas the term "abet" appears in sub-paragraph (c), it actually covers everything described in sub-paragraph (b). According to Cryer, this situation arose perhaps because of the unfamiliarity of the drafters with the common law term "abets".[1212] It is worth noting that no quantitative degree of aiding and abetting is described in the Rome Statute as constituting the material acts required in complicity. The Statute deviates from the model of the 1996 Code of Crimes drafted by the International Law Commission and stipulating that complicity must be "direct and substantial".[1213]

The word "substantial" is omitted in the Rome Statute perhaps due to the fact that the delegates at the Rome Diplomatic Conference adamantly refused to follow the International Law Commission's Draft Code on Crimes. This refusal gave the impression that the Diplomatic Conference rejected the higher threshold of the case law of The Hague and Arusha Tribunals.[1214] It is an established rule that mere physical presence at the scene of a crime without the material act or omission, does not establish complicity. However, criminal responsibility will ensue in circumstances where the accused has a legal duty to intervene due to his or her hierarchical or superior position. For example, the failure to intervene by a superior authority constitutes encouragement or incitement.[1215] However, the Statute does not provide any section dealing with criminal

---

1209 *The Prosecutor v. Tadic* IT-94-1-T, 1997. paras. 666 and 669
1210 *The Prosecutor v. Tadic* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 192
1211 Cryer An introduction 20
1212 Cryer An introduction 20
1213 Report of the International Law Commission on the Work of Its Forty-Eighth Session, UN Doc. A/51/10, (1996)
1214 *The Prosecutor v. Tadic,* IT-94-1-T, 1997, paras. 691 and 692.; *The Prosecutor v. Aleksovski* IT-95-14/1-T, 1999. para. 61
1215 *The Prosecutor v. Tadic,* IT-94-1-T, 1997, paras. 678 and 691

responsibility for failure to act except for the specific sections dealing with responsibility for commanders and other superiors.[1216]

The Rome Statute provides for the inchoate offence of "direct and public incitement to commit genocide" as a crime that materialise even without an end result.[1217] The text whish was highly disputed in 1948 was derived from Article III(c) of the Genocide Convention.[1218] During the drafting of the Genocide Convention, the USA requested the inclusion of the term "direct and public" to restrict the scope of Article III(c). In her view, the provision had the potential to encroach upon the rights to freedom of speech which is why the USA requested the inclusion of the term "direct and public".[1219] Further attempts were made to broaden the scope of the inchoate offence of incitement for the purpose of accommodating other core crimes. However, such attempts were unsuccessful due to the debates on freedom of expression.[1220]

From the Nuremberg era, the offence of conspiracy raised contentious debates in international criminal law. Conspiracy is said to have materialised under common law when two or more persons reach an agreement to commit a crime irrespective of whether or not the crime actually occurred. In some continental systems particularly those inspired by the Napoleonic tradition, conspiracy is considered a form of complicity or participation in committing or attempting to commit a crime.[1221] The Rome Statute creates a balance that requires the commission of an overt act upon which conspiracy is based. However, the Statute imposes no conditional requirement that the crime of conspiracy be actually committed. The 1997 Convention for the Suppression of Terrorist Bombing adopted a formula that was subsequently introduced into the Rome Statute as a solution to the challenges posed by the offence of conspiracy. It is unfortunate that the provisions of the Genocide Convention concerning the crime of conspiracy are not fully reflected in the Rome Statute.[1222] During the historical development of the

---

1216 Schabas *An introduction* 9
1217 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Art. 25(3)(e)
1218 See Schabas *Genocide in International* Law 266–80
1219 Schabas *Genocide in International Law* 266–80
1220 Per *Saland International Criminal Law*, Roy S. Lee (ed) 200
1221 Damgaard *Individual Criminal Responsibility* 15
1222 Schabas *Genocide in International Law* 260

Genocide Convention, conspiracy was considered an inchoate offence for which offenders bear individual criminal responsibility under international law.[1223]

The doctrine of common purpose imposes liability upon persons who participate in a joint criminal enterprise for acts committed by their co-conspirators.[1224] The Rome Statute describes such commission or attempted commission as a group of persons participating in a crime with a common purpose.[1225] Under the Rome Statute, such contribution is not merely described to be international but as well, the aim of encouraging the criminal activity or the criminal purpose of the group must be established in circumstances where the activity or purpose involves the commission of a crime within the jurisdiction of the ICC. Inspired by the tribunal for the Former Yugoslavia,[1226] the 'joint criminal enterprise' theory of liability has been developed, a case law that has become influential on the application of Article 25 of the Rome Statute.

It is instructive to point out that the link between morality and criminal law is hardly simple or straightforward. The proponents of political philosophy see the law as grounded in effective political authority and its institutional execution, and for them moral claims are only ideological justifications of authority.[1227] They propagate the philosophy that morality does not have power on its own, but can be justified by political authority through institutional execution to determine what is right or wrong.[1228] However, international criminal law deviates from this political orientation by providing a counter argument that morality is not necessarily justified by political authority. Rather, its justification can be interpreted as a function of the law. Fundamentally, there are some crimes that are too serious to be ignored and, in turn, they generate norms that should be protected everywhere.[1229] The protection of such

---

1223 Schabas *Genocide in International Law* 260
1224 Schabas *Genocide in International Law* 260
1225 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 25 (3)(d)
1226 See, for example, *The Prosecutor v. Tadic,* IT-94-I-A 1999, para. 222
1227 Hoover 2014 *LCP*
1228 Hoover 2014 *LCP*
1229 Hoover 2014 *LCP*

norms irrespective of personal interests actually justifies the function of morality in the context of this study.[1230]

The sanctity of morality in the pursuit of international criminal justice was emphasized by the statutes of the ICTY and ICTR.[1231] Both statutes mentioned the importance of morality by stating that the judges should be chosen from among persons who possess "high moral character, impartiality and integrity", including the necessary requirement for such persons to qualify for the highest judicial office in their respective countries.[1232] The drafters of the Rome Statute adopted the same formula. Article 36(3)(a) of the Statute is *pari materiae* to Article 13 of the ICTY Statute, Article 12(1) ICTR Statute and, Article 13(1) of the Statute of the SCSL.[1233] All provisions mentioned above clearly inform that morality plays a critical role in the enforcement of criminal justice. In the context of this study, morality is used as discussed by Piaget and applied by the Statute of the relevant international criminal tribunals mentioned above.[1234]

In the case of an attempt to commit a criminal offense, the provisions of Article 25 of the Rome Statute impose liability for criminal participation towards the commission of the offense.[1235] Prosecution for attempt becomes significant when the ultimate goal of the Court is to prevent human rights abuses. However, the theoretical problem with attempts is associated with the relevant question of determining the actual point where prosecution should be permitted prior to the commission of the offense?[1236] Under domestic systems, judicial authorities have formulated testing mechanisms to distinguish between genuine attempts and mere preparatory acts.[1237] The Rome Statute

---

1230 Compare *The Prosecutor v. Milosevic et al*., IT-99-37-I, Indictment, 22 May 1999, with *The Prosecutor v. Milosevic et al*., IT-99-37-I, Amended Indictment, 29 June 2001 and *The Prosecutor v. Milosevic et al.,* IT-99-37-PT, Second Amended Indictment, 16 October 2001

1231 See ICTY Statute, Art. 13 and ICTR Statute, Art. 12(1). See also, the Statute of the SCSL, Art. 13(1)

1232 ICTY Statute, Art. 13 and ICTR Statute, Art. 12(1). See also, the Statute of the SCSL, Art. 13(1)

1233 Rome Statute of the International Criminal Court. Art. 36(3)(a) provides that "The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices".

1234 *The Prosecutor v. Tadic.,* IT-94-1-A, 1999, para. 228

1235 See Rome Statute of the International Criminal Court, 1998. Art. 25

1236 Greenwalt 2011 *ILJ*

1237 Greenwalt 2011 *ILJ*

speaks of "action that commences [the crime's] execution by means of a substantial step" that justifies the invocation of individual criminal responsibility in international law.[1238]

The sources and principles discussed above clarify the development and application of international criminal law. The need for such clarifications is essential to the functioning of the ICC, which is why the Rome Statute was adopted in 1998 to direct the operations of the Court.[1239] The Statute consists of principles and norms recognised by a community of nations as the standard for international criminal prosecution. Despite this comprehensive framework, the ICC still faces challenges as many states, including the USA, PRC and the Russian Federation have distanced themselves from the Court's jurisdiction.[1240] It was required of the ICC to exercise 'universal jurisdiction' and complement domestic courts without exception in circumstances where serious crimes under international law allegedly occurred.[1241] However, the question before us is not whether the mandate to exercise universal jurisdiction exists or not for such questions have already been addressed under the Rome Statute. What seems to be blurred is, what actually constitutes the phrase 'universal jurisdiction' and how is it interpreted such that it positively informs the functioning of the ICC. The answers to these questions will be revealed in the sections that follow.

4.5 UNIVERSAL JURISDICTION AND THE DUTY TO PROSECUTE

The Institutional Treatise published under the authority of Roman Emperor Justinian provides: "All nations are governed partly by their own particular laws, and partly those laws which are common to all [those that] natural reasoning appoints for all mankind."[1242] Accordingly, Justinian acknowledged the existence of a universal system of law regulating the conduct of humankind. In the seventeenth century, the Dutch jurist Hugo Grotius laid the foundation for the theory of universal jurisdiction in modern international law. He advanced from his *De Jure Pradae* (of captures) which was later referred to as *De Jure belli ac pacis* (of the law of war and peace) the view that there

---

1238 Schabas Genocide in International Law 260
1239 Schabas Genocide in International Law 260
1240 See Akande 3003 *JICJ*
1241 Akande 3003 *JICJ*
1242 Maine and Sumner Ancient Law, (1861 first ed.) 38

are universal principles of right and wrong.[1243] Within this transitional period, international law came to recognize the concept of *hostes human generis* (enemies of the human race) and they include pirates, hijackers, and similar outlaws whose crimes were typically committed outside the territory of any state. From this premise, the idea of trans-territorial and trans-cultural standards of right and wrong gave birth to the theory of universal jurisdiction.[1244]

What seem to constitute serious crimes in international law and therefore subject to universal jurisdiction, are those crimes directed against the interest of the international community as a whole. Due to the universal nature of such crimes, the international community is empowered to prosecute and punish their perpetrators regardless of the geographical location and/or the personality of the perpetrator.[1245] Such an obligation was drawn from the assertion that every legal system may defend itself with criminal sanctions against attacks on its elementary values.[1246] Considering the nature and scope of international criminal law, the ICC could easily have been equipped with worldwide jurisdiction on the basis of the theory of universal jurisdiction.[1247] However, a proposal in this regard by the German delegation was not successful at the Rome Conference.[1248] The motives for rejection were based on political rather than legal reasoning.[1249]

Besides rejecting the idea of universal jurisdiction as proposed by the German delegation, it is important to note that the nature of crimes under international law and their affiliation to the international legal order does not restrict the responsibility to prosecute on the international community alone.[1250] Every country is allowed to prosecute criminals in cases attracting universal jurisdiction.[1251] In the exercise of such

---

1243 As discussed in introductory notes, Grotius' account of universal principles of right and wrong derived from reason and divine Will, the underpinning of much modern international law. For detailed discussion See Grotius *The Authority of The Highest Powers* 30-31. See also Grotius *The Law of War* 1949. [published originally in 1625], Book I, Chapter II. p. 29. Further readings can be found in Grotius *De Jure Pradae* xviii., and also Edmond 1995 http://ro.uow.edu.au/ltc/vol2/iss1/9 Accessed 11/06/2016

1244 See Grotius *The Law of War* 1949

1245 See Bonacker and Safferling *Victims of International Crimes* 7

1246 Bonacker and Safferling *Victims of International Crimes* 7

1247 Marler 1999 *DLJ*

1248 See Steinke The Politics of International Criminal Justice 47

1249 Steinke The Politics of International Criminal Justice 47

1250 See Glasius The International Criminal Court 70

1251 See Ferdinandusse 2004 *EJIL*

legal obligations, it matters less as to where the conduct in question occurred or whether an alternative link with the prosecuting state can be established.[1252] Here the authority to punish derives from the crime itself ("criminal jurisdiction is based solely on the nature of the crime").[1253] The effects of acts directed against the most important interests of the community of nations are by definition not limited to the domestic realm of the state where the crime was committed.[1254] The dynamics of international crimes are completely different from domestic crimes. Therefore, the limits imposed by international law on the expansion of national criminal jurisdiction, does not affect the prosecution of international crimes.[1255]

Fundamentally, it is within the sovereign power of a state to determine as a function of state authority, the extent of national criminal jurisdiction. Each state is free to establish the area of applicability and the scope of its own criminal law.[1256] In doing so, states must abide by international obligations that exist in two ways. To begin with, the extension of national criminal jurisdiction is limited by international law, specifically by the prohibition on interference in the domestic affairs of other sovereign states.[1257] International law allows a state to extend its criminal jurisdiction only to matters with which it can show some connection, say for example, through the site of the conduct in

---

1252 See *The Prosecutor v Tadic*, ICTY App. Ch. 1995. para. 57. The ICJ did not take advantage of the opportunity to express an opinion an opinion on the validity of universal jurisdiction, see *DR Congo v. Belgium,* ICJ, judgment of 14 February 2002 (Case concerning the Arrest Warrant of 11 April 2000).

1253 ". . . without regard to where the crime was committed, the nationality of the victim, or any other connection to the state exercising such jurisdiction," as is correctly stated in Principle 1(1) of the Princeton Principles on Universal Jurisdiction in S. Macedo (ed.), Universal Jurisdiction (2004). p. 21

1254 See Lattimmer et al, 2015 A Step towards Justice: Current accountability options for crimes under international law committed in Syria. Syria Justice and Accountability Centre, https://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf Accessed 15/07/2016.

1255 Oko 2007 *FILJ*

1256 This has been recognised for national "jurisdiction to prescribe" since the decision of the Permanent Court of International Justice in the Lotus case (PCIJ Ser. A, No. 10 of 7 September 1927). The Court stated as follows; "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law." "[All that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty".

1257 See Charter of the United Nations and Statute of the International Court of Justice. (1945). Article 2(7).

question, the nationality of the perpetrator or the victim, or the protected interest involved.[1258] On the other hand, it may be required to extend its national criminal jurisdiction due to an international duty to prosecute.[1259]

Within this framework, obligations attached to national criminal jurisdiction may be clearly defined in two ways. The first step will be to determine the extent of national criminal jurisdiction for crimes under international law.[1260] Secondly, it must be asked if an additional duty exists to prosecute and punish the crimes in question.[1261] In this context, the admissibility of alternative models in dealing with crimes under international law must be determined.[1262]

The validity of the theory of universal jurisdiction under customary international law has been acknowledged for genocide, war crimes in international armed conflicts, and crimes against humanity,[1263] and is also accepted with regards to crimes in civil wars.[1264] These validations authorise states with seemingly no special connection to the crime/s to prosecute the perpetrators.[1265]

The unrestricted applicability of universal jurisdiction raises the possibility of decentralized prosecution of serious crimes in international law by third states. This would create a comprehensive network of jurisdictional claims for international crimes and greatly improve the chances of putting an end to widespread impunity for serious crimes in international law.[1266] However, the possibility of shortcomings must not be ignored as the intervention from third states might bring significant potential for

---

1258 Schiffer Building the International Criminal Court 4.

1259 Schiffer Building the International Criminal Court 4. See also *Columbia v. Peru (Asylum Case)*, ICJ Rep 266, (1950)

1260 See Whiting 2009 *HILJ*

1261 Whiting 2009 *HILJ*

1262 Whiting 2009 *HILJ*

1263 The fact that the Genocide Convention explicitly grants jurisdiction to prosecute genocide only to "a competent tribunal of the State in the territory of which the act was committed" or "such international panel tribunal [to be created] as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" as stated under Art. VI of the Genocide Convention is not an obstacle to the customary-law application of the principle of genocide, see *Bosnia and Herzegovina v. Yugoslavia*, ICJ, Judgement of 11 July 1996 (Application of the Convention on the Prevention and Punishment of the Crime of Genocide), ICJ Rep. 1996, p. 595, para. 31

1264 Courtney Domestic Politics 51

1265 Courtney Domestic Politics 51

1266 Grosswald 2013 *MJIL*

abuse.[1267] Given the political challenges associated with universal jurisdiction, the practice seems not to be an ideal solution in a world in which impunity for serious crimes remains the rule rather than the exception.[1268] However, the issue at hand from a policy perspective remains the quest to bring perpetrators to justice rather than invoking competing national claims.[1269] The reservations mentioned above are therefore not a reason to abandon universal jurisdiction as a relevant theory of criminal prosecution in international law. The theory generates and imposes upon member states of the international community the duty to prosecute or extradite the perpetrators of serious crimes.

The Rome Statute contains relevant provisions under which the international community, including individual states, assumes responsibility to enforce universal jurisdiction as a form of legal obligation.[1270] In the Preamble to the Statute, the contracting parties emphasize that "the most serious crimes of concern to the international community as a whole must not go unpunished and . . . their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". The parties recall that "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes", and underscore their resolve "to this end . . . to establish an independent permanent International Criminal Court".[1271] The Rome Statute further emphasizes the universality of the ICC and guarantees its international legal personality.[1272] It is reasonable therefore to support the debate that universal jurisdiction is a theory relevant to the functioning of the ICC.[1273]

1267 Courtney Domestic Politics 51

1268 Grosswald 2013 *MJIL*

1269 Grosswald 2013 *MJIL*

1270 See Preamble of the Rome Statute instituted at the Rome Diplomatic Conference in 1998. This portion of the document introduced relevant legal obligations imposed upon individuals through their states in particular and the international community as a whole, to enforce and observe the enforcement of norms that form the core of the human foundation.

1271 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Preamble (4) and (6)

1272 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 4

1273 For further details, see Bekou and Cryer 2007 *ICLQ*

4.5.1 The duty to prosecute by the State of commission

In contemporary discourse, customary international law recognizes that the state in whose territory a crime is committed has a duty to prosecute.[1274] Such a duty also exists under treaty law for genocide and war crimes in international armed conflicts.[1275] For instance, the "grave breaches" provisions of the Geneva Conventions enjoin every state party to prosecute such serious violations.[1276] Such acts may include killing, serious bodily injury or unlawful confinement if committed against "protected persons."[1277] Whereas the "protected persons" in question may include foreign nationals only, common Article 3 of the Geneva Conventions goes further to protect a state's own nationals in non-international armed conflicts and automatically, they assume the status of protected persons.[1278] By this enforcement mechanism, common Article 3 protects the human rights and dignity of nationals trapped by the horror of non-international armed conflicts.

The Inter-American Court of Human Right's decision of 1998 in the case of *Velasquez Rodriguez* also became useful in demonstrating the duty to prosecute. The Court's decision resulted in the wake of academic debate among scholars who argue that there was an obligation to prosecute serious violations of fundamental human rights.[1279] The Inter-American Court decided earlier that a state has a legal duty to prevent human rights violations, investigate evidence of such violations, identify those responsible, impose suitable penalties and ensure suitable restitution to the victims.[1280] Such a mandate has since been affirmed by Article 1 of the European Convention on Human Rights and Fundamental Freedoms and also the UN Human Rights Committee which

---

1274 Bekou and Cryer 2007 *ICLQ*

1275 See Genocide Convention, Article IV; Geneva Convention III, Article 129 and Geneva Convention IV Article 146; in addition, there is a treaty-based duty to prosecute if the crime under international law is based on torture; this derives from Article 7 of the Torture Convention.

1276 See Abtahi and Arrigg Koh 2012 *CILJ*

1277 Abtahi and Arrigg Koh 2012 *CILJ*

1278 See Common Article 3 of the Geneva Conventions (1949)

1279 *Velasquez Rodriguez*, Inter-American Court of Human Rights, Serial C No. 4 1988

1280 *Velasquez v. Rodriguez,* Inter-American Court of Human Rights, Serial C No. 4 1988

has stressed that the duty to prosecute follows from the duty of states to guarantee human rights and ensure effective legal protection.[1281]

The duty to prosecute has become an important instrument that guarantees the prevention of human rights violations that may generally amount to serious crimes in international law.[1282] It is important to note that not all human rights violations may amount to serious crimes in international law for which criminal sanctions can be imposed to restrict their occurrence. Some practices may be considered to be customary and hence accepted as a way of life in some societies.[1283] While such practices may amount to human rights violations, their occurrences would hardly attract criminal sanctions for the fact that they are acceptable by their respective communities as a way of life.[1284]

In South Africa, for example, ritual adult male circumcisions are accepted as a way of life by the people of the Eastern Cape community and hence not punishable by the law.[1285] Whereas such practices may go unpunished in South Africa and the Eastern Cape region in particular, they may well amount to gross human rights violation and attract criminal sanctions in other parts of the world. In this scenario, the sanctity of the act perpetrated against the victim is not determined by the global human rights instrument, but by the custom prevailing in the specific community.[1286] It is for such reasons that the law makes a difference between serious crimes under international law from international crimes. While the former calls for international prosecution without restriction, the latter may be prosecuted subject to the jurisdiction of specific states.[1287] Hence, serious crimes in international law generally possess characteristics of gross human rights violations that call for judicial actions. Therefore, the act of punishing

---

1281 The basis are primarily the "respect and ensure" clauses in the human rights convention (e.g., European Convention on Human Rights and Fundamental Freedom of 4 November 1950 (ETS No. 5, 1950), Article 1) and the guarantees of effective legal protection (e.g., European Convention on Human Rights and Fundamental Freedom of 4 November 1950, ETS No. 5 (1950), Article 13)

1282 See Anthony D, 2010 http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88

1283 Anthony D, 2010 http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88

1284 Richard *et al,* 1987 *ASIL*

1285 Kepe Secrets that kill 729–735

1286 Kepe Secrets that kill 729–735

1287 See Wise 1989 *DLR*

serious crimes in international law is also a judicial remedy to deter the perpetrators of such crimes.[1288]

4.5.2 The duty to prosecute by "Third States"

The duty to prosecute by third states is often limited due to the fact that crimes under international law are generally of interest to the state in whose territory the crime was committed. In most cases, granting the sole authority to prosecute on such host states would mean making the perpetrators their own judges.[1289] Hence, the question whether and to what extent there exist a duty to prosecute on the part of third states is of great legal importance.

A broader duty to prosecute crimes under international law committed outside a state's own territory by foreign nationals has been universally acknowledged for war crimes in international armed conflicts.[1290] The basis for this customary law principle is contained in the Geneva Convention of 1949. This provides that the contracting states must either prosecute "grave breaches" themselves, irrespective of where, by whom, or against whom they are committed, or "hand such persons over for trial to another High Contracting Party concerned."[1291] In like manner, the Gonocide Convention clearly acknowledges that contracting parties bear primary responsibility to prosecute the perpetrators of genocide whether committed in time of war or peace.[1292] This mandate imposed upon contracting states as highlighted in the Conventions above is generally referred to as "the duty to prosecute or extradite."[1293]

The duty to prosecute or extradite aims at the most complete possible prosecution of serious violations of international humanitarian law within the broader international community. Therefore any custodial state is obligated to try such perpetrators or hand them over to a state that is willing to prosecute.[1294] However, there exists a genuine

---

1288 See Safferling 2004 *GLJ*
1289 See Graefrath 1990 *EJIL*
1290 Graefrath 1990 *EJIL*
1291 See Geneva Convention IV, Article 146
1292 See Convention on the revention and Punishment of the Crime of Genocide, 1948. Art. 1
1293 Graefrath 1990 *EJIL*
1294 Graefrath 1990 *EJIL*

right to choose between the two alternatives.[1295] On the part of the Rome Statute, it leaves open the question whether third states are obliged to prosecute serious crimes under the principle of universal jurisdiction. The Statute also opens the possibility for third states to prosecute such serious crimes under international law.[1296]

It should be noted that the international criminal justice system is bigger than the ICC. The ICC is only an institutional Court design to prosecute serious crimes in international law stated under Article 5 of the Rome Statute. Given that the Court operates in an environment pregnant with politics, the possibility of political interference cannot be ignored.[1297] This perhaps may be the reason why its jurisdiction does not truly covers the broader international community as intended by the drafters and expressed by its title "International Criminal Court".[1298] However, it is important to point that besides the exercise of jurisdiction by the ICC, the international criminal justice system provides for the duty to prosecute serious crimes in international law as expressed in the relevant international law instruments discussed above. In the case of *Belgium v. Senegal*,[1299] the ICJ stressed that the prohibition of serious crimes in international law that amounts to *jus cogens* is grounded in a wide spread international practice and the *opinio juris* of states. Therefore, states bear the primary responsibility to investigate, prosecute and punish the perpetrators of such crimes. The ICC only comes in to complement domestic efforts particularly in circumstances where the state in question is unable or unwilling to prosecute the alleged perpetrators of crimes falling within the jurisdiction of the Court.[1300] Legal practitioners, activists and academics have on many occasions stressed that states bear the primary responsibility to prosecute serious crimes in international

---

1295 In the Lockerbie case, Libya argued that the Montreal Convention allows the custodial State the choice between prosecuting and extraditing. The ICJ did not decide this question. (*Libyan Arab Jamahiriya v United Kingdom*, ICJ judgment of 14 April 1992, Case Concerning Question of Interpretation and Application of the 1971 Montreal Convention Arising from Arial Incident at Lockerbie), ICJ Report. 1992, p. 3

1296 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 12

1297 Kemp *Tacking stock of International Criminal Justice* Van der Merwe (eds.) 11. One of the ICC judges once acknowledged that "even though politics and state interest present a delicate balance with the rule of law, the same remains an important obstacle to the effective operations of the Court". See also, Asaala *The African Court of Justice* Van der Merwe (eds.) 33

1298 Jalloh 2012 *NCCLR*

1299 See *Belgium v. Senegal,* ICJ judgment of 20 July 2012, Questions Relating to the Obligation to Prosecute or Extradite.

1300 Du Plessis *et al* 2012 *ISS*

law committed within and outside their territory.[1301] Where the state is unable or unwilling to prosecute, the law requires that the perpetrator/s be extradited to a state with competent jurisdiction, including the willingness and resource capacity to guarantee genuine prosecution.[1302]

The ICJ's decision in *Belgiun v. Senegal* and subsequent approval by the AU is a clear indication that the states bear primary responsibility to investigate, prosecute and punish serious crimes in international law.[1303] However, states have continued to express the inability or unwillingness to affect the necessary legislative measures against the perpetrators of serious crimes most especially for political reasons.[1304] Therefore, acting within the framework of universal jurisdiction as discussed above, the ICC always comes as the last resort to ensure accountability where national justice systems have failed.[1305]

4.5.3 The purpose of punishment

The international legal order is designed in such a way as to impose sanctions for the most serious crimes committed against humanity and as such, international criminal law as a component of this system, gains its legitimacy by purposefully punishing the perpetrators of such crimes.[1306] It is most acceptable that retributive and restorative punishments, including other forms of transitional justice, are the new mantras of the post-cold-war era.[1307] Their fundamental purpose is to foster reconciliation in societies that have experienced massive human rights violations and to promote reform, the ultimate aim being the removal of tension while the primary function of justice is rectification of the wrong perpetrated against the victims.[1308] Therefore, the significance of restorative punishment is the re-humanisation of the victims and restoration of their psychological and social functions, including re-integration and rehabilitation.[1309] The

---

1301 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11
1302 See Convention Against Torture and other inhumane or Degrading treatment. Art. 5(2)
1303 Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11
1304 Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 11
1305 Meernik 2005 *JPR*
1306 See Arimatsu 2010 *CHBP*
1307 Shelton Remedies in International Law 137
1308 Shelton Remedies in International Law 137
1309 Shelton Remedies in International Law 137

Yugoslavia Tribunal expressly confirmed the importance of the traditional purposes of punishment:

> The Trial Chamber is of the view that, in general, retribution and deterrence are the main purposes to be considered when imposing sentences before the International Tribunal. . . . punishment for having violated international humanitarian law is, in the light of the serious nature of the crimes committed, a relevant and important consideration. As to the latter, the purpose is to deter the specific accused as well as others, which means . . . persons worldwide from committing crimes in similar circumstances against international humanitarian law. The Trial Chamber is further of the view that another relevant sentencing purpose is to show the people of not only former Yugoslavia, but the world in general, that there is no impunity for these types of crimes. This should be done in order [to] strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust and respect for the developing system of international criminal justice. The Trial Chamber also supports the purpose of rehabilitation for persons convicted....[1310]

The idea of retribution is undeniably acknowledged under the international criminal justice system. However, the preventive effects of international criminal law are even more important (deterrence and norm stabilization).[1311] In this respect, the UN Security Council declared, in connection with the creation of the Yugoslavia Tribunal, that, "the prosecution and punishment of the guilty would contribute to preventing future human rights violations".[1312]

The Rome Statute emphasizes that punishing the perpetrators of crimes under international law will contribute towards preventing such crimes from happening in the future.[1313] The Statute is important for creating and enforcing international awareness about international criminal law. The punishment of serious crimes under international

---

1310 See *The Prosecutor v. Kupreskic et al*, ICTY Tr. Ch. 2000. para. 848., with additional notes, see *The Prosecutor v. Naletilic and Martinovic,* ICTY Tr. Ch. 2003. para. 739., See also, *The Prosecutor v. Deronjic*, ICTY Tr. Ch. 2004. para. 142 and *The Prosecutor v. Jokic*, ICTY Tr. Ch. 2004. para. 30

1311 Bosco 2011 *MSJIL*

1312 See UN Doc. S/RES/827 (1993)

1313 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Preamble 5

law should make humankind conscious of the fact that international law is law and will therefore be implemented against law breakers.[1314]

In punishing the perpetrators of serious crimes under international law, two important lessons are drawn. First, the perpetrator's "not guilty plea" is disputed by way of fact finding and checking throughout the proceedings.[1315] The determination of a crime has far-reaching consequences. Representatives of repressive systems typically deny that systematic violations of human rights have occurred. A judicial determination that crimes under international law did occur neutralizes such denials.[1316] Convictions mark official acknowledgement of past injustices and the suffering of the victims. They destroy the foundation for denial of atrocities and prevent falsification of history.[1317] Secondly, individual accountability clarifies the point that it is not an abstract entity, such as a state, that commits crimes under international law.[1318] The attribution of individual responsibility for war crimes is important for the victims and their relatives who depend entirely on the law. Such judicial determinations also confront the perpetrators and their individual participation in systematic crimes and thereby provide an opportunity for them to come to terms with their responsibility.[1319]

The theory of universal jurisdiction allows states and/or international organizations to claim jurisdiction over perpetrators of serious crimes under international law regardless of their nationality, country of residence or any other relations with the prosecuting entity.[1320] Universal jurisdiction is therefore connected to the idea that some international norms are *erga omnes*, or owed to the entire world community, as well as the concept of *jus cogens* that certain international law obligations are binding on all states.[1321] Some categories of crimes present so serious a threat to the international community that states have a logical and moral duty to prosecute individuals responsible thereof.[1322] It is logical therefore to assert that there should be no impunity

---

1314 See Resenberg et al, Reconstructing atrocity 241
1315 See Neuman 2003 *EJIL*
1316 Kolb The Exercise of Criminal Jurisdiction, A. Bianchi (ed.), 227
1317 Glashausser 1994 *DLJ*
1318 See Duffy The 'War on Terror' 124
1319 Duffy The 'War on Terror' 124
1320 See Galbraith 2009 *MJIL*
1321 See Luc Universal Jurisdiction 33
1322 Rauschenbach and Scalia 2008 *IRRC*

for individuals who have committed genocide, crimes against humanity, extra-judicial executions, war crimes, torture and forced disappearances.[1323]

4.6 THE DUTY TO PROSECUTE BY THE ICC

Crimes prosecuted under universal jurisdiction are considered crimes against all, too serious to tolerate.[1324] The creation of the ICC was aimed at complementing the theory of universal jurisdiction such that the court assumes jurisdiction based on the nature of serious crimes stated under Article 5 of the Rome Statute in circumstances where domestic courts fail to prosecute due to inability or unwillingness to do so.[1325] The Rome Statute provides that the Court shall possess such judicial capacity as may be required for the exercise of its functions and the fulfilment of its purpose.[1326] Admittedly, the ICC is internationally acknowledged as a Court of last resort, ensuring accountability for serious crimes under international law.[1327] The Court's duty to prosecute therefore arises from obligations owed to the international community and informed by the *erga omnes* doctrine.[1328]

Even though treaty obligations are considered to be binding only upon the contracting parties, the principles and rules of treaties which are declaratory of customary international law are also binding on non-party states. Eventually, modern principles of treaties widely accepted as good practice by parties and non-parties alike may become customary international law.[1329] For example, the Hague Convention of 1907 was not applicable to either of the two world wars because not all belligerent states were parties to the Convention.[1330] In like manner, the 1929 Geneva Convention on Prisoners-of-War

---

1323 See *R v. Bow Street Metropolitan Stipendiary Magistrates, ex parte Pinochet* Ugarte 3 WLR 1,456 (H.L. 1998) also referred to as the *Pinochet case*

1324 See O'keefe 2004 *JIJ*

1325 Seibert-Fohr The relevance of the Rome Statute, von Bogdandy and R Wolfrum (eds.), 553-590.

1326 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 4(1)

1327 See Seibert-Fohr The relevance of the Rome Statute, von Bogdandy and R Wolfrum (eds.), 553-590.

1328 The word "*Erga omnes"* is a Latin phrase which means "towards all" or "towards everyone". In legal terminology, *erga omnes* rights or obligations are owed toward all. ... Consequently, any state has the right to complain of a breach. Examples of *erga omnes* norms include piracy and genocide. For detail.

1329 See United Nation Security Council Doc. S/1994/674. (1994)

1330 United Nation Security Council Doc. S/1994/674. (1994)

was not to be applied between Germany and the Soviet Union because the Soviet Union had never ratified the treaty.[1331] However, when the Nazi defendants at the Nuremberg trials raised the non-applicability of The Hague and Geneva Conventions as a matter of defence, the International Military Tribunal held that the general principle of these Conventions had assumed the status of general international law and therefore were binding on German citizens.[1332] The International Military Tribunal further clarified in the *High Command Case*[1333] as follows:

> …the Hague and Geneva Conventions express accepted usage and customs of war. It must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement[s].

Customary international law constitutes one among other sources of international legal obligations documented in international agreements.[1334] Contained in the Statute of the ICJ, international custom is defined as "evidence of general practice accepted as law." Thus customary international law is made up of two components which are state practice used as evidence of generally accepted practice and the legal conviction that such practice is obligatory.[1335]

In the *Barcelona Traction case*, the ICJ stated:

> … In particular, an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising *vis-à-vis* another state in the field of diplomatic protection. By their very nature the former are the concerns of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.[1336]

1331 United Nation Security Council Doc. S/1994/674. (1994)

1332 United Nation Security Council Doc. S/1994/674. (1994). Also, the Vienna Convention on the Law of Treaties indicates that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". See Vienna Convention on the Law of Treaties 1969. Article 27

1333 See The United States of America v. Wilhelm von Leed et al. (The High Command Case) 1948. para. 56

1334 See Baker 2010 *EJIL*

1335 See *The North Sea Continental Shelf Case*, Judgment of the International Court of Justice, ICJ Report 1969. p. 3

1336 *Belgium v. Spain*, Case concerning the Barcelona Traction, Light and Power Company Limited, Second Phase. 1970 ICJ3, at 33. See also the Vienna Convention on the Law of

Both conventional and customary international law contain a category of higher norms, also known as *peremptory norms* or norms of *jus cogens* which are essential for the functioning of the international community, and therefore their breach entails serious consequences.[1337] These for example, include rules prohibiting slavery, colonialism and, apartheid as well as genocide, torture, international wars of aggression, and the body of laws codified under international humanitarian law.[1338] With respect to the latter, it is instructive to point that the Rome Statute was designed to achieve similar goals. Article 5 of the Statute confers upon the ICC the responsibility to target and prosecute serious crimes including war crimes, crimes against humanity and genocide.[1339] By implication, the intention of the drafters was to generate responsibility for the said *peremptory norms* or norms of *jus cogens* mentioned under Article 53 of the Vienna Convention on the Law of Treaties.[1340] A state cannot therefore deny responsibility to protect such norms as they are obligations *erga omnes* (towards all or towards everyone).[1341]

Admittedly, the ICC's mandate to prosecute serious crimes in international law is informed by the *erga omnes* doctrine which aims at protecting the norms of *jus cogens*. However, the Rome Statute itself provides for alternative but competing measures that continue to restrict the functions of the Court in terms of prosecution.[1342] Among others, the Rome Statute provides for Security Council deferrals in circumstances where the law conflicts with politics.[1343] Here, priority is given to a political settlement of disputes over judicial proceedings.[1344] Other measures have been advanced through the peace versus justice debate to restrict the Court in the face of crisis.[1345] However, they are not

---

Treaties (1969). Art 53 and 64.

1337 A State may be internationally liable for breach of such a norm, irrespective of its origin. Some of the rules are derivative from customary international law, but others have found expression in conventions, which in turn became norm generating.

1338 Endoh The Efficacy of the United Nations in conflict resolution: A study of the response of the Security Council to the Darfur conflict in the Sudan. 56

1339 Bassiouni 1996 *LCP*

1340 Vienna Convention on the Law of Treaties (1969)

1341 Memeti and Nuhija 2013 *NBP*

1342 Dimitrakos 2014 http://ssrn.com/abstract=2383587 Accessed 21/06/2016., See also Hoover "Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court". 2

1343 Hoover "Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court". 2

1344 Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, (1998). Article 16

1345 See Régime and Shilaho 2013 *JAE*

completely useless as they contribute significantly towards the maintenance of international peace and security which is part of the ICC's agenda.[1346] Whatever the case may be, the question remains: How do such measures affect the application of criminal jurisdiction by the ICC?

Most often, the ICC faces challenges based on the peace v. justice debate which is evident in the competing interests of retributive and restorative justice.[1347] Whereas, restorative justice focuses on the victim's needs, the root causes of the conflict and the need to reintegrate and rehabilitates the perpetrators into the society, retributive justice focuses on prosecuting the perpetrators of serious crimes.[1348] In order to advance scholarly debate and further understanding of the two principles stated above, the following questions must be considered:[1349] Can retribution and restoration find common place in the face of a conflict? Or, Should the ICC prioritise one over the other in the course of its operations in conflict driven communities? If so, what will be the justification for such an action by the Court? The answers to these questions lie in the provisions of the Rome Statute.

The Rome Statute provides for Security Council deferrals under Article 16 for a period of 12 months in circumstances where the proceeding in question has the potential to endanger international peace and security. By virtue of the provision of inadmissibility under Article 17 of the Statute, the practice of complementarity gives priority to alternative justice mechanisms that favour public security. Article 20 of the Rome Statute provides a third option which is the *ne bis in idem* principle. According to this principle, alternative justice mechanisms block ICC's proceedings to avoid the clash of applicable remedies. In the fourth option, Article 53 provides for prosecutorial discretion which allows the prosecutor to decline prosecution provided there is no factual basis to proceed.[1350] The Rome Statute provisions discussed herein provide alternative remedies that limit ICC's proceedings in circumstances where such proceedings conflicts with domestic measures.

1346 Régime and Shilaho 2013 *JAE*
1347 Dugard Possible Conflicts of Jurisdiction, 700 Antonio Casesse et al, (eds.) 67
1348 Dugard Possible Conflicts of Jurisdiction, 700 Antonio Casesse et al, (eds.) 9
1349 Stahn 2005 *JICJ*
1350 Meernik 2005 *JPR*

4.7 SUMMARY

This chapter analysed the sources and principles through which international criminal law has been developed as a component of the international legal order. The chapter started by defining international criminal law and distinguished between transnational crimes and serious crimes in international law. Whereas transnational crimes are crimes committed across international borders like piracy, serious crimes go beyond border relations to shock the conscience of humanity by violating the norms of *jus cogens* which is why the debates surrounding serious crimes have emerged as the focal point of contemporary international criminal law discourse.

The chapter further analysed the requirement of intention. Common to criminal jurisprudence is a rare characteristic and possibly an exception to the general principles applicable to different legal domains which states that ignorance of the law is no defence.[1351] Therefore, the requirement of intention qualifies the criminal nature of an offence as a crime under domestic and international law. Another important issue addressed in this chapter is the mandate to prosecute serious crimes conferred upon the ICC. The chapter provides a nexus between the ICC's mandate to prosecute serious crimes and the theory of universal jurisdiction. By the use of international legal instruments, including case law and related legislations, the chapter discussed the duty to prosecute international crimes by the ICC, including states parties and non-states party on the basis of special arrangements.

The theoretical conceptualisation of this study evokes the contention that whereas there is an existing mandate to prosecute serious crimes under international law conferred upon the ICC, there is also a greater need for the Court to exercise universal jurisdiction in respect to the nature of serious crimes stated under Article 5 of the Rome Statute. In support of this argument, this chapter suggests that member states should prosecute or extradite where necessary, the perpetrators of such crimes that violate the norms of *jus cogens*. Also, states are required to support the Court in terms of providing relevant information and witnesses pertaining to cases that calls for the

---

1351 See Schabas 2003 *NELR*

Court's intervention. In that way, the Court will function efficiently to produce positive results.

After theorising the sources and principles relevant to international criminal law, this chapter concluded that the ICC should exercise universal jurisdiction with respect to the crimes stated under Article 5 of the Rome Statute. In doing so, the Court will complement domestic courts and reach out to victims whose plight have been ignored by state officials in oppressive regimes. The next chapter will analyse the operations of the ICC as triggered by Article 13 of the Rome Statute in order to rebut or approve the claim that the ICC is selective in the enforcement of international justice in favour of the strong.

CHAPTER FIVE
ANALYZING THE POLITICAL DYNAMICS AFFECTING THE TRIGGER MECHANISMS OF ARTICLE 13 OF THE ROME STATUTE

5.1 INTRODUCTION

In previous chapters, we discussed the processes leading to the creation of the ICC, including a theoretical framework upon which the study is based. In this chapter the researcher analyses the political dynamics affecting the trigger mechanisms under Article 13 of the Rome Statute. The chapter adopts a case-by-case approach under which cases that triggered the jurisdiction of the Court in accordance with Article 13(a-c) of the Rome Statute are discussed. Furthermore, the chapter explores three ICC country conflict situations through which the potency of the trigger mechanisms are tested to determine their viability in the pursuit of international criminal justice.

In the first instance, the situation relating to the Lord's Resistance Army (LRA) in Northern Uganda is discussed. The situation was the first case to be referred to the ICC by a State Party.[1352] For the purposes of Article 13(a) of the Statute, the study interrogates the dynamics of the trigger mechanism to determine the extent to which the referral was successful. The next case that is discussed is the Darfur crisis and the President of Sudan. The crisis became the first case to be referred to the ICC by the UN Security Council acting in accordance with its mandate to maintain international peace and security.[1353] The study interrogates the legality and efficacy of the UN Security Council's authority to initiate such referrals. In the final analysis, the situation concerning the 2007/8 post-electoral violence in Kenya is discussed. The situation became the first of its kind in which the Chief Prosecutor of the ICC invoked *proprio motu* authority. How successful were the situations stated above constitute the salient features addressed in this chapter.[1354]

The aim of targeting the selected cases is to test the potency of the trigger mechanisms. In doing so, the researcher evaluates the merits and demerits, including challenges posed by these mechanisms in their individual nature as instruments through

---

1352 See Clark '*Law, Politics and Pragmatism,* Waddell N and Clark P (eds) 37-45
1353 See Van der Vyver 2011 *AHRLJ*
1354 See Sjostrom The initiation of an investigation 5

which the ICC's jurisdiction is set in motion. Before delving into the political details surrounding the trigger mechanisms, the study highlights a handful of conflict situations that necessitated the creation of the ICC. Furthermore, the chapter unveils the political scenarios through which the ICC continuously waives its duty to deliver justice against perpetrators of massive crimes committed in conflict situations that have come before the Court. Lastly, the chapter provides a summary followed by a conclusive evaluation of the ICC's operations both in Africa and the world at large.

5.2 AN OVERVIEW OF CONFLICTS IN AFRICA

Historically, Africa has been in the spotlight for violent intra-state and inter-state armed conflicts.[1355] Within the Continent, the current that flows from North to South, East to West and Central is defined by political, ethnic, religious, social and cultural turbulence.[1356] Since the 1960s, a series of civil wars have spread across Africa, including the conflict in Chad (1965-1985), Nigeria (1967-1970), Angola (1974-2002), Liberia (1980-2003), Sudan (1990-1995), Burundi, Rwanda and Sierra Leone between the years (1991-2001) and Somalia (1999-1993).[1357] By the dawn of the new millennium, an estimated number of 18 African countries were facing armed rebellions, 11 faced severe political crises and 19 countries were relatively stable politically.[1358] Progressively, some of the countries that enjoyed a fairly stable political environment moved to a state of instability. According to the United Nations Development Programme's (UNDP) representative:[1359]

> "A snapshot of explosive conflicts in today's Africa presents a worrying picture: of Eritrea and Ethiopia; of the DRC, Rwanda, Uganda, Zimbabwe, Sudan, the last with the longest-running civil war on the continent; of Sierra Leone with gruesome atrocities against civilians; of Somalia, Burundi, Guinea Bissau and Lesotho, the latter reeling from South Africa's recent intervention".

Besides the recurrent escalations of civil wars and political conflicts mentioned above, Africa has also witnessed a number of intermittent border skirmishes and inter-state conflicts notable among which are the following:

1355 See Ibrahim *et al.,* 2014 *IJHSSE*
1356 Ibrahim *et al.,* 2014 *IJHSSE*
1357 See Watts and Ibaba 2011 *AS*
1358 See Bujra African Conflicts 1
1359 Bujra African Conflicts 1

i. Eritrea- Ethiopian crisis between 1962 and 1979;
ii. Algeria- Morocco conflict over the Atlas Mountains area in October 1963;
iii. Kenya- Somalia border war of 1963 -1967 in which Somalia aimed to recover its lost territories including the Northern frontier district of Kenya
iv. Somalia-Ethiopia dispute of 1964 to 1978 over the Ugandan desert region;
v. Tanzania- Uganda crisis in 1978-1979;
vii. Chad- Libya crisis of 1980- 1982;
vii. Nigeria- Cameroon dispute over the Bakassi peninsular between 1994-2008.[1360]

In the absence of an effective judicial mechanism charged with the responsibility to ensure individual accountability for heinous offences committed against humanity, the continent relied on *ad hoc* tribunals created under UN Security Council Resolutions.[1361] For example, the UN Security Council established the International Criminal Tribunal for Rwanda in 1994 to respond to the Rwandan genocide and later established the Special Court for Sierra Leone to try Charles Taylor. Also, inter-state conflicts and border disputes as stated above have been managed by the ICJ.[1362] While the UN special tribunals invoked individual accountability in international law, they had peculiar limitations in terms of geographic territory as they were created to respond to specific crises. Similarly, the ICJ lacked criminal jurisdiction which is why it cannot bring individuals to book. These limitations in the realm of international criminal law prompted the adoption of the Rome Statute in 1998 followed by the establishment of the ICC that became operational in 2002.[1363]

Since the inception of the Court, it has opened preliminary investigations into more than seven countries worldwide with regards to alleged crimes committed in these regions.[1364] In Africa, more than 25 individuals have been brought before the Court on

---

1360 See Olaosibikan 2010 *ARR*
1361 Olaosibikan 2010 *ARR.*
1362 See Mutabazi The United Nations ad hoc Tribunals' effectiveness in prosecuting international crimes 3.
1363 Forsythe "Human Rights in International relations" 103
1364 See Report on preliminary examination activities, 'International criminal tribunals', Leitner Center for International Law and Justice at Fordham Law School, The Office of the Prosecutor at the International Criminal Court, (2013)

various counts of war crimes, crimes against humanity and genocide.[1365] So far, more than 78 charges of war crimes, 1 genocide charge and more than 83 charges of crimes against humanity have been invoked before the Court. Overall, an estimated 5.7 million murder cases were referred to ICC from country conflict situations.[1366] For ease of reference, refer to the illustrations in the proceeding section.[1367]

[1365] Report on preliminary examination activities, 'International criminal tribunals', Leitner Center for International Law and Justice at Fordham Law School, The Office of the Prosecutor at the International Criminal Court, (2013)

[1366] Report on preliminary examination activities, 'International criminal tribunals', Leitner Center for International Law and Justice at Fordham Law School, The Office of the Prosecutor at the International Criminal Court, (2013)

[1367] For more detail regarding the illustrative frame below, see Consultancy Africa Intelligence (CAI). CAI is the definitive source of expert research and analysis on Africa, in Africa. The Head quarter is in South Africa and its consultant units are spread across the African continent and abroad. For more details about CIA, refer to consultancyafrica.com. Additional information regarding the illustrative frame has been obtained from Africa Conflict Monthly Monitor (ACMM). ACMM is a dynamic CAI monthly report that provides concise, insightful and up-to-date analysis of major conflict and conflict resolution developments in Africa. ACMM expertly synthesizes past developments, current dynamics and future prognoses into an analysis-driven, intelligible and informative synopsis.

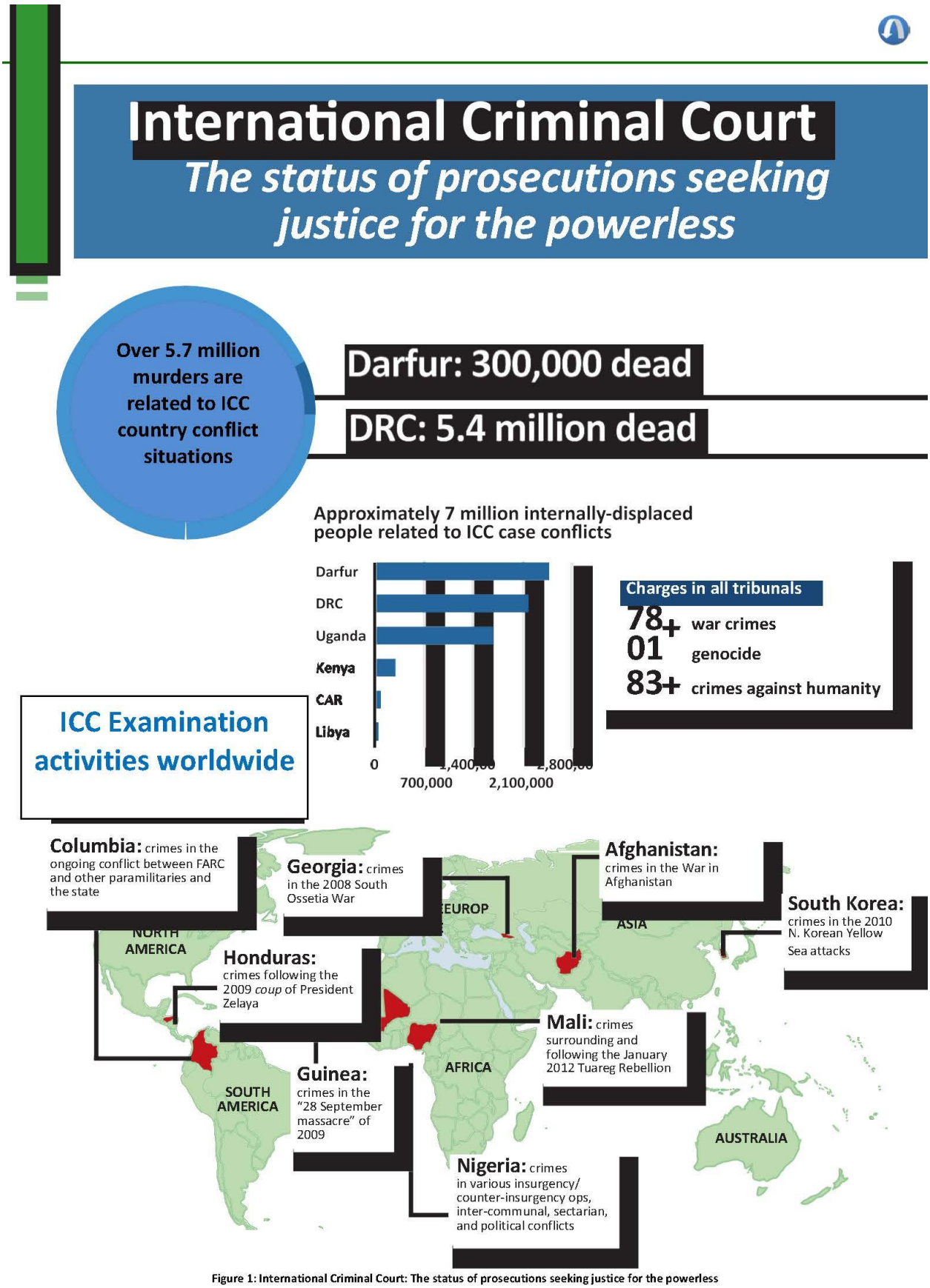
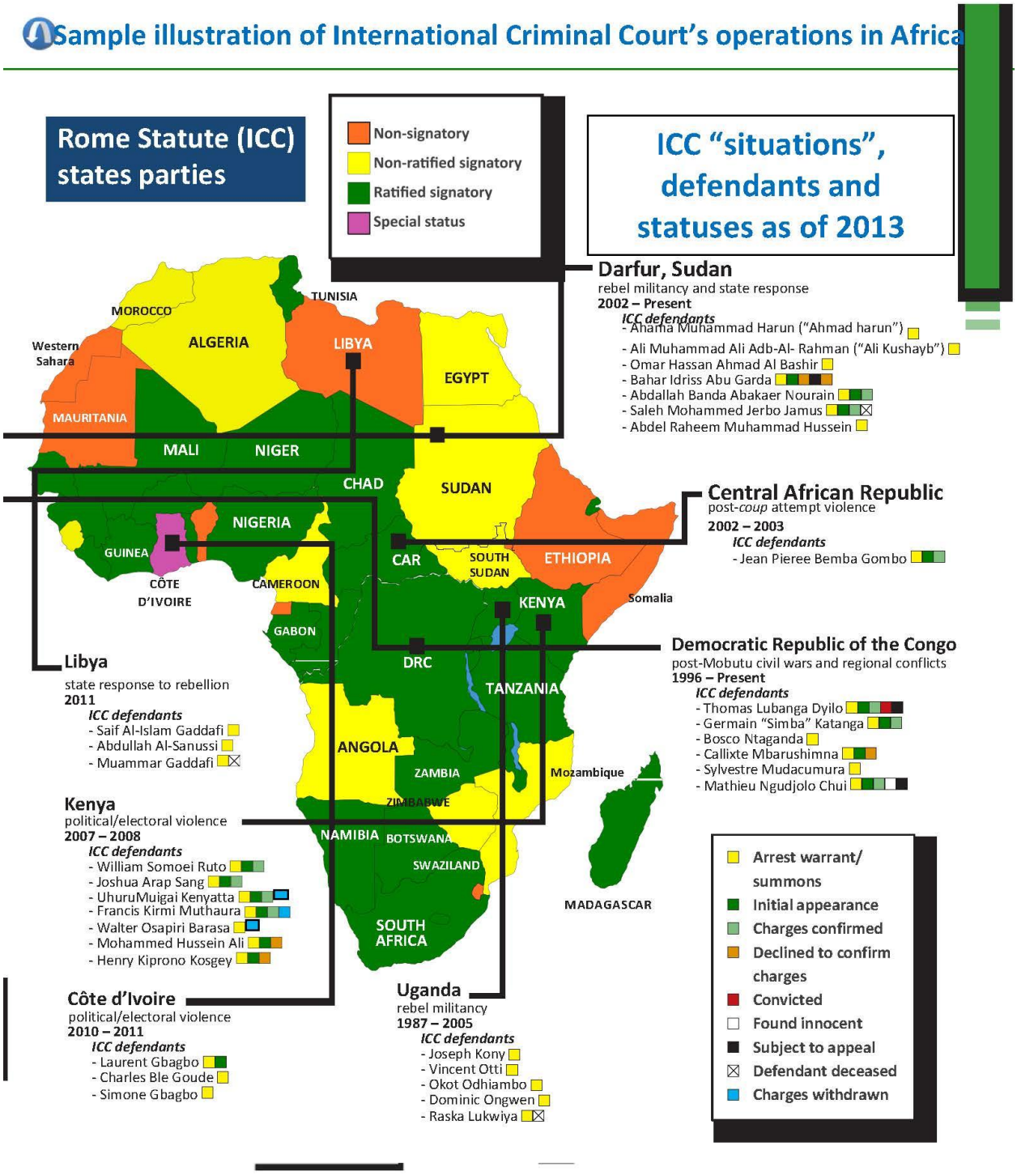


Figure 1: International Criminal Court: The status of prosecutions seeking justice for the powerless



Source for figures 1 and 2: Report on preliminary examination activities, 'International criminal tribunals', Leitner Center for International Law and Justice at Fordham Law School, The Netherlands, 2013.

Figure 2: Sample Illustration of International Criminal Court's operations in Africa

The above illustrations present a summary of the ICC's operations both in Africa as a continent and the world at large. From inception, the Court has merely opened investigations into situation of countries located in regions other than Africa. However, such is not the case with situations emanating from Africa. The Court has mainly focused its attention and pulled it resources towards prosecuting African leaders.[1368] This targeted move has raised the question as to why Africa and not the West? In the next section, three cases are sampled so as to evaluate the merits of the Court's operations in Africa. As mentioned above, the aim of the debate is to test the potency of the trigger mechanisms with respect to cases referred to the ICC. Therefore, the study introduces each section with a synoptsis followed by a brief analysis of the political dynamics that informed the Court's selective approach towards the prosecution of the alleged perpetrators.

5.3 SYNOPSIS OF THE SITUATION IN UGANDA

The war involving the government of Uganda and the Lord's Resistance Army (LRA) begun in 1986 after the present government under the leadership of President Yoweri Museveni, supported by the National Resistance Army (NRA) overpowered its political opponents.[1369] From the onset of the conflict, defeated soldiers from the vanquished government fled to their hometowns in Northern Uganda and continued their fight against the interim government.[1370] They have been fighting under the banner of the Holy Spirit Movement (HSM)[1371] created by the defeated government to counter the NRA which is today referred to as the Ugandan People's Defence Force (UPDF). The HSM combined its political orientation with the Christian doctrine to inspire its followers under the leadership of Joseph Kony and thus the LRA was born.[1372] The LRA has been at the forefront of the conflict in Northern Uganda whose consequences have led to massive human rights violations in the region.

The gruesome war has resulted in the death of many innocent civilians and non-combatants and in some cases, almost entire populations of villages were uprooted and

---

1368 See Abass 2013 *EJIL*
1369 See Ellen 2015 *ISP*
1370 Ellen 2015 *ISP*
1371 See Allen 1991 *A*
1372 See Beard 2011 *GMEJ*

displaced. While some of the victims have become refugees in neighbouring countries, others have found safe haven in Internally Displaced Person Camps (IDPS).[1373] The LRA has been blamed for this notorious brutality against civilians, including the abduction of children, turning girls into sex slaves and forcefully recruiting teenage boys into the militia.[1374] In response to these atrocities, the government through its UPDF launched military crackdowns and as a result, the government's UPDF forces have also been accused of committing similar atrocities against the civilian population of Northern Uganda.[1375]

Pressure from international donors, civil society organisations and Non-Governmental Organisations (NGO) working in the war-torn region[1376] compelled the government to refer the situation to the ICC for adjudication.[1377] The referral resulted in the indictment of the LRA leaders and further established a controversial picture along the lines of the peace versus justice dilemma. Those opposing the ICC indictments argued that the threat of arrest and prosecution of the LRA leaders constituted threats to on-going peace talks negotiated by the government of Southern Sudan.[1378] On the other hand, supporters of the ICC indictments argued that the prosecution of the LRA leaders would bring an end to the culture of impunity in the region.[1379] These two distinct lines of argument have developed to a more complex political debate regarding the referral of the case relating to the LRA to the ICC. 'Who's Who' is determined in the course of the debate as conflicting parties battle to gain political alliances within the international sphere.

1373 Beard 2011 *GMEJ*

1374 Beard 2011 *GMEJ*

1375 Beard 2011 *GMEJ*

1376 The Refugee Law Project's paper position on the announcement on the formal investigations of the LRA by the Prosecutor of the ICC and the implications on the search for peaceful solutions to the war in northern Uganda (2004)

1377 ICC Press Release, 2004 <www.icc-cpi.int/pressrelease details&id=16.html> Accessed 25/05/2017

1378 The Refugee Law Project's paper position on the announcement on the formal investigations of the LRA by the Prosecutor of the ICC and the implications on the search for peaceful solutions to the war in northern Uganda (2004)

1379 Human Rights Watch, 2008 When Peace Talks Undermine Justice. Published in International Herald Tribune <http://hrw.org/english/docs/2008/07/04/global19268.htm> Accessed 25/05/201

5.3.1 The politics of the struggle to gain allies

The politics behind the referral of the LRA to the ICC is intertwined with the crisis in the eastern region in the DRC. The case concerning the LRA was referred to the ICC in 2003 by the government of Uganda.[1380] Three months before the referral was initiated the former Chief Prosecutor of the ICC, Luis Moreno-Ocampo, had made known his intention to keep a close watch over the situation in the eastern DRC and also called upon countries to show support by referring the situation to the Court.[1381] The ICJ was at the same time resolving allegations to the effect that Uganda violated international law by involving itself in the crisis in the eastern region of the DRC.[1382] Hence, the ICC's Office of the Prosecutor was invited alongside the government of Uganda for purposes of triggering the jurisdiction of the Court in accordance with Article 13(a) on the basis that Uganda had a situation in its territory that called for the ICC's attention.[1383] The request was warmly approved by the Office of the Prosecutor (OTP) and Uganda became the first state to trigger the ICC's jurisdiction in accordance with Article 13(a).[1384]

The Ugandan referral was considered a significant milestone towards promoting the Court's jurisdiction. However, it was staged as an experiment to test the potency of the Court's mandate stipulated under Article 13(a) of the Rome Statute. In the words of an advisor to the government of Uganda concerning the issue, the referral was design as a motivation, calling on the international community's attention to the situation concerning the LRA leaders with the intention to brand them as international terrorist.[1385]

1380 ICC, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC', ICC-20040129-44-En (2004)

1381 See Report of the Prosecutor of the ICC to the Second Assembly of States Parties to the Rome Statute of the International Criminal Court, (2003)

1382 In Armed Activities on the Territory of the Congo, see *Democratic Republic of the Congo v. Uganda,* ICJ Rep 168. 2005, at para. 207 (see also paras 211 and 250), the ICJ later establish that the Ugandan armed forces (UPDF) had committed 'massive human rights violations and grave breaches of international humanitarian law' on the territory of the DRC.

1383 See Nouwen and Werner 2011 *EJIL*

1384 See Clark, "Grappling in the Great Lakes" 261.

1385 Akhavan 2005 *AJIL*

Whereas the debates at the Rome Conference were mostly directed towards the possibility of states preventing the ICC's intervention which directly threatened the sovereignty of a state, it was least expected that any state would attempt to invoke the Court's jurisdiction over its territory as stipulated under Article 13(a) of the Rome Statute.[1386] With regards to the situation in Uganda, the irony lies in the fact that the government viewed the ICC intervention as an opportunity to bring down the relentless Ugandan militia.[1387]

Even though negotiations were initiated by the government to promote a military solution in past years, changing dynamics, including new developments, proved that the government was and still continues to be unable to end the conflict or reach an amicable settlement with the LRA.[1388] A military coup calculated to wiping out the LRA failed in Northern Uganda with devastating consequences, among which the number of displaced persons rose from around 400,000 to 1.6 million people, with numbers still rising at the time the case was referred to the ICC.[1389] Given that the humanitarian situation was rapidly deteriorating and also that Northern Uganda was classified by the office of the UN Secretary General for Humanitarian Affairs as the world's most abandoned crisis.[1390] The government thought it necessary to find alternative solutions and save its image from being tarnished. The image problem was exacerbated by the prosecution of political opponents that provoked riots in the streets of Kampala.[1391] Also, international donors funding a huge percentage of Uganda's budget[1392] joined local leaders in a common voice to criticise the government's failure to settle the conflict and put a stop to human rights violations in the North.

It is against this backdrop that the Ugandan government resolved to refer the situation concerning the LRA to the ICC as a strategy to save its reputation and avoid further destabilisation in the already politically volatile atmosphere of Northern Uganda. The referral was initiated not by Uganda's Ministry of Justice but Ministry of Defense with

---

1386 See, Arbour L, 1999 *UTFLR*
1387 See Akhavan 2003 *AJIL*
1388 'Uganda: Interview with President Yoweri Museveni', 2005, www.irinnews.org/Report.aspx?ReportId=54853 Accessed 24/06/2017
1389 See Lomo 2004 *APPGGLGP*
1390 Nouwen and Werner 2011 *EJIL*
1391 Nouwen and Werner 2011 *EJIL*
1392 Nouwen and Werner 2011 *EJIL*

the aim to intimidate the militia.[1393] Therefore, the involvement of the ICC was a form of international assistance towards the arrest of the government's military opponents. The government of Uganda lobbied the ICC to ensure legal enforcement against the LRA leaders but the questions about the potency of such enforcement action remain a worrying concern as such leaders are still free from the long arm of the law.[1394]

By invoking the ICC's jurisdiction under Article 13(a), the government of Uganda was convinced that by the Court's international reach, it will succeed where the Ugandan military force had failed. Also, it was the need to declare war against the Sudanese government for supporting the LRA, which prompted the initiation of the referral.[1395] Admittedly, the Ugandan government re-defined the conflict in terms of international criminal law so as to use international criminal justice as a tool to defeat its enemy. The logic is, considering the fact that the government referred to the LRA as 'irrational', 'religious fundamentalists', 'terrorists', the ICC could easily describe them as internationally wanted 'criminals'. In this regard, the militia could easily be transformed from enemies of the Ugandan government to enemies of the international community by virtue of the Court's intervention.[1396]

5.3.2 The friend-enemy dichotomy

The politics behind the government's initiated efforts can be discussed in two dimensions. By virtue of the government referral, the LRA on the one hand was portrayed as an enemy of the human race, what Grotius referred to as *hostes human generis,*[1397] calling for international prosecution to bring such individuals to book in accordance with the universal jurisdiction theory. On the other hand, the government was branded as humanity's friend and as well, an advocate for international criminal justice. In view of the government's calculated strategy, the ICC's targeted investigation against the LRA motivated States Parties to treat the LRA leaders as most wanted

---

1393 Nouwen and Werner 2011 *EJIL*
1394 Carofiglio 2015 http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/ Accessed 28/06/2017
1395 Interview with a government minister, Kampala, IRIN, 2008.
1396 Nouwen and Werner 2011 *EJIL*
1397 See Grotius *The Law of War* 29

criminals and of course, the government was considered a legitimate authority fighting against such criminals.[1398]

Admittedly, the referral had the potential of portraying the government of Uganda as an advocate of international justice as it is the first state to trigger the jurisdiction of the ICC in accordance with Article 13(a). The government thought it wise to establish a link between the prosecution of the LRA leadership and the ICC's credibility.[1399] In that way, ICC supporters from European nations would replace their criticism of the Ugandan People's Defence Force (UPDF) and the government's failure to improve the humanitarian situation in northern Uganda with revived commitments to support a legitimate government fighting the so called *hostes human generis*.[1400] Also, the situation concerning the LRA was a targeted referral such that the ICC prosecutor would solely depend on cooperation from the government of Uganda and avoid any form of jeopardy caused by cooperation with unlikely friends.[1401]

The government's alliance with the ICC raised the possibility for the Court to accuse opposition leaders and war-lords for the atrocities committed in the northern region of Uganda. Therefore, the Court was invited to prosecuting the enemy.[1402] Given that only the 'situation concerning the LRA' was referred to the Court, the government was certain that the ICC would solely prosecute and probably convict the LRA.

Seemingly, the government's calculated strategy proved positive as it succeeded in gaining much-needed support from the ASP. With the popular argument that Uganda is the first state to refer a situation before the ICC, it succeeded in convincing the ASP to the Rome Statute that Kampala should be the host of the ICC Review Conference and such was the case.[1403] Also, the ICC's arrest warrant issued against the LRA offered the possibility through which the Ugandan government found it easier to convince the Congolese government to allow the Ugandan army to chase out the LRA from its

---

1398 Nouwen and Werner 2011 *EJIL*
1399 See also Akhavan 2003 *AJIL*
1400 See Branch 2004 http://www.dissentmagazine.org/article/?article=336 Accessed 24/05/2017
1401 See Southwick 2005 *YJIA*
1402 Nouwen and Werner 2011 *EJIL*
1403 Marschner *et al*., 2010 http://perso.unifr.ch/derechopenal/assets/files/obrasportales/op_20101107_01.pdf Accessed 28/06/2017

territory.[1404] Added to this is the fact that international criticism against the UPDF's operations in the DRC that dispersed the LRA and resulted in the killings and displacement of hundreds of civilians was silenced.[1405] On this note, efforts made by states in the region to address the security threat posed by LRA, was highly applauded by the Security Council.[1406] The Ugandan government was also correct in its conviction that the Court would not pursue government officials as up until now, the Court has not opened investigations into alleged crimes by states actors due to a flawed application of gravity as selection criterion.[1407]

When the referral was announced, the government of Uganda was presented by the ICC Prosecutor as a partner in combating international crimes. The announcement further implied that only the LRA, and not the government forces, particularly the leaders of the UPDF, would be the subject of investigation.[1408] In response to criticisms posed by Non-Governmental Organisations (NGOs), the Court acknowledged the situation but failed to open an investigation into the crimes committed by the UPDF. Rather, it was announced over the news that the UPDF have been cleared by the ICC.[1409] In the news headlines, the Prosecutor declared the availability of evidence against Kony and not against the UPDF commanders.[1410]

By this selective approach, the government officials felt legitimized by the fact that ICC proceedings were not directed against UPDF officers for offenses perpetrated in a large scale and argued that the ICC found no evidence against the UPDF officers.[1411] Apart from the ICC's reluctance or refusal to open investigations against government officials, the OTP was in close collaboration with the government towards conducting investigations against the LRA, including fun activities and pleasure trips for enjoyment

---

1404 Nouwen and Werner 2011 *EJIL*

1405 DRC–Uganda: Deadly LRA Attacks Prompt Exodus in Northeastern DRC, 2008 *IRIN,* http://www.irinnews.org/Report.aspx?ReportId=82140, Accessed 24/05/2017.; Eichstaedt 2009 www.friendsforpeaceinafrica.org/news/17-lra-updf-war/332-offensive-against-kony-backfires-iwpr.html. Accessed 24/05/2017

1406 See Doc. S/PRST/2008/48

1407 See Statement by Prosecutor of the ICC, Fourth Session of the Assembly of States Parties, ICC-02/04-01/05-67, 2005, at 2., See also Schabas 2008 *JICJ*

1408 ICC, 'President of Uganda Refers Situation Concerning the LRA to the ICC', ICC-20040129-44-En, (2004).

1409 Mugisa and Nsambu, *Saturday Vision* Anon

1410 Mugisa and Nsambu, *Saturday Vision* Anon

1411 See Hoover 2015 *LCP*

purposes.[1412] Moreover, the governments initiated referral was entertained by the OTP without adopting a critical approach in assessing the requirements relevant to admissibility. By implication, many Ugandans held the impression that the Court acted because the government wanted it to do so.[1413] This friendly relationship between the Ugandan government and the ICC lasted for a while. However, when the government thought otherwise to complement the ICC by initiating domestic proceedings so as to convince the LRA to sign a peace agreement, the friendly ICC-Ugandan government relations developed goose pimples.[1414] However, the LRA leader Joseph Kony failed to sign the Final Peace Agreement negotiated with the government. As a consequence, LRA remained an enemy to the government of Uganda and the ICC while the government continued its friendly relationship with the Court.

It is worth noting that the OTP branded the LRA leaders as criminals from the moment the referral was issued. Even though an investigation was yet to be conducted by the Prosecutor, the referral of the LRA leadership was announced by the ICC press release with emphasis on arresting the LRA leadership as a key issue.[1415] Continuously, the Prosecutor's branded the LRA as a criminal organization. Challenged in a public debate in London as to why the ICC did not initiate investigations against the government forces in Uganda, the Prosecutor responded sharply by maintaining that the LRA is a criminal organization.[1416] Similarly, the Prosecutor blamed supporters of the peace talks between the government of Uganda and the LRA on the basis that the LRA leader "Joseph Kony [had been] allowed to use the resources of the 'Juba talks' to promote his criminal goals".[1417]

It is generally argued that the ICC's approach was determined by its institutional interest at the time the referral was made.[1418] While the Court was lobbying the

---

1412 Hoover 2015 *LCP*

1413 Hoover 2015 *LCP*

1414 See Assembly of States Parties, Sixth Resumed Session, side event for African States, (2008)

1415 ICC, 'President of Uganda Refers Situation Concerning the LRA to the ICC', ICC-20040129-44-En, (2004)

1416 Branch, 2010 http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/. Accessed 25/05/2017

1417 See Moreno-Ocampo, 'Remarks by the Prosecutor of the International Criminal Court', Chicago, (2008).

1418 Nouwen and Werner 2011 *EJIL*

international community for support, the result of which just 60 states had ratified the Rome Statute at the time the referral was made, it was necessary for the Court to exercise its jurisdiction so as to announce its presence and reassure doubting states that it was actually the long awaited solution to international criminal justice.[1419] According to an account by an ICC official, the situation concerning the LRA presents 'a perfect case for [the OTP's] first… investigation'.[1420] Given that the referral was initiated by the government of Uganda, there was little or no argument regarding breach of state sovereignty. The referral was not opposed as the OTP planned for a relatively easy and successful investigation.

The situation however did not remain the same as the ICC gradually lost concentration on and commitment towards the Ugandan referral owing to the fact that the government also diverted its interest.[1421] At the time the referral was made, the government of Uganda believed that the ICC was going to propagate its interests. This perception changed immediately it was certain that the ICC could not arrest the LRA leaders, given that the LRA leaders refused to sign the peace deal so long as the ICC was concern in the conflict.[1422] At a point when the government had reached an agreement with the LRA, national proceedings were initiated with effect of nullifying ICC proceedings.[1423] The Prosecutor proved adamant against supporting such a legitimate action. Rather, the OTP made it clear that any admissibility request will be challenged in court',[1424] irrespective of the extent to which such a process may seem genuine. Upon awareness of the government's plan to complement the ICC's action with domestic proceedings, the Pre-Trial Chamber of the ICC decided on its own accord to initiate proceedings to assess complementarity,[1425] all in an effort to establish that the authority to render a case inadmissible rest not with the government of Uganda but

---

1419 Nouwen and Werner 2011 *EJIL*
1420 Nouwen and Werner 2011 *EJIL*
1421 See Schomerus The Lord Resistance Army in Sudan 10
1422 Nouwen and Werner 2011 *EJIL*
1423 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9, 1998. Articles 17 and 20(3)
1424 OTP quoted in Glassborow, 2008 http://iwpr.net/report-news/uganda-insists-peace-not-odds-icc. Accessed 25/05/2017
1425 Decision Initiating Proceedings under Article 19, requesting Observations and Appointing Counsel for the Defence, ICC-02/04-01/05-320, (2008)

with the ICC.[1426] The situation concerning the LRA became difficult for the ICC to deal with given that it battled to continue with the case and at the same time struggled to sustain the government's cooperation.

What seemed at first sight to be a friendly relationship later became sour due to competing national and international interests? Whereas the ICC used the friend-enemy dichotomy to align with the government of Uganda to test the capability of its mandate arising from Article 13(a) of the Rome Statute, it later realised the weaker side of its authority in terms of enforcement.[1427] Also, the government of Uganda intended to annihilate the LRA using the ICC's purportedly strong arm of justice. However, the failure to arrest the LRA leaders gave the government the impression that the ICC is a toothless bulldog.[1428] Instead of arresting and prosecuting the alleged suspects, the Court relied on the government for necessary support. In the end, it was clear that neither the Court nor the government was able to arrest the LRA leaders. The question of enforcement therefore became the reason for which the situation concerning the LRA in Uganda has remained unchanged.

5.4 SYNOPSIS OF THE SITUATION IN SUDAN

The conflict in the Darfur region of Sudan erupted in 2003 when the Darfur indigenes supported by many rebel factions took up arms against the Sudanese government for continuously neglecting their pleas for equality and inclusive leadership. The African Union High-Level Panel on Darfur (AUPD), reported that the remote causes of the Darfur conflict started from the pre-colonial era and was evident by the complete neglect of the Sudanese peripheries.[1429] The conflict exposed the inequitable distribution of wealth and power which the Panel referred to as "Sudan's crisis in

---

1426 Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, Pre-Trial Chamber II, (2009)

1427 Nouwen and Werner 2011 *EJIL*

1428 Nouwen and Werner 2011 *EJIL*

1429 See Report of the African Union High-Level Panel on Darfur. Peace and Security Council 207th meeting of the Heads of States and Government, AU Doc. PSC/AHG/2(ccvii). (2009). para.281. Considering the Darfur crisis to be interconnected with governmental policies and political issues, the Panel suggests that the general political crisis in Sudan must be addressed and possibly resolved to obtain better results of peace and reconciliation in Darfur. In the Panel's view, the crisis in Darfur can trace its origin from the general political crisis facing Sudan.

Darfur".[1430] At the onset of the conflict, an estimated four foreign humanitarian agencies were banned from working in the eastern region by the Sudanese government.[1431] Additionally, while humanitarian access was severely hampered in Darfur, it was blocked completely in the South Kordafan and Blue Nile states.[1432]

The Conflict in Darfur is said to have claimed more than 400, 000 lives, including the loss of livestock and other valuables. Also, thousands of Darfuris have either moved to Internally Displaced Persons Camps (IDPC) for refuge or relocated as refugees in neighbouring countries.[1433] In 2004 the UN Security Council voted for resolution 1564 to set up Commission of Inquiry to investigate and determine the question as to whether human rights violations did occur in Darfur for which the perpetrators should be held accountable.[1434] According to the Commission's report, even though human rights violations occurred in Darfur, such violations did not amount to genocide as stated under Article 2 of the Genocide Convention.[1435] The UN Security Council in turn voted for resolution 1593 to refer the Darfur case file to the ICC in accordance with Chapter VII of the UN Charter for further clarification regarding the question of genocide.[1436]

Despite the UN Security Council Resolutions, the conflict in Darfur still persisted. The Government of Al Bashir has been working in cahoots with the Arab *Janjaweed* militia. The government backed *Janjaweed* militias came from the Abala camel-herding nomads who migrated to Darfur from different parts of Africa in 1970s, and from Arab camel-herding tribes from North Darfur.[1437] The *Janjaweed* have built on a culture called the

---

1430 Report of the African Union High-Level Panel on Darfur. Peace and Security Council 207th meeting of the Heads of States and Government, AU Doc. PSC/AHG/2(ccvii). (2009)

1431 Annette 2012 http://enoughproject.org/blogs/Khartoum-pattern-neglect-continues-eastern-sudan-government- expels-aid-groups Accessed 28/05/2017

1432 Annette 2012 http://enoughproject.org/blogs/Khartoum-pattern-neglect-continues-eastern-sudan-government-expels-aid-groups Accessed 28/05/2017

1433 Annette 2012 http://enoughproject.org/blogs/Khartoum-pattern-neglect-continues-eastern-sudan-government-expels-aid-groups Accessed 28/05/2017

1434 United Nations Security Council Resolution 1564, Press Release: SC/8191, (2004)

1435 Report of the International Commission of Inquiry in Darfur to the UN Secretary-General, ICID report, (2005)

1436 United Nations Security Council Resolution 1593, Press Release: SC/8351, (2005)

1437 Donovan 2005 *AISA*

Hambati or 'social bandits' taken from among the Arab tribes. They have been rejected by their own communities for breaching established traditions.[1438]

Some *Janjaweed* members seems to be more hardened criminals among which, some have been released from prison to join or lead the militia.[1439] The Commission of Inquiry on Darfur referred to the *Janjaweed* in the Arabic context as "devils on horseback".[1440] The Sudanese government specifically created the militia to bolster its military capability and ignore the criminal activities, including looting and raping perpetrated by the militia.[1441] The mass atrocities committed by the militia against the Darfur indigenes correlated with the government's assumed strategy aimed at clearing the land of potential rebel support.[1442]

Despite numerous international calls to disarm the *Janjaweed,* Mustafa Ismail, the Former Sudanese Foreign Minister, categorically deny the disarmament of the militias provided weapons were still in the hands of rebel forces.[1443] He further noted that the *Janjaweed* militia was a spontaneous tribal retaliation to rebels who are predominantly Zaghawa black Africans.[1444] Such negative actions created the unlikely situation in which the Sudanese government was placed in the spotlight as a state perpetrating evil against its people. The government therefore became a subject of contention, vulnerable to attack from likely oppositions both nationally and internationally under the guise of protecting the Darfur indigenes.[1445] Below is a reflection on the politics surrounding the referral of the Sudanese situation to the ICC.

5.4.1 The politics of the struggle to gain allies

The Sudanese case, compared to the situation concerning the LRA in Uganda, presents a controversial picture about the ICC. Whereas in Uganda, the referral of the LRA was initiated by the government, the Sudanese situation in Darfur initiated by the Security

---

1438 Donovan 2005 *AISA*
1439 Donovan 2005 *AISA*
1440 United Nations Security Council Resolution 1564, Press Release: SC/8191, (2004). para.100
1441 Donovan 2005 *AISA*
1442 Donovan 2005 *AISA*
1443 Robert Genocide in Darfur 17
1444 Robert Genocide in Darfur 17
1445 Robert Genocide in Darfur 17

Council was rejected by the government.[1446] Also, the Court was used by the Government of Uganda as a tool to make the LRA an enemy of the human family while Sudan on the other hand perceived the Court as a post-colonial tool propagating western imperialism in accordance with the ideologies of the permanent members of the Security Council with the intention to change the Sudanese government by issuing arrest warrants.[1447] Despite the obligation imposed upon UN member states by Article 25 of the UN Charter, the government considered the Court's intervention as an attack by the permanent members of the Security Council directed against the government of Sudan.[1448]

Due to multiple sanctions levied against the government by the ICC, the Sudanese government saw the intervention by the Court as a combined political effort to destabilize the government and portray the State of Sudan as an enemy nation to international criminal justice.[1449] It is further argued that the political character of the referral was expressed in agreement with related punitive measures against the Sudanese government.[1450] The government contended that the Sudanese situation did not threaten the peace and security of the global landscape as stated under Article 39 of the UN Charter[1451] and therefore, it did not call for a Security Council referral.[1452]

1446 Nouwen and Werner 2011 *EJIL*

1447 Nouwen and Werner 2011 *EJIL*

1448 Nouwen and Werner 2011 *EJIL.* Under Article 25 of the UN Charter, member states, including Sudan agree to accept and carry out the decisions of the Security Council in accordance with the Charter.

1449 See, for instance, De Waal, *Darfur, the Court and Khartoum,* N. Waddell and P. Clark (eds), 34. See also President Bashir in Dealy, 2009 www.pbs.org/newshour/bb/africa/july-dec09/bashir-full_08-13.html, stating: 'We think that the ICC is a tool to terrorize countries that the West thinks are disobedient.'

1450 The referral was made in the same week in which the Council imposed sanctions (SC Res 1591, 29 Mar. 2005). According to para. 3(c), sanctions can be imposed on those who impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities, violate the UN embargoes, or are responsible for offensive military overflights.

1451 Article 39 of the UN Charter provides: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

1452 Preconditions over which the Security Council may exercise the authority to refer a situation to the ICC for investigation and prosecution are stated under Article 13(b) of the Rome Statute read along with Article 39 of the UN Charter. Article 13(b) of the Rome Statute provides that the Security Council may refer a situation to the ICC provided it

Admittedly, the referral occured two months after the government had already engaged in positive concessions in the mediated peace negotiations with the Sudan's People Liberation Movement (SPLM).[1453] According to the Sudanese representative at the UN, the government of Sudan was praised for fighting and supressing Africa's longest crisis with further sanctions and processes.[1454]

Given that the USA representative mentioned the Security Council's 'firm political oversight' of proceedings[1455] and also the fact that the US announced the call for Al Bashir's arrest warrant before the ICC Prosecutor,[1456] it is rational to agree with the Sudanese government's argument to say justice within the international community is dominated by the USA and favourable to its Allies. The referral also points to the selective application of justice, owning to the fact that the Court constitutes a political battlefield to settle the scores of political enemies.[1457] Because the US and UN peace-keepers continue to stay away from the ICC's jurisdiction with regards to situations in which the aggressors are westerners, such as Iraq, Afghanistan and Israel, the ICC is perceived as a forum for international politics and not international justice.[1458]

In particular, the call for a warrant to arrest the Sudanese President justified the argument that the Court is an institution targeting particular States in Africa so as to meet the political expectations of the West.[1459] While the charges brought against the Sudanese President were built on the basis of individual accountability, the ICC Prosecutor further labelled the entire Sudanese state as criminal by stating that the

---

constitutes a threat to international peace and security as stipulated under Article 39 of the UN Charter.

1453 The ruling party in the North had signed an agreement granting the South the right to self-determination, committing itself to sharing substantial parts of its wealth and power and consenting to the presence of 10,000 UN peacekeepers to monitor implementation of the agreement.

1454 See Doc. S/PV.5158

1455 See Doc. S/PV.5158

1456 See Statement of Abdulbasit Sabderat, Minister of Justice in the Republic of the Sudan before the AU Peace and Security Council, (2008), at paras. 6 and 8; interview with SPLM MP, Khartoum, 2008.

1457 See, for example, Sudan Bar Association, *Statement of the Sudan Bar Union* Sudan Bar Association (ed.) 2

1458 See De Waal, *Darfur, the Court and Khartoum,* N. Waddell and P. Clark (eds) 34

1459 Nouwen and Werner 2011 *EJIL*

crimes committed were so done 'by using state apparatus'[1460] or claims that President *Al Bashir* ensured that multiple factions of the government, including the Armed Forces and the *Janjaweed* militia were brought together in order to enforce the governments initiated plan.[1461]

Contrary to the Sudanese government's position, leaders of the rebel movements in Darfur have not only welcomed the ICC's intervention in the conflict but have declared themselves supporters of the ICC fighting against impunity.[1462] The leader of the Justice and Equity Movement (JEM) stated that the movement appreciates and applaud the ICC and were ready to fully co-operate with the Court to make sure the perpetrators of mass atrocities do not go unpunished.[1463] The leader further insisted on the need for an ICC warrant of arrest against Al Bashir by stating that it will bring 'an end to his legitimacy to be President of Sudan' and that the JEM intends to bring down the President provided he fails to cooperate with the ICC and as assured that in that situation, the war will intensify.[1464] His words turned out to be correct given that the movement increased its military activities against the Sudanese government after the request for Bashir's warrant was announced. The JEM acted as a driving force through which other rebel movements refused to come to terms with the Sudanese government as they joined the argument that it was wrong to negotiate with 'war criminals'.[1465]

Given that international criminal justice was against the Sudanese government, leaders of the rebel movements in Darfur resolved to put negotiations on hold until such a time when the stronghold of the government would have been weakened by international criminal law to the extent where a peace agreement would be reached on terms favourable to the rebels.[1466] At same time, the rebels pledged their willingness to cooperate with the ICC as opposed to their opponents, the 'Sudanese government',

---

1460 See Public Redacted Version of the Prosecutor's Application under Article *58*, ICC-02/05-157-AnxA, OTP, (2008). para. 62 and paras 250–343

1461 Public Redacted Version of the Prosecutor's Application under Article *58*, ICC-02/05-157-AnxA, OTP, (2008), para. 269

1462 Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case *Sudan Tribune* 4

1463 Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case *Sudan Tribune* 4

1464 Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case *Sudan Tribune* 4

1465 Mamdani The Politics of Naming 17

1466 See also President Bashir in Dealy, 2009 www.pbs.org/newshour/bb/africa/july-dec09/bashir-full_08-13.html

who remained staunchly opposed to the Court's plea for cooperation. The irony of the struggle centered on the quest to gain allies. At face value, rebel leaders in Darfur seem to have extended a friendly hand to the ICC for the sake of ensuring accountability for heinous offences committed in the region.[1467] While that was the case, the rebels also felt delighted to align with the ICC on the basis that the Court branded their opponents as international criminals and of course legitimized their movements against such criminals.

By JEM's alliance with the ICC, the rebels had conceived that the Court will arrest Sudanese government officials, including President Al Bashir and consequently subdue their strongholds.[1468] The ICC however failed to live up to such expectations due to the lack of an effective policing mechanism to enforce the Court's decisions with regard to arrest warrants. As a consequence, the leaders of the JEM and related rebel movements soon lost sight of the importance of justice in favour of a negotiated agreement with the government to have their members in captivity released on the basis of amnesty.[1469] The leaders of the rebel movements felt disappointed by the Court's failure to arrest and prosecute *Al Bashir* and others wanted for the atrocities in Darfur. At the request of the Prosecutor, summonses to appear were issued by judges of the Court to three members of the rebel movements on suspicion of attacking a peace-keeping base of the African Union.[1470]

However, such ICC initiated summons with no specific outcome did not alter the positive attitude of the leaders of the main rebel movements towards the Court as they continuously showed support for the Court's operations irrespective of the outcomes, in particular the failure to bring *Al Bashir* to book.[1471] Other movements promised to avail themselves should they be indicted by the Court. A spokesperson of another promised to report to the international community acts of human rights violations perpetrated in

---

1467 Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case *Sudan Tribune* 4

1468 Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case *Sudan Tribune* 4

1469 See Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan and the Justice and Equality Movement, Doha, (2010)

1470 Decision on the Prosecutor's Application under Article 58, ICC-02/05-02/09-1, Pre-Trial Chamber I, (2009) and Second Decision on the Prosecutor's Application under Article 58, ICC-02/05-03/09, Pre- Trial Chamber I, (2009)

1471 Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case *Sudan Tribune* 4

the region for possible sanctions irrespective of the perpetrators.[1472] Accordingly, Abu Garda voluntarily identified himself before the Court, participating in the proceedings after which the judges declined from confirming charges against him on the basis of insufficient evidence connecting the accused to the crimes.[1473]

5.4.2 The friend-enemy dichotomy

Just like the friend-enemy dichotomy observed in the situation concerning the LRA in Uganda, the Darfur situation depicts another example where the ICC exhibited the character of going by the friend-enemy dichotomy to differentiate its friends from its enemies.[1474] However, the Sudanese government's behaviour does not necessarily portray the image that the Court is entirely ineffective. In his first report to the Security Council, the Prosecutor mentioned instances where the government of Sudan offered to co-operate, while omitting completely the possibility of non-compliance.[1475] Therefore, he stressed the possibility of ending the ICC's involvement on the basis of complementarity.[1476] The Prosecutor made significant strides towards encouraging the Sudanese government to establish domestic proceedings as an alternative to the ICC investigations.[1477] The Prosecutor's efforts were successful to the extent that the Sudanese government initially rejected the Court in public, but continued its

---

1472 Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case *Sudan Tribune* 4

1473 Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, Pre-Trial Chamber I, (2010). The Prosecutor's request for leave to appeal this decision was declined (Decision on the 'Prosecution's Application for Leave to Appeal the "Decision on the Confirmation of Charges"', ICC-02/05-02/09, Pre-Trial Chamber I, 23 Apr. 2010)

1474 The referral had been a vote of confidence in the Court since even China, an important business partner of Sudan, and the United States, a strong antagonist of the ICC, had allowed the Council's first triggering of the ICC's jurisdiction.

1475 See Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2006), at 9 and Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2006), at 9 and 10

1476 ICC-OTP, 'Prosecutor Receives List Prepared by Comission [sic] of Inquiry on Darfur', ICC-OTP-20050405- 97-En, (2005)

1477 See Second Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UN Security Council 1593 (2005), 13 Dec. 2005, at 6. For example, the Prosecutor never publicly requested Sudan to allow ICC investigators to work in Darfur, arguing that the ICC's presence would be too dangerous for witnesses who cooperated with the Court: See paragraph 4 of the Second Report, paragraph 1 of Third Report and paragraph 3 and 4 of Fourth Report Pursuant to Security Council Resolution 1593 concerning the Darfur situation.

cooperation with the ICC in its case against the LRA and also allowed ICC officials into the country to assess questions of admissibility with regards to the Darfur situation.

The government withdrew from cooperating with the Court both formally and informally after charges were issued against the Sudanese governor and former minister Ahmed Harun and Ali Kushayb, alleged leader of the government-aligned *Janjaweed* militia.[1478] This action created the situation in which the ICC Prosecutor changed his policy from informal alliance into full confrontation.[1479] As a result, the Prosecutor made known his intention to go after those who support the ministerial position given to Harun.[1480] At a point when it seemed *Al Bashir*, made numerous promises not to hand over his nationals to foreign courts, [1481] the relationship Sudan and the ICC took a new dimension which reflected a battle between the Prosecutor Court and the President of Sudan. As a consequence, charges levied against the Sudanese President were interpreted by Sudanese officials as the ICC's revenge for the Presidents' refusal to hand over Harun and Kushayb to the Court. The Prosecutor further confided in a top government official that if Sudan had initially handed over the two principal suspects to the ICC, it would not have had the problem with the President.[1482] In his statement to the Security Council, the Prosecutor also accused Harun of committing atrocities in Abyei by stating impunity was not new to the people given that a member of the NCP-SPLM Committee, [Harun] was sent to Abyei to manage the conflict and the community was destryed, the result of which, 50,000 citizens were displaced.[1483] He further advanced arguments to justify the need for the Security Council to send warnings to the Sudanese government when he referred to the government as an example of 'evil in contemporary western political thinking', and further stated:

1478 See The Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) ICC-02/05-01/07

1479 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, Pre-Trial Chamber I, (2009), at para. 229. The Sudanese Embassy in The Hague literally refused to open the door to accept the warrants. No more ICC delegations were welcome in Sudan.

1480 Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UN Security Council Resolution 1593 (2005) 10.

1481 Hoge International Herald Tribune 2

1482 Hoge International Herald Tribune 2

1483 Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UN Security Council Resolution 1593 (2008)' 3

> "Sudanese officials protect the criminals and not the victims. Denial of crimes, cover up and attempts to shift responsibility have been another characteristic of the criminal plan in Darfur. We have seen it before. The Nazi regime invoked its national sovereignty to attack its own population, and then crossed borders to attack people in other countries".[1484]

Continuously, the Security Council was advised by The Prosecutor to clarify the public that the two fugitive indictees and those who shielded them were not eligible to benefit from any leniency, any support from the international community'.[1485] In his conclusion, the Prosecutor warned the Security Council not to remain silent or inactive as it could portray the image of complicity in the commission of such crimes. He specifically stated, 'Silence has never helped or protected victims. It only helps the criminals.'[1486]

From the discussion above, one can conclude that despite the Prosecutor's earlier accusations against three rebel leaders, he presented an overall picture of Darfuri rebel movements' friends to both the ICC and the international community. As evident in the Prosecutor's report to the Security Council, the Sudanese government expressed unwillingness to cooperate with the Court while the rebel leaders expressed the willingness to do so.[1487] Also, at a point when the decision to issue arrest warrant against *Al Bashir* was a priority, the Prosecutor urged the judges to sideline important process in favour of summonses for rebel leaders to appear before the Court.[1488] Despite such selective advantages aimed at encouraging the government to cooperate with the Court, *Al Bashir* and his allies refused to change their position towards the Court.

1484 See Kurczy 2010 *CSM*. The Prosecutor referred to the Sudanese elections in 2010, in which Al-Bashir ran for President, as a 'Hitler election'.

1485 See Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UN Security Council Resolution 1593 (2008) 3

1486 See Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UN Security Council Resolution 1593 (2008) 9

1487 See 'Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)', (2009): para 22 contrast para 23. According to para. 22 of the Prosecution's report, the government of Sudan refused to cooperate with the Court and the Prosecutor, in contradiction with UN Security Council Resolution 1593 and Presidential Statement while paragraph 23 provides that other parties to the conflict offered a degree of voluntary cooperation.

1488 See Request for Expedited Decision on the Prosecution's Application Pursuant to Article 58, ICC-02/05- 207, OTP, (2009)

Likewise, the Darfur rebels were highly appreciated by the Prosecutor for cooperating with the ICC when two suspects from rebel movements voluntarily took themselves to the Court in response to summonses.[1489] Such actions were in sharp contrast to the position of the Sudanese government which refused to execute three warrants of arrests against government officials, including President *Al Bashir*. The friend-enemy dichotomy became more visible in Sudan when the Court directed the Pre-Trial Chamber in February 2010 to reconsider its decision not to charge *Al Bashir* with genocide,[1490] and later declined to confirm charges against the rebel leader *Abu Garda*.

While the Sudanese President was issued with arrest warrants to appear before the ICC, it remains uncertain as to whether such warrants will be effected giving that countries like South Africa, Nigeria, Malawi and many more have failed to arrest *Al Bashir* in their territories despite numerous calls from the Court for them to do so.[1491] In the judgment of the *North Gauteng High Court* Pretoria, South Africa was blamed for failing to arrest *Al Bashir* while he was attending the AU Summit in Johannesburg.[1492] Therefore, it can be concluded that the Court is not endowed with the necessary enforcement capabilities to deal with perpetrators of crimes under its statute.[1493] In the case of Uganda, the Court identified the LRA as enemies of the human family but failed to deliver justice as promised due to the inherent institutional weakness of enforcement. The Sudanese situation presents no exception given that the alleged perpetrators of the crimes committed in Darfur have continued to roam the streets of Africa despite arrest warrants issued against them by the Court.

1489 Tenth Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UN Security Council 1593 (2005)

1490 Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09-73. (2010)

1491 See Bateman and White 2017 http://ewn.co.za/2017/07/06/icc-sa-violated-icc-agreement-when-it-failed-to-arrest-al-bashir Accessed 07/07/2017

1492 See Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development *and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (2015)

1493 See Barnes 2011 *FILJ*

5.5 SYNOPSIS OF THE SITUATION IN KENYA

Kenya has witnessed its worst humanitarian crisis since independence following the 2007/8 presidential elections involving incumbent Mwai Kibaki against his opponent Raila Odinga. The result was highly contested by the opposition on the basis that the entire electoral process was dominated by political manipulations and fraud engineered by the government, including the cabinet, as they had access to the entire electoral process. Consequently, the opposition mounted protest that devolved into widespread violence and resulted in the deaths of many people as well as the destruction of life stocks and valuable properties.[1494]

The causes of the crisis in Kenya can be discussed from three different perspectives.[1495] While a huge number of Kenyans held the view that the violence was a spontaneous reaction to the election results, the UN Office of the High Commissioner for Human Rights (OHCHR) established a Commission of Inquiry to identify the perpetrators of the crimes committed during the crisis.[1496] In observing the overall situation, the spokesperson for the OHCHR mission noted that the violence emanated from long-standing frustrations triggered by the poor living conditions and historical disenfranchisement of the voiceless majority, and was fuelled by the fury of the opposition as they held the general view that the election results were stolen.[1497] The Commission of Inquiry reported that the pattern of violence applied by the perpetrators varied from one area to the other, greatly depending on area-specific dynamics.[1498]

In the first pattern, many on-lookers concluded the crisis was spontaneous, resulting in the burning and looting of shops, houses and commercial outlets in the slums of Nairobi and Kisumu by youth groups.[1499] In the second pattern of violence observed around the Rift Valley, communities were targeted, including small farmers and landholders who were considered to be government supporters, with the primary intention of driving

---

1494 Endoh and Mbao 2016 *ASR*
1495 See Murithi 2008 *AR*
1496 See Report of the United Nations High Commissioner for Human Rights, General Assembly official records, sixty-third session, supplement no. 36, (2008)
1497 Mutiso *et al*. 2010 *JETERPS*
1498 See Report of the United Nations High Commissioner for Human Rights, General Assembly official records, sixty-third session, supplement no. 36, (2008)
1499 See Adudans *et al,* 2011 *AJRH*

them out from the region.[1500] The OHCHR mission put together relevant evidence to the effect that "the violence was partly organised by local politicians and/or traditional leaders who sought to settle long-held grievances over land issues, as well as other real and perceived discrimination".[1501] In a third pattern, "violent reprisals against communities of mainly migrant workers perceived to be opposition supporters were reportedly carried out by government supporters, including militia, in the areas of Nakuru, Naivasha and Central Province and in the slums of Nairobi (Kibera and Mathare)".[1502] An estimated 1 200 people (men, women and children) are said to have died as a result of the conflict. A considerable number of internally displaced persons lived in camps, while equal numbers sought refuge with relatives or friends.[1503]

5.5.1 The politics of the referral

The situation in Kenya became the first case to be tried before the ICC using *proprio motu* authority. The ICC Prosecutor initiated investigations against alleged perpetrators of heinous offences committed during the 2007/08 post-election violence in Kenya without having received a referral from either the UN Security Council or the state itself.[1504] Before the Prosecutor's involvement, the Kenya government deployed a facts finding mission also referred to as the Waki Commission, to investigate the Post-Election Violence (CIPEV).[1505] According to the Commission's recommendation, the government was expected to create a special tribunal with a mixed composition of national and international judges to investigate and prosecute the perpetrators of the post-election violence. The Commission also recommended that the failure to establish the proposed tribunal automatically gave room for the ICC to step in and utilize the information collected by the Commission.[1506] The Kenyan parliament voted against such a Tribunal in 2009 with no further actions to ensure accountability. As a consequence,

---

1500 Adudans *et al,* 2011 *AJRH*
1501 Endoh and Mbao 2016 *ASR*
1502 Endoh and Mbao 2016 *ASR*
1503 Endoh and Mbao 2016 *ASR*
1504 See Mueller 2014 *JEAS*
1505 See Waki and Philip, Report of the Commission of Inquiry into Post Election Violence in Kenya (CIPEV). https://searchworks.stanford.edu/view/7911942 Accessed 29/06/2017
1506 Waki and Philip, Report of the Commission of Inquiry into Post Election Violence in Kenya (CIPEV). https://searchworks.stanford.edu/view/7911942 Accessed 29/06/2017

the ICC prosecutor was given the necessary documentation and information as gathered by the Waki Commission in 2009 for further action.[1507]

On his part, the Prosecutor examined the documents at his disposal and called for the ICC's attention to open investigations into crimes against humanity that allegedly materialized after the 2007/08 post-election violence.[1508] The Prosecutor's request was granted by the Pre-Trial Chamber of the ICC in March 2010 and nine months later, the Prosecutor summoned six individuals to appear before the ICC.[1509] The Pre-Trial Chamber in 2012 dismissed charges against two of the six suspects (Henry Kiprono Kosgey and Mohammad Hussein Ali) summoned to appear before the ICC on the basis of insufficient evidence. The Chamber found that the Prosecutor's evidence "failed to satisfy the evidentiary threshold" required by the Rome Statute to hold them accountable for the commission of the alleged offences.[1510] The Chamber observed that the Prosecutor's investigation against one of the two suspect Kosgey, had solely relied on a single "anonymous and insufficiently corroborated witness."[1511]

Furthermore, the Pre-Trial Chamber II observed that evidence brought against Mohammed Hussein Ali, the second suspect, was not sufficient enough to be linked to attacks in the areas where Orange Democratic Movement (ODM) supporters resided. Therefore, the failure to produce sufficient evidence of some police involvement led the Chamber to decline to confirm the charges.[1512] Additionally, charges against Muthuara and Uhuru Kenyatta were withdrawn in 2013 and 2014 respectively for want of evidence and witness testimony and both cases eventually came to a close.[1513]

Kenyan government officials argued that the case against Kenyatta was assisted by mere allegations and rushed [to the ICC] without proper investigation which the

---

1507 See Asaala *Prosecuting Crimes,* Van der Merwe Gerhard Kemp (eds), 27

1508 Asaala *Prosecuting Crimes,* Van der Merwe Gerhard Kemp (eds) 27.

1509 Asaala *Prosecuting Crimes,* Van der Merwe Gerhard Kemp (eds) 27

1510 See The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed *Hussein Ali*, ICC-01/09-02/11.See also, Open Society Foundations 2015 *IJM*

1511 Open Society Foundations 2015 *IJM*

1512 Open Society Foundations 2015 *IJM*

1513 Uhuru Kenyatta became President in 2013 and Ruto became Vice President. This was followed by the withdrawal of charges against Muthuara and Uhuru Kenyatta for want of evidence and witness testimonies. See BBC News, 2015 http%253A%252F%252Fwww.bbc.com%252Fnews%252Fworld-africa-30347019. Accessed 03/06/2017

Prosecutor chose to particularly deal with in a biased manner that satisfied particular interests and undermined justice[1514] Given that the Court is a newly instituted judicial institution, it was time for it to gain fame and protect its image by proving its case against the Kenyan President. Unfortunately, the reverse was true and the Court was proved wrong. Ultimately, "[m]any observers saw the case against President Kenyatta as the biggest test in the Court's history." The Court failed this test.[1515]

The Court's failed attempt to convict most of the suspects in Kenya proved its political rather than legal decision-making in terms of summons, indictment, investigation and prosecution. The Court's efficacy is often judged by its ability to successfully gather evidence, apprehend and prosecute suspects as the case may be.[1516] In the Kenyan situation, the Court was unable to follow through with President Kenyatta's trial due to lack of cooperation from Kenya which resulted in insufficient evidence to establish Kenyatta's guilt. This failed attempt to enforce justice raised doubts in the minds of independent observers and consequently the Court lost many supporters in the process.[1517] One may ponder the question as to why the Kenyan situation proved so difficult and unsuccessful before the Court. Two reasons can be advanced to justify the Prosecutor's action that resulted in an unsuccessful prosecution.

In the first case, the Prosecutor wanted to exercise his *proprio motu* authority stated under Article 13(c) of the Rome Statute to prove that the ICC had jurisdiction over the crimes committed in Kenya. In doing so, he referred to available evidence at his disposal and argued that the alleged crimes fitted the definition of murder, rape, deportation and other inhuman acts that amounted to crimes against humanity as defined by Article 5 of the Rome Statute.[1518] The Prosecutor also noted that the alleged crimes occurred in the territory of Kenya after it domesticated the Rome Statute on 1

1514 BBC News, 2015 http%253A%252F%252Fwww.bbc.com%252Fnews%252Fworld-africa-30347019. Accessed 03/06/2017

1515 BBC News, 2015 http%253A%252F%252Fwww.bbc.com%252Fnews%252Fworld-africa-30347019. Accessed 03/06/2017

1516 Nouwen and Werner 2011 *EJIL*

1517 Nouwen and Werner 2011 *EJIL*

1518 Nouwen and Werner 2011 *EJIL*

June 2005. Consequently, the conditions under Article 11 and 12 of the Statute were satisfied.[1519]

Secondly, the Prosecutor argued that the situations were admissible before the ICC given that Kenya as a state for the purposes of the Rome Statute was both unwilling and unable to prosecute the alleged crimes as required by Article 17(1)(a-c) of the Statute.[1520] He emphasised the absence of any previous investigation, noting that no such activity was likely to be undertaken by the Kenyan authorities in the near future. His claim was qualified by the fact that the Kenyan Parliament defeated a motion calling for the establishment of a special tribunal "to investigate the violence and also refused to refer the matter to the ICC".[1521] Furthermore, he argued that the alleged crimes met the gravity threshold outlined in Article 17(1)(d) of the Statute. It was therefore obvious that Kenya was unwilling to prosecute which is why the ICC conceived the notion that William Ruto and Joshua Sang were involved in the 2007/08 post-election violence in Kenya and consequently called for Pre-Trial Chamber II to issue summonses for the two suspects to appear before the Court.[1522]

In order for the ICC to proceed with investigations and subsequent trial of the two suspects listed above, it had to fulfil the requirements of complementarity on the established grounds that the Kenyan government was unwilling to prosecute the suspects.[1523] On their part, the Kenyan government countered the ICC's judicial intervention by challenging the admissibility of the cases before the Court.[1524] The government argued that the adoption of a new Constitution provided the opportunity for an investigation to be conducted by the Kenyan government against the alleged suspects which is why the government argued that the cases were not admissible before the ICC. Despite the government's plea to restrain the ICC from getting involved

---

1519 Nouwen and Werner 2011 *EJIL*

1520 Asaala *Prosecuting Crimes,* Van der Merwe Gerhard Kemp (eds) 27

1521 Justin 2015 http%3A%2F%2Fhrbrief.org%2F2010%2F02%2Ficc-prosecutorrequests-investigation-into-kenyan-post-election-violence%2F. Accessed 3/06/2016

1522 Justin 2015 http%3A%2F%2Fhrbrief.org%2F2010%2F02%2Ficc-prosecutorrequests-investigation-into-kenyan-post-election-violence%2F. Accessed 3/06/2016

1523 Bosco The Washington Post 9

1524 See "Jurisdiction and Admissibility" 2014 http%3A%2F%2Fwww.icccpi.int%2Fen_menus%2Ficc%2Fabout%2520the%2520court%2Ficc%2520at%20%2520a%2520glance%2F%20Pages%2Fjurisdiction%2520and%2520ad missibility.aspx. Accessed 03/06/2017.

in the Kenyan situation, Pre-Trial Chamber II rejected the said challenges in May 2011 and went on with ICC proceedings against Kosgey and Ali.[1525]

Unlike the situation in Uganda, the Kenyan government was adamant about the ICC's intervention in the country's political conflicts that resulted in perpetual violence and disruption.[1526] For political reasons, the government requested the Security Council in accordance with Article 16 of the Rome Statute, to defer investigations into alleged crimes committed in Kenya. The government noted that the Court's intervention did not only jeopardize the principle of complementarity but also distorted the peaceful and diplomatic settlement of the conflict.[1527] The government went as far as to "launch a political campaign against the Court in order to have the cases against its leaders deferred".[1528] After a long and failed struggle to limit the arm of the ICC, Kenyan law makers threatened to withdraw from the Rome Statute.[1529] They accused the Court of acting "imperialistically" and specifically "targeting African states and their leaders".[1530]

It is argued that the Prosecutor's authority to initiate investigations *proprio motu* risks "politicizing the Court and thereby undermining its credibility". Providing the Prosecutor with such enormous authority to trigger the jurisdiction of the Court may result in abuse.[1531] While the Prosecutor might generally enjoy autonomy in terms of prosecution inside the courtroom, that may not be the case when faced with difficult situations that call for desperate measures outside the courtroom.

Accusations continued that the OTP took inappropriate, politically based decisions with regards to the situation in Kenya. While investigations were under way, a man who was killed was reportedly under the ICC's protection though his name never appeared in the Court's list of witnesses.[1532] According to the OTP, the deceased left the Court's protection programme long before his death. However, the Court sympathized with the deceased's family and stated that it "is profoundly concerned by this grave reported

---

1525 Nouwen and Werner 2011 *EJIL*
1526 See Materu The Post-Election Violence in Kenya 231
1527 De Vos et al, Contested Justice 209
1528 Katja 2015 *FBP*
1529 See "Cases and Situations: Kenya. 2015 http%3A%2F%2Fwww.iccnow.org%2F%3Fmod%3Dkenya. Accessed 04/06/2017
1530 Katja 2015 *FBP*
1531 Benjamin International Justice Tribune 5
1532 Benjamin International Justice Tribune 5

incident.[1533] It stands ready to provide the local authorities with any assistance, if required, in their investigations. Ensuring the safety and security of witnesses is a cornerstone of fair trials".[1534] The Court denied any allegations in connection with the death of the deceased. However, many Kenyans remained adamant that such cases were prompted by the Court's political intervention in the situation in Kenya which became catastrophic for ordinary Kenyans. The International Justice Monitor reported that "Yebei's death generated political heat in Kenya. Some leaders of the Jubilee Coalition of President Uhuru Kenyatta and Ruto maintained that the OTP was involved in Yebei's death".[1535] The OTP did not hesitate to respond by stating;

> "The Office of the Prosecutor wishes to categorically state that any suggestion that the Office of the Prosecutor was involved in Mr. Yebei's alleged abduction and murder is both outrageous and utterly false. Nothing could be further from the truth….."[1536]

The OTP argued that it was out of place to imagine, let alone assume, that an essential organ of the ICC that works towards ending impunity and bringing justice to victims could go so far as to kill people who should be protected by the Court. Such controversial debates between the OTP and Kenyan civil society were a consequence of the Court's untimely intervention in Kenya.[1537] Numerous calls from the government of Kenya requesting the ICC to defer proceedings in accordance with Article 16 of the Rome Statute were ignored in favour of justice which became more problematic for the people of Kenya. The Court was therefore perceived by many as an enemy of peace while Kenyan leaders were hailed for managing a peace-loving government.[1538] Except for the Kenyan civil society, international observers also criticized the ICC's untimely intervention in Kenya. An International Federation for Human Rights' (FIDH) representative to the African Union highlighted the detrimental effects of politics by stating:

> "The politicization and media coverage of these trials will be exhausting for victims who have already suffered serious crimes. In such a hostile context, institutions such as the African Union have the responsibility to show full support and solidarity with them. This

---

1533 Nouwen and Werner 2011 *EJIL*
1534 Tom 2015 *IJM*
1535 Tom 2015 *IJM*
1536 Tom 2015 *IJM*
1537 Nouwen and Werner 2011 *EJIL*
1538 Nouwen and Werner 2011 *EJIL*

> implies a public stand for Kenya's unconditional cooperation with the ICC and for effective national proceedings".[1539]

From the above analysis, it is clear that the Court could not succeed without cooperation from the government of Kenya. In the absence of such necessary cooperation as evident in the Kenyan situation, the case eventually became a situation of Kenya versus the ICC.[1540] As a result, ICC supporters by default became enemies of the Kenyan government while the reverse was true for government supporters. Instead of bringing solutions to the crisis in Kenya, the Court conflicted with the country's national authorities and further risked the lives of many Kenyans in the search for evidence and witness testimonies. Consequently, the Court failed in its first attempt to invoke the prosecutor's *proprio motu* authority under Article 13(c) of the Rome Statute.[1541]

5.6 THE CHALLENGE OF SECURITY COUNCIL DEFERRALS: JUSTICE V PEACE

Besides the political challenges opposing justice as evident in each of the cases discussed above, Article 16 deferrals under the Rome Statute present a greater challenge to African states with regards to the ICC's intervention in Africa. Article 16 authorises the Security Council to adopt a resolution to defer ICC investigations or prosecutions for a period of one year in circumstances where justice conflicts with peaceful negotiation to end conflicts.[1542] Even though the Article was highly debated during negotiations that led to the adoption of the Rome Statute, it was perceived that the provision will encourage diplomatic settlements of disputes in situations where the law conflicts with politics. Hence, African states relied on Article 16 deferrals to provide political solutions to conflicts emanating from Africa.[1543] However, the Security Council rather became an obstacle to Africa's quest for peace as it failed to defer ICC investigations and prosecutions of conflict situations in Africa. The Security Council

---

1539 Beginning of ICC Trial Against Ruto and Sang Is a Historical Opportunity for Victims and for the Kenyan Society to Face the Truth and Find Justice." 2015 https%3A%2F%2Fwww.fidh.org%2FInternational-Federation-for-Hum%20an-ights%2FAfrica%2Fkenya%2Fkenya-%20icc%2Fbeginning-of-icc-trial-against-ruto-and-sang-is-a-histor%20icalopportunity-13921. Accessed 04/06/2017

1540 Nouwen and Werner 2011 *EJIL*

1541 Nouwen and Werner 2011 *EJIL*

1542 Rome Statute of the International Criminal Court. Article 16

1543 See Okoh Africa, *the United Nations Security Council* Werle G *et al*. (eds.) 198

refused to defer the Sudanese situation against President *Omar Al Bashir* despite numerous calls for the Court to allow for a diplomatic settlement to the conflict in Darfur.[1544]

The AU otherwise called on called on African Countries to decline from cooperating with the ICC towards arresting and handing over *Al Bashir*. Article 98 of the Statute dealing with cooperative efforts regarding waiver of immunity and consent to surrender was cited by the Union as the legal basis for its decision.[1545] Consequently, African States, including states parties to the Rome Statute, have reluctantly allowed *Al Bashir* to enter and exit their countries despite the ICC's warrants of arrest against him. This pattern of behaviour portrayed by African states is the consequence of the AU's proposal for amendment of Article 16 deferrals under the Rome Statute such that when the Council declines to consider a proposal of a state with regards to deferral, the matter can be decided upon by the General Assembly of the UN.[1546] Apart from the arrest warrant issued against *Al Bashir*, the AU showed deep concern for the warrant of arrest issued against the late *Muammar Gaddafi* of Libya stating that the warrant undermined the President's effort towards providing a peaceful solution in a political and diplomatic process to satisfy Libyan citizens. The request was never considered and subsequently, the Gaddafi regime was overthrown which at the end created more problems than solutions for Libyans.[1547]

On October 12, 2013, Kenya launched a campaign to encourage the deferred of cases against President *Uhuru Kenyatta* and his deputy, *William Ruto* accused of perpetrating criminal offences during the 2007/8 post-election violence that occurred in Kenya.[1548] Once again the Council declined to adopt a resolution in accordance with Article 16 of the Rome Statute. The AU contested the Council's decision on the grounds that the

---

1544 Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the nternational Criminal Court (ICC), Assembly/AU/Doc.245(XIII), Sirte, (2009)

1545 See Okoh Africa, *the United Nations Security Council* Werle G *et al*. (eds.) 198

1546 See Okoh Africa, *the United Nations Security Council* Werle G *et al*. (eds.) 198

1547 See Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the nternational Criminal Court (ICC), Assembly/AU/Doc.245(XIII), Sirte, (2009). para. 6

1548 Africa Union Assembly, Discussion on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. (2013)

territorial integrity and stability of the country was compromised by the continuous prosecution of the President and his Deputy, undermining the country's ability to champion the struggle to end terrorism in East Africa.[1549] The failure to adhere to Kenya's request for a draft resolution coupled with past denials by the Council to invoke Article 16 provoked immediate criticisms from the African representatives.[1550] The Kenyan representative expressed total dissatisfaction and stated that the Security Council could not be trusted as a forum for solving complex political issues within the international community.[1551]

The fury of the African and Kenyan representatives was followed by a communiqué from the Foreign Affairs Ministry, accusing certain members of the Security Council with veto powers of not appreciating issues concerning peace and security in Kenya. The Ministry emphasised the Security Council's reluctant approach towards the AU's Resolution, granting immunity from prosecution to sitting Heads of States and government officials.[1552]

The sequence of events discussed above provides the background against which the AU expressed dissatisfaction with regarding the Council's approach on the question of deferrals. While the AU expressed discontent about the arrest warrants against the Sudanese and Libyan Presidents on grounds that the peaceful and political solutions initiated by both Presidents were impeded, it lamented that the failure to defer the Kenyan situation undermined the country's authority to enforce its constitutional mandate and to deal with serious peace and security issues emanating from the region. These actions contrast the AU's decision as it reaffirmed during its 21st ordinary session that the quest for justice does not under estimate genuine efforts initiated for the promoting of lasting peace.[1553]

1549 Africa Union Assembly, Discussion on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. (2013)

1550 See UN Security Council 7060th Meeting, S/PV. 7060 "Peace and Security in Africa" (2013)

1551 UN Security Council 7060th Meeting, S/PV. 7060 "Peace and Security in Africa" (2013)

1552 See Kenyan Ministry of Foreign Affairs, 2013 http://whereiskenya.com/full-statement-ministry-foreign-affairs-kenya-negative-un-security-council-vote/ Accessed 19/July 2017

1553 Africa Union Assembly, Decision on International Jurisdiction, Justice and the International Criminal Court, Doc. Assembly/AU/13 (XXI) (2013). para. 4

Even though the AU continuously argues that peace is the basis for its calls for deferrals, an issue that greatly annoyed the Union is the continuous prosecution of African leaders before the ICC, which perhaps to a greater extent informed the Union's motive for the request for deferrals.[1554] This motive could be anchored on the decision of its extraordinary session of October 2013 when the Union reiterated its "concern on the politicization and misuse of indictments against AU leaders."[1555] All these arguments form an informative background against which the AU lamented the failure of the UN Security Council to use Article 16 for purposes of justice rather than politics.

5.7 ICC AND THE DYNAMICS OF POLITICS AND JUSTICE IN AFRICA

Apart from the failure to defer cases emanating from Africa by the Security Council, critics have argued that the Council's attitude to hastily refer cases from Africa to the ICC for prosecution is even more problematic. While the Council anchored its decision to refer the Sudanese situation to the ICC on massive atrocities committed in Darfur, it also alleged that the referral of the Libyan situation was based on the inability to prosecute.[1556] Correctly put, the Country's judicial structures collapsed to the point of it being unable to prosecute alleged suspects of massive crimes committed in Libya.[1557] However, African leaders expressed discontent for the mere fact that such referrals were instigated by the Security Council. While the Council acted in excessive haste to have leaders of both countries indicted, efforts to refer the situation in Syria particularly were and still continue to be disappointingly unsuccessful due to the efforts of some of the permanent members of the Security Council with selfish interests.[1558]

So far just two of the five permanent members of the Security Council-the United Kingdom (UK) and France-are signatories to the Rome Statute and hence members of the ICC.[1559] The other three permanent members are not signatories and this is the basis upon which the Court is being accused of double standards. It is indeed a call for concern to grant referral authority to states that are not parties to the Rome Statute.

1554 Tladi 2009 *SAYBIL*

1555 Africa Union Assembly, Decision on International Jurisdiction, Justice and the International Criminal Court, Doc. Assembly/AU/13 (XXI) (2013). para. 4

1556 Kuwonu *Africa Renewal* 29

1557 Kenny 2017 *UJIEL*

1558 Kuwonu *Africa Renewal* 29

1559 Kuwonu *Africa Renewal* 29

Perhaps it is the main reason for which aggrieved parties have been calling for reforms.[1560]

In 2013, Kenya made a genuine request for sitting heads of states not to be indicted while South Africa later pressed for their immunity against prosecution to be respected.[1561] After failed attempts to arrest the Sudanese President, the government of South Africa indicated that the main problem with the ICC is its desire to arrest sitting heads of states, a duty that conflicts with the international practice of diplomatic immunity. The Council prefers to defer or possibly decline from referring situations concerning UN-peacekeepers from non-party states and press for the indictment and arrest of sitting heads of state from non-party states.[1562] Admittedly, the Council refused outrightly to accede to the request on behalf of *Omar Al-Bashir* of Sudan,[1563] trampled over Kenya's request[1564] and ignored Uganda's LRA's demands.[1565] All these raised the question; under what circumstances does the Security Council act, and for what purpose?[1566]

While the Council is quick to push African leaders to the ICC, such is not the case with western leaders. Numerous calls from the international community for the ICC to indict George Bush and Tony Blair for massive atrocities committed in Iraq and Afghanistan has been met with no reaction.[1567] It seems the ICC is operating on the basis of a victor-victim relationship for which Africans continue to be the victim. Western influence over decisions emanating from the Security Council jeopardises the principle of equality before the law set forth under Article 27 of the Rome Statute. As a matter of legality, it is an offence to be above the law you advocated for. In the *Lockerbie Case*, Judge Robert Jennings comment:

1560 Kuwonu *Africa Renewal* 29

1561 Kuwonu *Africa Renewal* 29

1562 See Security Council Press Release 2002 Security Council requests International Criminal Court not to bring cases against peacekeeping personnel from states not party to Statute http:// www.un.org/News/Press/docs/2002/sc7450.doc.htm Accessed 14 August 2017

1563 See Obura 2015 *SLJ*

1564 UN refuses to defer Kenya hearing 2011 http://news.uk.msn.com/world/articles.aspx?cp-documentid=156942638 Accessed 14 August 2017

1565 Schabas *An introduction* 41

1566 Obura 2015 *SLJ*

1567 Kenny 2017 *UJIEL*

> "The first principle of the applicable law is this: that all discretionary powers of lawful decision making are necessarily derived from the law, and are therefore governed by the law….. it is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law".[1568]

The dynamics surrounding referrals under Article 13(b) and deferrals under Article 16 of the Rome Statute indicate that the Security Council has become more of a liability than an asset to the ICC.[1569] These are some of the most contested issues upon which African heads of states, including the AU continue to call for reforms based on the Councils authority over the ICC.[1570] In October 2016, Burundi and South Africa wrote a formal letter to the UN Secretary-General to communicate their intentions to withdraw from the ICC. After both countries announced their withdrawal, The Gambia followed suit.[1571] However, The Gambia's decision was reversed within a short while by the authority of its interim government and also South Africa's decision to withdrawal from the Court was challenged by the Country's judicial authorities.[1572]

So far, Burundi remains the only African country which is willing to enforce its decision to exit the ICC. Efforts to exit the Court have have been unsuccessful probably due to the fact that the continent lacks an alternative judicial mechanism to ensure accountability for massive crimes committed within Africa.[1573] Opinions are divided among African countries and among citizens of countries advocating for withdrawal.[1574] For example, the AU's call for mass withdrawal was opposed by Nigeria on the argument that subscription to the Court was based on individual decisions and withdrawal should be treated as such.[1575] This argument has been supported by Senegal, Cape Verde and other African countries. While it seems the ICC is targeting Africans, almost all the cases before the Court, including the historic case of Uganda were referred by states themselves.

1568 Judge *ad hoc* Sir Robert Jennings dissenting opinion in *Lockerbie Case (Preliminary* Objections) ICJ (1998)
1569 Kuwonu *Africa Renewal* 29
1570 Kuwonu *Africa Renewal* 29
1571 Kuwonu *Africa Renewal* 29
1572 Kuwonu *Africa Renewal* 29
1573 Obura 2015 *SLJ*
1574 Obura 2015 *SLJ*
1575 Kuwonu *Africa Renewal* 29

It is generally argued that the greatest support towards the adoption of the Rome Statute came from Africa, and still, Africa continue to be actively involved in the day-to-day running of the ICC. Africa has the highest number of states that have accepted the Rome system marked by a total of 34 countries that have acceded to the Rome treaty.[1576] In measurable value, Africa forms 23% of the total number of states parties to the Rome Statute.[1577] Also, most African states have domesticated the Rome Treaty by enforcing implementing legislations, incorporating in whole or in part, aspects of the Rome Treaty into domestic criminal codes. The points listed below further define Africa's role towards the ICC:[1578]

- The Rome Conference was convened by an African *(Kofi Annan)*;
- The process of ratification of the Rome Statute was spear-headed by an African States (Senegal);
- The ICC's current Prosecutor is not just a woman but as well an African with a Gambian Nationality; she was favoured by the African Union, and approved through consensus by states parties;
- 25 % of the bench are made up of African judges;
- An estimated 70% of the Prosecutor's requests for assistance directed to African states have received positive responses;
- A huge block of suspects currently facing charges before the Court were sent by African countries;
- Resolution 1593 of the Security Council concerning the situation in Darfur was approved with support from Benin and Tanzania; and
- Resolution 1970 of the Security Council, concerning the situation of Libya was approved with votes from Gabon, Nigeria and South Africa.

The points listed above speak to the fact that Africans had a positive attitude towards the creation of the ICC. This position however changed when the OTP requested a warrant of arrest against the Sudanese President in July 2008.[1579] Therefore, the first controversy of an ICC bias against African leaders featured after the warrant of arrest was issued against *Omar Al Bashir* followed by the confirmation of charges against top government officials in Kenya. These are some among other instigating factors that raised the question of an ICC bias and subsequently ignited the AU's call for mass

---

1576 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49
1577 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49
1578 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49
1579 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49

withdrawal.[1580] However, such attempts failed, probably due to the absence of an alternative judicial mechanism to ensure accountability for massive crimes committed in Africa. Most African leaders have expressed the desire to remain signatories to the Rome Statute using the argument that an imperfect system is better than no system.[1581] Perhaps that is the reason why Africans complain and yet they continue to be part of the system despite the Court's selective application of justice.

5.8 SYNOPTIC ANALYSES OF THE ICC'S POLITICAL STRUGGLES IN AFRICA

Besides the dynamics of politics and justice affecting the operations of the ICC, the Court's effort towards addressing the situations in Uganda and Sudan was marked with significance. The Court actually initiated judicial proceedings at a time when the need for accountability for heinous offences committed in these regions called for concern from the international community.[1582] However, to date (Octobe, 2017), the Court has not been able to live up to its international obligations in the respective regions for reasons of lack of cooperation from states parties.[1583] Also, the Statute fails to provide for a policing mechanism to oversee its enforcement activities worldwide and consequently, it relies on cooperative friends in most cases to effect and execute its orders.[1584] By implication, the ICC does not have an organ charged with the responsibility to execute and enforce its arrest warrants and related orders like the outsourcing of information for the purposes of evidence and witness testimonies.[1585]

In Uganda, the Court relied on the government's cooperation and assistance to execute the arrest warrants of the LRA leaders and consequently, it established a friendly relationship with the government to lobby its cooperation.[1586] Within a short while, the government proved unreliable, an outcome that greatly changed the dynamics of its relationship with the Court. While the government was unable to assist the ICC on the one hand, the Court itself proved incompetent by failing to arrest and prosecute the

---

1580 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49
1581 Kuwonu *Africa Renewal* 29
1582 See Tiemessen 2014 *IJHR*
1583 Human Rights Watch, 2017 https://www.hrw.org/news/2017/04/10/zambia-support-international- criminal-court Accessed 23/06/2017
1584 Nouwen and Werner 2011 *EJIL*
1585 Nouwen and Werner 2011 *EJIL*
1586 See Lanz The ICC's Intervention in Northern Uganda 19

LRA leaders. These pitfalls created a politically unstable climate in which neither the ICC nor the government of Uganda was able to find a lasting solution to the crisis affecting the northern part of Uganda.[1587] It remains a fact that lack of an effective mechanism of enforcement constitutes a major challenge resulting in the Court failing to prosecute the LRA leaders.

The question of enforcement is still in the spotlight regarding the situation concerning the Sudanese President. While the Court relied on the government of Uganda to arrest the LRA leaders, it otherwise relied on the broader international community, particularly African states, to execute its arrest warrants against the Sudanese President *Omar Al-Bashir*.[1588] Thus far, the arrest warrants remain outstanding as no state has been able to perform this difficult task.[1589] From when the first arrest warrant was issued in 2009, the Sudanese President has successfully entered and exited more than 20 different countries without being arrested.[1590] The question here is not whether the host states lack the necessary capacity to arrest *Omar Al-Bashir* but whether they possess the political will to execute an arrest warrant that is capable of bringing their international relations into total disrepute. While attending the African Union Summit in Johannesburg, South Africa, in June 2015, the ICC called for South Africa's cooperation to arrest and hand over *Al-Bashir* to the relevant authorities for prosecution.[1591] While the government of South Africa tactfully refused to adhere to this call, it announced

---

1587 See Parrott 2006 AJPS.; See also Nzwili F, 2004 http://www.cwnews.com/news/viewstory.cfm?recnum=29396 Accessed 23/06/2017.

1588 See Minister of Justice and Constitutional Development and Others v. The Southern Africa *Litigation Centre* (27740/2015) [2015] ZAGPPHC 675 (2015). See also, Derbal 2008 *CCHR*.

1589 See The Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, ICC-02/05-01/09, 2017. Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute.

1590 See Southern Africa Litigation Centre v Minister of Justice And Constitutional Development *and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) 2015. See also, Totten and Tyler 2008 *JCLC*

1591 See Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development *and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) 2015. In *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 2009, the ICC issued its first warrant of arrest against Al Bashir for his role in the Darfur genocide, accusing him of overseeing murder, extermination, forcible transfer, rape, and torture, as well as directing pillaging and other attacks against civilians. The warrant has not stopped the dictator-one of the longest serving in the world from traveling 74 times to 21 countries since then, seemingly without fear of prosecution.

that the request was inconsistent with the international practice of diplomatic immunity which is highly appreciated by the AU and its member states. South Africa was therefore summoned to appear before the ICC in accordance with the provisions of Article 87(7) of the Rome Statute for failing to leave up to its contractual obligations arising from the Statute.

On July 6, 2017, the ICC delivered judgment against South Africa stating that it failed to live up to its obligation under international law by failing to perform its role as a state party to the Rome Statute.[1592] Even though the Court debated whether to refer South Africa to the ASP, South Africa incurred no liability for this omission for obvious reasons. If other states parties, including the Federal Republic of Nigeria[1593] could defy the Court's order by not arresting Al-Bashir, why should South Africa's case be so special?[1594] It remains to be seen whether Al-Bashir will be arrested in the near future by any other state which is a party to the Rome Statute. Till then, previous actions have revealed that the absence of an organ responsible for enforcement continue to pose a major challenge to the Court.

There is no doubt that the Sudanese case presents a similar picture to that observed in Uganda as the challenge of lack of an effective mechanism of enforcement by the Court remains outstanding. A task best reserved for a competent organ of the ICC has been shifted to external actors due to the absence of a defined policing mechanism to execute such functions.[1595] As a consequence, the Sudanese President continues to be a free man despite international arrest warrants issued against him. The question is, if the ICC cannot enforce its arrest warrants to prosecute perpetrators and ensure accountability, who then can perform this task for the Court? The Court continues to be a victim of challenges related to enforcement as evident in cases brought before it.

1592 See Bateman B and White R, http://ewn.co.za/2017/07/06/icc-sa-violated-icc-agreement-when-it-failed-to-arrest-al-bashir Accessed 07/07/2017

1593 The Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, Decision of 2017. The Sudanese President attended the opening session of the African Union Summit held in Abuja, Nigeria in July 2013 and he was not arrested.

1594 See Phillip de Wet, *Mail and Guardian,* (07 July 2017) 7.

1595 See Jamshidi M, 2013 http://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html Accessed 23/06/2017. It goes without being said that Sudan's lack of cooperation is one among many compliance challenges facing the ICC's work in Darfur.

While the Ugandan and Sudanese cases posed enforcement challenges, the situation in Kenya was more about lack of cooperation for purposes of evidence gathering and witness testimonies. The Prosecutor opened investigations and issued summonses against top government officials without properly analyzing the dynamics of the crisis.[1596] Within a short while, the Court turned around to request the government's cooperation in terms of providing evidence and witness testimonies to substantiate its allegation. In other words, the Court called for Kenyan government officials to provide incriminating evidences against themselves. How difficult it was if not impossible to achieve such a demand! The government therefore withdrew its cooperation completely with the result that the Court ran out of options.[1597] Admittedly, the Court failed to enforce any of its decisions due to lack of cooperation from the government of Kenya.

A critical review of the results obtained in all three countries as discussed above reveals that the independence of the Court is not guaranteed. The Court is always reliant upon states either for cooperation in terms of enforcement or for the purposes of availing witnesses or evidence gathering to substantiate the cases before it.[1598] Such was and still continues to be the case due to changing dynamics and political uncertainties.[1599] It is for these reasons that the call for the establishment of a special mechanism of enforcement operating as an arm of the Court continues to be of paramount importance. There is no doubt that such a subsidiary arm of the Court will adopt a comprehensive and more uniform approach in dealing with cases before the ICC.[1600]

Besides the setbacks impeding the efficacy of the Court as listed above, two features have been identified through which the ICC is motivated to function in the realm of politics rather than justice. For the first instance, with the exception of the tribunal for the Former Yugoslavia,[1601] the Court's predecessors operated as post-war institutions addressing judicial concerns posed by atrocities committed during the war.[1602] The ICC

1596 See Osgood E, 2013 http://www.jurist.org/dateline/2013/10/jess-kyle-icc-kenya.php Accessed 23/06/2017

1597 Osgood E, 2013 http://www.jurist.org/dateline/2013/10/jess-kyle-icc-kenya.php Accessed 23/06/2017

1598 See Posner and Yoo 2005 *CLR*

1599 Posner and Yoo 2005 *CLR*

1600 Corell 2013 *WUGSR*

1601 See Pierre Justice in a time of war xi.

1602 Corell 2013 *WUGSR*

deviates from this traditional position by way of exercising jurisdiction over on-going armed conflicts. Admittedly, the Court seems to be functioning while the conflict is on-going, the result of which collaborations always determine its friends and enemies.[1603] Whereas the Nuremberg and Tokyo Tribunals dealt with defeated enemies, the ICC can be used as an instrument to defeat the enemies.[1604] This is one among many reasons why the Court almost always ends up in political struggles necessitated by the need to clarify the friend-enemy dichotomy.

In a second instance, the Court's reliance on state cooperation makes it more political as it struggles to protect its interest within the scheme of the friend-enemy dichotomy. Be they rebels, warlords, opposition leaders or state officials, the more the Court's suspects are generally recognized as enemies of humankind, the greater the likelihood that other actors will assist the Court in terms of providing supporting evidence and witnesses, including executing its arrest warrants.[1605] Clearly put, the Court is obliged to identify itself with political friends so as to deal with common enemies.[1606]

Further, the Court's reliance on state cooperation gives room for parties, particularly governments, to limit the risk posed by political trials against state officials as evident in the Ugandan, Sudanese and Kenyan cases.[1607] The Court is designed to prosecute all sides in every given conflict. However, subject to the condition of a stranger in a foreign land,[1608] the OTP relies completely on government cooperation regarding issues ranging from issuing visas for investigators to the execution of arrest warrants. Therefore, the OTP always remains in desperate need for cooperation from governments of the states where the crimes have been or are being committed. In this case, prosecuting government officials will usually not be beneficial to such relations.[1609]

1603 Corell 2013 *WUGSR*
1604 Katja 2015 *FBP*
1605 Nouwen and Werner 2011 *EJIL*
1606 Nouwen and Werner 2011 *EJIL*
1607 See Kirsten 2011 *CRIA*
1608 Katja 2015 *FBP*
1609 Nouwen and Werner 2011 *EJIL*

5.9 RE-OCCURRENCE OF SELECTIVE PROSECUTIONS UNDER ARTICLE 13 OF THE ROME STATUTE

An exhaustive examination of the entire chapter points to the trigger mechanisms of Article 13 of the Rome Statute. The provision introduced trigger mechanisms through which different actors have been conferred with the authority to refer cases to the ICC depending on their modes of convenience.[1610] As a consequence, the said actors have taken advantage of such authority to politicise the referral of cases to the ICC.[1611] In Uganda, the so-called self-referral invoked in accordance with Article 13(a) was not aimed at achieving justice but to punish the enemy (the LRA). By so doing, the ICC exercised selective prosecution as witnessed during the Nuremberg and Tokyo trials.[1612]

In Sudan, the case concerning *Omar Al-Bashir* did not actually constitute a threat to international peace and security as stipulated under Article 24 of the UN Charter yet it was referred to the ICC by the Security Council in accordance with Article 13(b).[1613] From a critical point of view the Council acted not in the interest of justice, but to meet the political ambitions of hegemonic states. The Council ignored situations that arguably actually constituted a threat to international peace and security in regions like Syria and focused on Sudan with the intention to get rid of the President.[1614] This targeted move also invoked the exercise of selective prosecutions in the enforcement of international criminal justice. Also, the fact that the Council continues to decline from adopting a resolution to defer investigations and prosecutions of complex situations from Africa reveals its political interest pertaining to ICC prosecutions

In addition to the Ugandan and Sudanese cases brought before the Court, it is generally argued that the Prosecutor acted in excessive haste to refer the situation

---

1610 The construction of Article 13 of the Rome Statute gives room for three actors to refer cases to the ICC. Article 13(a) allows for self-referral, a situation in which the case is referred to the Court by the state in whose territory the crime occurred. Article 13(b) authorize the UN Security Council to refer cases to the Court provided such cases provided such cases threaten the peace and security of the international community and lastly, Article 13(b) allows the prosecutor to initiate investigations *proprio motu* and refer cases to the Court. These are the three categories of referrals under Article 13 of the Rome Statute as discussed above.

1611 Blumenson 2006 *CJTL*

1612 See Happold 2007 *MJIL*

1613 Pease 2016 *IRPPS*

1614 Nouwen and Werner 2011 *EJIL*

concerning the 2007/8 post-election violence in Kenya to the ICC.[1615] After the referral was made, numerous calls came from Kenyan government officials requesting the ICC to defer proceedings in accordance with Article 16 of the Rome Statute.[1616] The government had initiated alternative measures to deal with the crisis at the national level, including the establishment of a commission of inquiry to investigate post-election violence in the region and a road map towards the adoption of a new constitution.[1617] These measures were designed to adopt a proactive and diplomatic approach to reconcile the demands of peace and justice in Kenya. Unfortunately, the Court rebuffed all domestic advances from the Kenyan government. Therefore, the government of Kenya remained adamant against the ICC for choosing to prosecute Kenyan government officials against all odds.[1618]

In line with the dynamics of Article 13 of the Rome Statute, each case as discussed above presents a unique political challenge but in the end, all three cases boil down to one conclusion: 'selective prosecutions'.[1619] From the Nuremberg era, selective prosecution has been a major challenge by which only the defeated enemies were prosecuted after the cold war.[1620] Later on, numerous debates leading to the Rome Diplomatic Conference were designed to set up an improved system of international criminal justice free of any political shenanigans or manipulations.[1621] However, the results of the trigger mechanisms under Article 13 of the Rome Statute for seemingly political ends reveals that selective prosecution in the enforcement of international criminal justice continues to be the rule rather than the exception.[1622]

In this chapter, it is argued that the scope of Article 13 of the Rome Statute serves only the interest of politics and not justice. It is therefore necessary to unify the provisions under Article 13 into a single and more comprehensive jurisprudence with a strategic focus that addresses the concerns of international criminal justice. To achieve best

---

1615 Mueller 2014 *JEA*
1616 Obel 2012 *AJHR*
1617 See Tom 2009 *CJIL*
1618 Tom 2009 *CJIL*
1619 See Yvonne http://www.oneearthfuture.org/siteadmin/images/files/file_43.pdf/. Accessed 26/06/2017.
1620 Margaret 2012 *MJIL*
1621 Janine Natalya Clark 2011 *JICJ*
1622 Nkansah 2014 *AJICJ*

results, the modified version of Article 13 should be applied as a single and uniform referral mechanism addressing all cases brought before the ICC. In that way, the Rome Statute would have moved a step further towards bringing to account all perpetrators of serious crimes under international law, regardless of their nationality or official capacity as stated under Article 27 of the Rome Statute.

5.10 SUMMARY

This part of the study expounded on the political dynamics that unfolded in selected ICC country conflict situations. While highlighting the Court's operations across the world, the chapter laid much emphasis on situations emanating from Africa and identified the reasons why the prosecution failed in each case. Furthermore, the chapter discussed the political challenges encountered by the Court in its quest to deliver justice in three conflict situations. In this regard, the situations in Uganda, Sudan and Kenya were tested and their outcomes pointed to the fact that the ICC has been and still continues to be ineffective due to the selective nature of prosecutions as triggered by Article 13 of the Rome Statute.[1623]

In Uganda, the government invited the ICC to bring down its long standing enemy, the LRA and its entire leadership. While the Court clearly aligned itself with the government of Uganda, it rather aligned itself with the rebels in Sudan in order to arrest the Sudanese President and bring the government to total submission.[1624] Whereas in both Uganda and Sudan, the ICC established alliance with one faction to the conflict to defeat the other, the Court rather became a victim of vehement attacks in Kenya for which it was rejected by both the Kenyan government and civil society.[1625] The Court's failed attempt to deliver justice in Kenya sets a bad precedent with far-reaching implications for the efficacy of Article 13(c) of the Rome Statute. From this reference point, it is unlikely that the Court will succeed in circumstances where the Prosecutor initiates investigations *proprio motu* and subsequently refers the case for prosecution before the Court. The situations in Uganda and Sudan presents no exception given that

---

1623 See SaCouto and Cleary 2008 *AJIL*
1624 See Clark *Law Politics and Pragmatism* Africa, ed. 42–3
1625 Clark *Law Politics and Pragmatism* Africa, ed. 42–3

no government will choose to bow before rebels within its territory nor will any rebel accept to stand trial before a court that promotes a particular government agenda.[1626]

All three cases discussed above present different political challenges that resulted in selective prosecutions in the enforcement of international criminal justice. Therefore, the chapter questions the credibility of the Prosecutor and the Security Council for their selective application of penal sanctions. Two mechanisms have actually politicised prosecutions before the Court and they include the referrals of conflict situations to the ICC by political actors, i.e. States Parties to the Rome Statute and United Nations Security Council, and the prospect and degree of state cooperation with the Court.[1627] Consequently, prosecutions have targeted just one side of conflict situations before the Court which automatically reflects the strategic political interests of the referring actors. The case studies discussed herein differ in the nature of referrals and degree of cooperation, making for an instructive comparison and revealing an identifiable pattern of selective morality. It is obvious that such selective morality in the functioning of the Court emanates from global geo-political realities instead of the quest for international criminal justice.

In conclusion the chapter actually opened a vibrant political debate that answers the questions posed in this research and also justifies the research aims and objectives. In the next chapter, the researcher recaps the entire research and draw conclusions from the main research findings. Also, the chapter proposes alternative judicial improvements that can better enhance the functioning of the ICC in terms of enforcement.

1626 Clark *Law Politics and Pragmatism* Africa, ed. 42–3

1627 See Tiemessen 2014 *IJHR*

CHAPTER SIX
CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

The study investigated the allegations of selective application of criminal sanctions by the ICC. Going by the experiences of the Nuremberg, Tokyo, Yugoslavia and Rwandan Tribunals, including the SCSL, the study argue that the challenge of selectivity has been re-current in the history of international criminal tribunals that predates the ICC. After the creation of the ICC, the allegations of selectivity increased thereby bringing the activities of the Court to the spotlight. The study therefore outlined the problem under investigation (selective application of criminal sanctions by the ICC) and advanced questions to address the problem. The aim of the thesis was to explore the allegations of selectivity by the Court and how such phenomenon affects the trigger mechanisms under Article 13 of the Rome Statute. Objectively, the study sought to examine the nature and implications of Article 13 referrals and evaluate the merits of the criticisms raised against the ICC in the light of such referrals. Qualitative method was used to collect data and analysis was based on triangulation and the interpretative phenomenological approach. Data analysis based on the relevant literature provided the major research findings, conclusions and recommendations as discussed in the summary below.

6.2 RESEARCH SUMMARY

This study pointed out that the question of selective prosecutions was first invoked at Nuremberg and Tokyo when the victors of WW II subjected their captive enemies to justice.[1628] Although the Nuremberg and Tokyo tribunals were hailed for establishing a moral legacy by invoking the principle of individual criminal responsibility in international law,[1629] the said legacy was tainted given the selective application of criminal sanctions before the tribunals.[1630] As mentioned in previous chapters, the Nuremberg tribunals targeted the Axis powers while the Tokyo Tribunal selectively

---

1628 Sunga The Emerging System of International Criminal Law 281
1629 Bassiouni Historical Survey 7
1630 Sunga The Emerging System of International Criminal Law 281

prosecuted Japanese soldiers involved in hostilities in the Far East.[1631] Even more problematic, the Tokyo Tribunal was accused of USA's hypocrisy given that American soldiers were neither prosecuted nor their leaders brought to justice despite the atomic bombs that were dropped on Hiroshima and Nagasaki.[1632] Such selective application of criminal sanctions promoted the exercise of selective morality in the pursuit of international criminal justice.[1633]

This study argues that the selective application of criminal sanctions is still recurrent as evident in the trigger mechanisms under Article 13 of the Rome Statute. The provision was identified as the main problem to be investigated. Article 13 provides three categories through which cases can be referred to the ICC for adjudication. Article 13(a) provides for self-referrals through which a situation is brought before the Court by the state in whose territory the crime was or is being committed. Article 13(b) confers upon the Security Council the authority to refer a situation to the ICC provided it constitutes a threat to international peace and security as stated under Article 39 of the UN Charter. Article 13(c) authorizes the Chief Prosecutor to initiate investigations *proprio motu* and make referrals to the ICC.[1634]

Article 13(a) was invoked to refer the situation concerning the LRA of Uganda to the ICC. The referral was initiated by the government to target and prosecute the leaders of the LRA for serious crimes committed in Northern Uganda.[1635] The ICC actually responded to the government's call by initiating proceedings and issuing arrest warrants against the leaders of the LRA. No similar charges were brought against government officials who might have participated directly or indirectly in the conflict, whose outcome resulted in serious crimes committed in the region.[1636] Such a referral merely

---

1631 Sunga The Emerging System of International Criminal Law 281

1632 Bassiouni Historical Survey 7

1633 Bassiouni Historical Survey 7

1634 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9 (2002) Article 13

1635 ICC Press Release, 2004 <www.icc-cpi.int/pressrelease details&id=16.html> Accessed 25/05/2017

1636 See The Refugee Law Project's paper position on the announcement on the formal investigations of the LRA by the Prosecutor of the ICC and the implications on the search for peaceful solutions to the war in northern Uganda (2004)

reinforces the perception of selective morality in the pursuit of international criminal justice.

Furthermore, Article 13(b) was invoked when the UN Security Council referred the situation concerning Darfur region of Sudan to the ICC and subsequently, two arrest warrants were issued against the Sudanese President.[1637] The real question surrounding the referral was whether the situation in Darfur actually threatened international peace and security within the meaning of the UN Charter? Whether serious crimes were indeed committed in Darfur to warrant ICC involvement?[1638] From the report of the International Commission of Inquiry on Darfur,[1639] serious crimes did occur in Darfur and as well, the situation threatened international peace and security which is why the Security Council referred the matter to the ICC for further determination.[1640] However, this study raises a contentious debate given that the Security Council referred the situation in Sudan and not Afghanistan, Iraq and Syria.[1641] The fact that the ICC pressed on arresting Omar Al Bashir while ignoring similar atrocities committed in Afghanistan, Iraq and Syria became the bone of contention between the AU and the ICC.[1642] The Union alleged that the Court acted in excessive haste and in the process violated Article 16 of the Rome Statute by failing to defer the case against Omar Al Bashir as well as dismissing the country's plight to find stability in the midst of unprecedented challenges.[1643]

Article 13(c) was invoked when the prosecutor initiated investigations *proprio motu* and referred the situation concerning Kenya's 2007/8 post-election violence to the ICC. At a time when the government was making efforts to setup internal structures, including adopting a new constitution to deal with the crisis internally, the Court insisted on prosecuting the president, including senior government officials in Kenya.[1644] Admittedly,

---

1637 See Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, Pre-Trial Chamber I, (2009)

1638 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49

1639 See Report of the International Commission of Inquiry on Darfur to the UN Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004

1640 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49

1641 See Sunga The Emerging System of International Criminal Law 281

1642 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49

1643 African Union Peace and Security Council communiqué, PSC/PR/COMM.(CLXXV) (2009)

1644 Batohi Africa and the International Criminal Court G. Werle et al (eds.) 49

such prosecutions ignored the principle of complementarity articulated under paragraph 10 of the Preamble to the Rome Statute as well as Articles 1 and 17 of the Statute.[1645] Despite numerous calls for Security Council deferrals in accordance with Article 16 of the Rome Statute, the Court insisted on prosecuting Kenyan leaders. Such actions provoked distrust from African states, including the AU against the ICC. Therefore, African leaders advanced the debate that the ICC is biased against Africans, the result of which is that only African officials have been summoned before the Court since it was created.[1646]

The summary above justifies the research problem cited under the trigger mechanisms of Article 13 of the Rome Statute. The aim of the study was to conduct an investigation to determine the extent to which the exercise of selective morality affects and/or influences the trigger mechanisms of Article 13 of the Rome Statute. Also, the study examined the nature and implications of referrals under the Rome Statute with a view to proposing an amendment to Article 13 that would address the challenges posed by such referrals. To achieve best results, the study engaged in a legal debate to assess the historical evolution and progressive development of international criminal justice. In the course of the debate, critical issues that were highly contested before and during the adoption of the Rome Statute were analysed. Such issues were resolved to the benefit of the majority of states parties who conceived of a permanent, impartial and independent international criminal court charged with the responsibility to ensure global accountability.[1647] Therefore, the outcome of the Rome Diplomatic Conference of 1998 was considered the bedrock upon which the ICC came into existence in 2002.[1648]

The operational efficacy of the ICC was explained through a theoretical model based on universal jurisdiction. Grotius' universal jurisdiction theory propounded that certain

---

1645 See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9 (2002). Paragraph 10 of the Preamble of the Rome Statute emphasise that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions. Paragraph 10 is *pari materae* to Articles 1 and 17 of the Statute.

1646 Out of the eight cases from Africa, "four situations were self-referred by States Parties: Uganda, Democratic Republic of the Congo, Central African Republic and Mali, two situations were referred by the UN Security Council: Darfur (Sudan) and Libya and also, two investigations were opened by the Prosecutor *proprio motu*: Kenya and Cote d'Ivoire".

1647 Bassiouni 1999 *CILJ*

1648 Washburn 1999 *PILR*

crimes committed against humanity are too serious to be ignored. These crimes violate the norms of *jus cogens* and as well threaten the sub-stratum upon which the human civilization is formed. Therefore, their occurrence calls for universal prosecution irrespective of the nationality, official capacity or geographic location of the perpetrators.[1649]

The debates advanced in previous chapters argue that the ICC was created to complement the theory of universal jurisdiction by serving as a legal institution that ensures global accountability for serious crimes in international law. It further argues that the international legal personality stipulated under Article 4(1) of the Rome Statute grants the ICC international recognition. The study raises concerns regarding the construction of Article 13 of the Rome Statute by arguing that the Article created the window through which the ICC is influenced to exercise selectivity in the pursuit of international criminal justice. The allegations of selectivity elaborated upon in the previous chapters will be summarised in the major research findings discussed below.

6.3 MAJOR FINDINGS

For purposes of effective analysis, this portion is structured into three sub-sections. The first section will draw from previous analysis to justify arguments in support of the allegations of selective application of criminal sanctions by the ICC. Furthermore, instances in which the Court specifically targeted weaker factions in conflict situations will be highlighted to support the view that the ICC is selective in prosecuting the perpetrators of serious crimes in international law. In sub-section two, arguments borrowed from advocates, practitioners and academics who perceive the Court as an impartial institution committed to discharging its mandate arising from the Rome Statute will be summarized. The essence for summarizing the arguments for and against the allegations of selectivity is to find a balance between competing political and legal claims that criticize, guide, justify and strengthen the functioning of the ICC. In sub-section three, justifications for the UN Security Council's determinations and referral of situations to the ICC for subsequent prosecutions will be analyzed. All three sub-sections will provide contextual analysis for the major research findings of the study.

[1649] Grotius The Authority of The Highest Powers 30-31

6.3.1 Summarizing the allegations of selectivity by the ICC

The allegations of selective prosecutions by the ICC are easily directed to the fact that the Court has yet to bring charges regarding any but African militia leaders or government officials. This gives the picture of a criminal court influenced by the politics of the Security Council[1650] as well as a prosecutor that seems to investigate only suspects who are Africans and perhaps unfriendly to Western powers.[1651] Also, the USA seems to have engaged in aggressive wars-torture, and war crimes in Iraq and Afghanistan with similar atrocities committed by British forces in Iraq yet, none of these cases have gone through and successfully complete the process of preliminary examinations before the ICC.[1652] These arguments emanating from the ICC's primary evaluative audiences-states, NGOs, communities most affected by the ICC's work, academics and more generally, the global community have generated growing concerns about the legitimacy of the ICC regime.[1653] Most especially, leaders of African states who had formed one of the most supportive constituencies of the ICC have begun to object to the ICC's exclusive focus on prosecuting African defendants.[1654] This study explores diverse opinions of authors who have cited a "growing perception" in arguments that "Africans have become the sacrificial lambs in the ICC's struggle for global legitimization". [1655] Questions have emerged as to why the Court is quick to indict and probably issue arrest warrants to leaders of Africa states for serious crimes and at the same time slow in responding to similar atrocities when committed by western leaders, in particular, the prosecutor's refusal to investigate war crimes allegedly committed by British soldiers in Iraq.[1656]

1650 Christiano T, 2015 Christiano_The_Problem_of_Selective_Prosecution_and_the_Legitimacy_of_the_ICC_2.pdf [Access 12 September 2018].

1651 Christiano T, 2015 Christiano_The_Problem_of_Selective_Prosecution_and_the_Legitimacy_of_the_ICC_2.pdf [Access 12 September 2018].

1652 See DeGuzman 2012 *MJIL*

1653 See Julie and De Waal, Case Closed: A Prosecutor Without Borders WORLD AFF. Available at:http://www.worldaffairsjoumal.org/articles/2009-Spring/full-DeWaalFlint.html

1654 Julie and De Waal, Case Closed: A Prosecutor Without Borders WORLD AFF Available at http://www.worldaffairsjoumal.org/articles/2009-Spring/full-DeWaalFlint.html (noting that "Africans were once the most passionate supporters of the ICC" but that

1655 See Jalloh 2009 *ICLR*

1656 Schabas 2008 *JICJ* (questioning the ICC prosecutor's decision not to investigate crimes of

Likewise, African and non-African audiences have questioned the legitimacy of the ICC prosecutor's decision to pursue rebel defendants but not those associated with the governments in power.[1657] Arguably, the role of the prosecutor has come to the fore because the Rome Statute provides that "the prosecutor must determine that there is a reasonable basis to proceed before starting an investigation, a determination over which the judges have power to review".[1658] According to the reasonable basis determination, the prosecutor and sometimes the judges are required to decide whether: "national courts are already investigating or prosecuting in good faith; the situation involves cases that are of sufficient gravity for ICC adjudication and lastly, investigation and prosecution serve the interest of justice".[1659] Going by the construction of Article 53 of the Rome Statute, it is clear that once a situation is under investigation, decisions about which cases, crimes and defendants to prosecute rests almost entirely with the prosecutor.[1660] Unfortunately, the previous prosecutor (Moreno-Ocampo) failed to articulate a coherent understanding of the gravity threshold for admissibility.[1661]

The prosecutor declined to open investigation into alleged British war crimes based on arguments that the gravity threshold was not met given that the number of victims were very low (4-12 of willful killing) and a limited number of victims of inhumane treatment.[1662] The prosecutor noted that the number of victims alleged in Iraq was "of a different order" compared to other situations before the Court, each of which involves thousands of deaths.[1663] However, the prosecutor announced earlier that he was

---

British soldiers in Iraq); Press Release, ICC Watch, Why Won't the ICC Move Against Tony Blair on War Crimes? Available at: http://www.iccwatch.org/pdf/Press%20Release%2004FeblO.pdf (discussing failure of the ICC to investigate alleged war crimes of British leaders and soldiers).

1657 See Happold 2007 *MJIL* (explaining criticism the ICC received for focusing investigations and prosecutions on rebels rather than state actors despite evidence that both parties committed atrocities)

1658 Rome Statute of the International Criminal Court 1998. Art. 15 and 53

1659 Rome Statute of the International Criminal Court 1998. Art. 53

1660 DeGuzman 2012 *MJIL*

1661 DeGuzman 2012 *MJIL*

1662 See Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC, to The Hague. Available at; http://www2.icc-cpi.int/NR/rdonlyres/F596DO8D-D810-43A2-99BB-B899B9C5BCD2/277422/OTPletter to senders reIraq_9 February_2006.pdf.

1663 Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC, to The Hague. Available at; http://www2.icc-cpi.int/NR/rdonlyres/F596DO8D-D810-43A2-99BB-

conducting a preliminary examination of war crimes allegedly committed by North Korean forces that as well involved a relatively low number of victims, approximately 50 people killed.[1664] These glaring examples of selectivity continue to pose the question as to what situation and cases are 'major' enough for ICC investigation within the context of its mandate to ensure global justice. Admittedly, scholarly attention and advocacy have identified selectivity as a threat to the Court's legitimacy.[1665]

With respect to cases emanating from Africa, the ICC has also exercised selectivity in terms of investigations and prosecutions for different reasons. The Nyankunde people of the DRC were reluctant in burying their dead in hopes of an ICC investigation-yet, the Court's investigators were present in Ituri, but not in Nyankunde and therefore, the suspects in Nyankunde were not investigated.[1666] Also, the ICC has not indicted Laurent Nkunda, leader of the rebel group known as the National Congress for the Defense of the People (CNDP) in Eastern Congo.[1667] It is generally observed that when the ICC opens its own investigation other than a UN Security Council referral, it avoids investigating people in power.[1668] In the DRC and Uganda cases, the Court has only acted against rebels and/or opposition leaders, whereas a UN envoy reported that government troops in the DRC might have committed serious crimes in North Kivu in 2010. In similar vein, Ugandan human rights activists have asked the ICC to indict both

---

B899B9C5BCD2/277422/OTPletter to senders reIraq_9 February_2006.pdf.

1664 Press Release, ICC OTP, ICC Prosecutor: Alleged War Crimes in the Territory of the Republic of Korea Under Preliminary Examination, ICC-CPI-20101206-PR608. Available at: http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases %20(2010)/pr608?lan=en-GB. [Accessed 26 March 2018].

1665 Human Rights Watch, The selection of situations and cases for Trial before The International Criminal Court**.** Available at: http://www.hrw.org/en/news/2006/10/26/selection-situations-and-cases-trial-internationalcriminal-court; McDonald and Haveman Prosecutorial discretion-some thoughts on 'objectifying' the exercise of prosecutorial discretion by the Prosecutor of the ICC. Available at: http://www.issafrica.org/anicj/uploads/McDonald-Havemanissues-relevant.pdf. [Accessed 26 March 2018] (noting the need for objective criteria on investigation, admissibility, and prosecution of cases); Danner 2003 *AJIL* (emphasizing the importance of transparency); Lepard 2010 *JMLR* (arguing the ICC prosecutor should use fundamental ethical principles to guide selection decisions).

1666 Gadget 2013 *TWQ*

1667 Gadget 2013 *TWQ*

1668 KimenyiM, 2011 http://www.brookings.edu/opinions/2010/1217_africa_crime_kimenyi.aspx; and 'Kenya: ICC warns Ocampo six over hate speech, Nairobi Star, 8 April 2011, http://allafrica.com/stories/printable/201104080858.html. [Accessed 12 September 2018].

sides of the conflict in Uganda.[1669] As pointed out in Chapter five, the ICC has gone after Joseph Kony and his entourage and not Mouseveni and other government officials. Similarly, the ICC has gone after militia leaders in DRC, but not the government. In all these situations, the Court has not gone after individuals who committed, aided or abetted the commission of crimes against humanity and war crimes of immense gravity. These cases of selectivity have changed the attitude of the AU towards the ICC from enthusiastic supporters to being skeptical.[1670]

Apart from the aspects of selectivity discussed above, the ICC has very few resources for pursuing investigations on its own. The Court relies solely on the cooperation of the states to properly execute its functions. The ICC depends on states to provide financial support, intelligence-gathering, and gathering of information on conflict zones.[1671] Therefore, it is difficult for the Court to function without full cooperation from the states parties. This pattern of reliance is flawed by the fact that states often show support with respect to the specific benefits that accommodates their interest or the interest of their allies. Without evidence of such interest, it becomes difficult for the Court to obtain the relevant support and comply with due process.[1672] Therefore, one major reason for the ICC's selective application of criminal sanctions may be linked to the fact that the Prosecutor sometimes relies on a state to provide the necessary evidence for the trial even though the state in question may have a permanent interest that conflicts with the due processes to be followed by the Court. Another reason for the exercise of selectivity is linked to the fact that the ICC sometimes secure the good will of the major powers by not investigating their nationals or those of their allies and by pursuing only cases the major powers favor.[1673] This pattern of behavior promotes a kind of selectivity

---

1669 BranchA, 2017 http://www.aljazeera.com/indepth/opinion/2012/04/201247943869166.html. [Accessed 12 September 2018].

1670 Schabas 2013 *JICJ*

1671 Christiano T, 2015 Christiano_The_Problem_of_Selective_Prosecution_and_the_Legitimacy_of_the_ICC_2.pdf [Access 12 September 2018].

1672 Christiano T ,2015 Christiano_The_Problem_of_Selective_Prosecution_and_the_Legitimacy_of_the_ICC_2.pdf [Access 12 September 2018].

1673 Bosco's *Rough Justice* in chapters 5-7

in the process of investigation that systematically explains the lack of equality in prosecution.[1674]

The factors listed above provide the means through which the ICC's actions appear to be selective in favor of major powers, their allies and/or stronger factions in conflict situations. In this case, we are not referring to racial selectivity, but the kind of invidious selectivity that undermines the Court's impartiality. The selectivity implies a kind of impunity for the major powers, their allies and/or stronger factions in conflict situations.[1675] This is the kind of selectivity discussed throughout this thesis on the basis equality. This perception of bias by African states whose cooperation or lack of it is crucial to the execution of the arrest warrants became the major reason for which the ICC failed to execute any of its decisions against the President and other members of the Sudanese government.

6.3.2 Justifications for ICC's operations

Although the ICC is criticized to have focused on Africa,[1676] it has conducted preliminary investigations worldwide: "Iraq, Venezuela and Colombia (2006); Afghanistan (2007); Georgia and Sri Lanka (2008); and Gaza, Honduras and South Korea (2010)".[1677] However, these investigations have not resulted in any indictment for various reasons: crimes where insufficient in number, national justice systems were able to deal with the situations, investigations are on-going and/or the ICC cannot legally address some crimes committed in a state not party to the Rome Statute.[1678] With regards to the investigation in Iraq the former Chief Prosecutor Ocampo decided not to further the investigation on grounds that the situation did not meet the required gravity threshold. The Prosecutor stated that the crimes committed in Iraq were not severe enough to

---

1674 The issue of seeking the good will of the USA by the prosecutor of the ICC from 2002 to 2005 has been elaborated upon by Bosco's *Rough Justice* in chapters 5-7

1675 Christiano T ,2015 Christiano_The_Problem_of_Selective_Prosecution_and_the_Legitimacy_of_the_ICC_2.pdf [Access 12 September 2018]

1676 Thakur *Daily Yomiuri*

1677 Gadget 2013 *TWQ*

1678 ICC, Report on Preliminary Examination Activities http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf [Accessed 12 September 2018]

warrant ICC prosecution.[1679] In 2006, the Prosecutor analyzed the clashes in Venezuela that occurred in 2002 between supporters and opponents of Former President Hugo Chavez and resolved to reject the idea of a formal investigation. Also, the ICC pressurized Colombia to make appropriate use of its criminal justice systems.[1680] Concerning the situation in Afghanistan, investigations commenced in 2007 with the Prosecutor affirming that NATO forces, including USA personnel's and the Taliban would be investigated.[1681]

The ICC has kept close watch and continually monitoring the situation that occurred in Georgia in 2008, as well as sending delegations to Georgia and Russia.[1682] The ICC launched investigation into the use of child soldiers in Sri Lanka in 2008.[1683] Although Sri Lanka has not ratified the Rome Statute, the ICC could potentially have jurisdiction over crimes committed by nationals of states parties on its territory.[1684] The ICC considered investigating war crimes committed in Gaza in 2010 but could not indict the perpetrators of serious crime committed in Palestine as these territories did not legally constitute a state.[1685] The ICC opened preliminary examinations on crimes committed during the 2009 Coup in Honduras in which, the military ousted President Manuel

---

1679 ICC, "Letter from the Prosecutor" http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf [Accessed 12 September 2018]

1680 Guaqueta *The way back* Berdal and Ucko (eds.). p. 31

1681 The Prosecutor of the International Criminal Court, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan https://www.icc-cpi.int//Pages/item.aspx?name=171120-otp-stat-afgh [Accessed 12 September 2018].

1682 See Statement by the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda regarding recent ICC-visit to Georgia https://www.icc-cpi.int/Pages/item.aspx?name=16_02_18_otp-stat [Accessed 12 September 2018]

1683 ICC, "Investigating the use of child soldiers in Sri Lanka http://www.sundaytimes.lk/050807/news/2.html [Accessed 12 September 2018]

1684 ICC, "Investigating the use of child soldiers in Sri Lanka http://www.sundaytimes.lk/050807/news/2.html [Accessed 12 September 2018]

1685 See ICC's Declaration, Art. 12(3) http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Declarations.htm; and ICC, "Situation in Palestine", 3April 2012, http://icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf [Accessed 12 September 2018]

Zelaya, and on war crimes committed by North Korean forces in the territory of the Republic of Korea in 2010.[1686]

The points listed above are arguments in support of the fact that the ICC is actually adopting an outreach strategy to target situations out of Africa. The Court has clarified that its presence in Africa is influenced by the complementarity principle.[1687] On 10 March 2009, the Pre-Trial Chamber of the ICC made it clear that at the time the ICC instituted proceedings against the LRA leaders, Uganda's national proceedings were not sufficient to warrant the exclusion of such actions from the Court.[1688] This decision was upheld by the Appeals Chamber on 16 September 2009.[1689] Therefore, it is evident that the ICC's proceedings could not be waived since the Government of Uganda could not show proof of a structure to complement the ICC by investigating and prosecuting the suspects.[1690] Similarly, there have been increasing allegations that Nigerian security forces have committed serious violations against citizens while trying to end the terrorist attacks by Boko Haram.[1691] On her visit to Nigeria in 2012, the Chief Prosecutor of the ICC, Fatou Bensouda stated that the ICC was only conducting preliminary analysis and did not intend to interfere with domestic proceedings provided the government was ready to prosecute those responsible for serious crimes committed in the country.[1692] Nigeria has been listed as one among other countries under preliminary investigation given that the Office of the Prosecutor of the ICC has received several communications since 2005 in relation to the situation prevailing in the country. This situation includes ethnic and religious conflicts that have affected the central region of

---

1686 Mutua 2001 *HILJ*

1687 *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/0401/05 (Decision on the admissibility of the case under Article 19(1) of the Statute)

1688 *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/0401/05 (Decision on the admissibility of the case under Article 19(1) of the Statute)

1689 *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/0401/05-408 (Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under Article 19(1) of the Statute' of 10 March 2009)

1690 Maunganidza *Uganda's International Crimes Division* Van der Merwe (eds.) 57

1691 The Economist, 'Nigeria's crisis: A threat to the entire country' The Economist (29 September 2012) <http://www.economist.com/node/21563751> accessed 14 February 2013.

1692 Olugbo *Nigeria and the International Criminal Court* Van der Merwe (eds.) 83

the country since 2004 and violent clashes after the parliamentary and presidential elections in 2011.[1693]

While debates continue to mount on the subject of selective application of criminal sanctions, pro-ICC activists have argued that the ICC's involvement in Africa is justified on the basis of complementarity and not selectivity. Whereas the ICTY, ICTR and the SCSL had primacy over domestic courts, the ICC gives primacy to domestic courts by complementing and not supplanting genuine national proceedings.[1694] The principle of complementarity fosters respect for the primary jurisdiction of states as well as practical considerations of efficiency given that states generally have the best access to the evidence, witnesses and resources and will therefore be in the best position to carry out the proceedings. As long as a state is able and willing genuinely to investigate and prosecute a matter, the ICC does not have jurisdiction.[1695] This is in compliance and furtherance of the objectives of the Rome Statute, which affirms that "the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".[1696]

In the opinion of Geerhard Kemp, the ICC is neither pro-west, nor is it anti-Africa.[1697] Although the current situations before the ICC comes from Africa, the Prosecutor of the Court is not focused on prosecuting Africans only. Preliminary examinations were conducted and are still on-going with regards to situations in countries like Afghanistan, Colombia, Georgia and also the controversial situation in the Palestinian territories.[1698] Despite outstanding challenges posed by the AU to the ICC regime,[1699] some African

---

1693 International Criminal Court, The Office of the Prosecutor: Report on Preliminary Examination Activities (13 December 2011) <http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011. pdf> accessed 13 February 2013

1694 Rome Statute of the International Criminal Court, Article 17

1695 Art. 19 of the Rome Statute provide that "The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17".

1696 See Preamble of the Rome Statute. para. 4

1697 Kemp *Tacking stock of International Criminal Justice* Van der Merwe (eds.) 7

1698 See Black 2009/2010 *AYIHL*

1699 See AU Resolution adopted on 3 July 2009, in Sirte, Libya, calling on African States not to enforce the ICC warrant of arrest against President Al Bashir of Sudan.

states have continued to support the work of the Court by signing and ratifying the Rome Statute. For example, Ivory Coast was warmly welcomed by the ICC on 18 March 2013 as the 122nd state party to the Rome Statute.[1700]

While powerful states like the USA seem not to have endorsed the ICC, they show indirect support for the Court. The fact that the USA did not veto resolution 1593 and 1970 referring the situations in Sudan and Libya indicated that the USA and other superpowers indirectly favored the functions of the ICC.[1701] On Monday 18 March 2013, Bosco Ntaganta, the Congolese war-lord indicted by the ICC surrendered himself to the USA embassy in Rwanda. The Embassy did not reject his gesture, but rather, he was transferred to The Hague for subsequent prosecution by the ICC. This incident underscored the fact that the USA considers the ICC to be a legitimate role player in the fight against impunity.[1702] Furthermore, France's envoy to the UN Gerard Assembly, declared that the Security Council referrals to the ICC constituted recognition of the Court as a "key actor on the international stage".[1703] While it is arguably more realistic to depict the ICC as an important role player in the international scene, its functions are still being subdued by the whims of the most important military and economic powers, notably the USA, PRC and the Russian Federation.[1704]

6.3.3 ICC investigations pursuant to UN Security Council referrals

It is generally acknowledged that Article 27(2) of the Rome Statute has neutralized the immunity granted to senior officials from states that are parties to the Rome Statute.[1705] However, immunities granted to officials of non-states parties are not affected by Article 27(2) of the Statute because the states have not sign and ratified the treaty. From this

---

1700 The Rome Statute entered into force for Ivory Coast on 1 May 2013.

1701 Kemp *Tacking stock of International Criminal Justice* Van der Merwe (eds.) 7

1702 See Statement by the Prosecutor of the ICC on 22 March 2013. Available at: <http://www.icc-cpi.int/en_menus/ icc/press%20and%20media/press%20 releases / Pages / rstatement-22-03-2013.aspx> [Accessed 21 August 2018].

1703 See Lynch C, 'The world's court vs the American right' *Foreign Policy,* Available at: <http:// turtlebay.foreignpolicy.com/posts/2013/02/11/ the_icc_vs_american_ conservatives> [Accessed 21 August 2018].

1704 Kemp *Tacking stock of International Criminal Justice* Van der Merwe (eds.) 7

1705 See *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber I, Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of *Omar Al Bashir*, 13 December 2011. para 18

premise, a distinction is drawn between immunities accruing to officials of non-state parties from that which is afforded to officials of state parties to the ICC. However, such distinctions in terms of jurisdiction and admissibility do not apply when a case is referred to the ICC by the UN Security Council in accordance with its Chapter VII mandate arising from the UN Charter.[1706] The first arrest warrant issued against President Omar Al Bashir in 2009 was a consequence of the UN Security Council referral of the situation in Darfur in accordance with its Chapter VII mandate.[1707] Thereafter, the Pre-Trial Chamber held that in line with Article 27 of the Rome Statute, President Omar Al Bashir's position as Head of State not party to the Rome Statute had no effect on the Court's jurisdiction over the case.[1708]

It is important to differentiate the exercise of jurisdiction by an international criminal court as opposed to the jurisdiction of national authorities over such officials. From this point of view, it can be argued that the question of immunity with regards to Security Council referrals comes on two levels and to limit the debate on the basis that the ICC simply has jurisdiction over sitting Heads of States does not exhaust the issue. With regards to the case concerning President Omar Al Bashir for instance, the ICC was supposed to obtain custody of the President at least during the trial phase.[1709] By this requirement, the question of immunity from arrest by national authorities emerges. Faced with this imminent challenge posed by the question of immunity at the national level, Pre-Trial Chamber I of the ICC request the registry to call on states parties, including UN Security Council members that are not parties to the Rome Statute to cooperate towards the arrest and surrender of President Omar Al Bashir.[1710] Also, the

---

1706 Trendafilova Africa and the International Criminal Court: A judge's perspective, G Werle *et al* (eds.) 30

1707 See Security Council Resolution 1593, Doc. S/RES/1593 (2005)

1708 See *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's application for a warrant of arrest against *Al Bashir*, 4 March 2009. para 41

1709 See Rome Statute of the International Criminal Court, 1998. Art. 63(1) provides that the Pre-Trial Chamber shall conduct hearing in the presence of the accused and his counsel. However, Article 63(2) further stipulates that such a condition may be waived under specific circumstances provided by the Statute.

1710 *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's application for a warrant of arrest against *Al Bashir*, 4 March 2009. para 93

Court called on state parties to cooperate towards the arrest and surrender of President Omar Al Bashir.[1711]

After the issuance of arrest warrants in 2009, President Omar Al Bashir has visited among other states, Chad (in 2010, 2011 and 2013) and Malawi (in 2011). By virtue of their membership to the Rome Statute, these states were duty bound to enforce the Court's order and execute the arrest of the President pursuant to Articles 86 and 89 of the Rome Statute. However, they failed to do so. To justify their omission, Malawi for example made reference to the immunity of Heads of State that are not parties to the Rome Statute, as well as the AU's position towards the arrest warrant issued against the Sudanese President.[1712] Malawi argued that Article 27 did not compel states that were not parties to the Rome Statute.[1713] Furthermore, Malawi cited the provisions of Article 98(1) of the Rome Statute which is to the effect that the Court may not proceed with a request for surrender or assistance that imposes a duty on the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state which is not party to the Rome Statute.[1714]

In response to Malawi's justification, the Pre-Trial Chamber of the ICC issued a number of decisions on the visits of the Sudanese President to state parties or states which are not parties to the Rome Statute. The first decision came in 2010 when Pre-Trial Chamber I notified the ASP and the UN Security Council of President Omar Al Bashir's 2010 visit to Chad.[1715] The Chamber further stated on 12 and 13 December 2011 that Malawi and Chad failed to consult with the Court and therefore breach their obligations

---

1711 *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's application for a warrant of arrest against *Al Bashir*, 4 March 2009. para 93

1712 *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber I, Decision in accordance with Article 87(7) of the Rome Statute on Malawi's non-compliance with the ICC's request to arrest and surrender Al Bashir, 13 December 2011. para 8 and Annex 1.

1713 *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-139-Corr. Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Al Bashir.

1714 *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-139-Corr. Para. 8

1715 *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber I, Decision informing the UN Security Council and the Assembly of the States Parties to the Rome Statute about Al-Bashir's recent visit to the Republic of Chad, 27 August 2010

arising from the Rome Statute.[1716] Also, both countries where blamed for failing to bringthe the issue concerning President Omar Al Bashir's before the Chamber for proper determination as prescribed by Article 119(1) of the Rome Statute.[1717] Pre-Trial Chamber I concluded that Malawi and Chad undermined the Court's mandate arising from the Rome Statute by failing to comply with the Court's decisions.[1718] Consequently, the non-compliance procedure was initiated by the Chamber and Malawi and Chad were referred to the ASP and UN Security Council.[1719] The Chamber argued that the principle of immunity had been rendered ineffective by the very nature and purpose of the ICC- to bring an end to a culture of impunity for serious crimes in international law.[1720] In this regard, the Chamber concluded that the Rome Statute's provision under Article 98(1) was inapplicable.[1721]

Besides the challenge of states failure to arrest the Sudanese President, the fact that Omar Al Bashir was referred to the ICC by the Security Council in accordance with Chapter VII of the UN Charter cannot be ignored. By virtue of the Council's mandate to maintain international peace and security, there is a chance that Omar Al Bashir's immunity as the Head of State in the Republic of Sudan might have been removed despite the fact that Sudan was not a party to the Rome Statute.[1722] Security Council resolution 1593 referring the Darfur situation to the ICC directly implied that investigations and prosecutions would be conducted in accordance with the Court's statutory framework irrespective of alternative defenses.[1723] Therefore, it is rational to

---

1716 See Rome Statute of the International Criminal Court, 1998. Art. 97

1717 *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-139-Corr. para 12., See also *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber I, Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Al Bashir. para. 8 (hereinafter Chad non-compliance Decision).

1718 *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-139-Corr. para. 21 and Chad non-compliance Decision. para. 8

1719 *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-139-Corr.

1720 *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-139-Corr. para. 22-36

1721 *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-139-Corr. para. 37-43

1722 Trendafilova Africa and the International Criminal Court: A judge's perspective, G Werle *et al* (eds.) 31

1723 See Art. 13(b) of the Rome Statute read along with Art. 24 and 39 of the UN Charter. The responsibility of the Security Council to refer cases to the Court as provided under Art. 13(b) of the Rome Statute is considered a function of the Council's mandate to ensure international peace and security as provided for under Art. 24 of the UN Charter and to

argue that despite Sudan not being State Party to the Rome Statute, she has obligations arising from the Statute by virtue of Security Council Resolutions as if it were a State Party to the Statute. Put differently, it can be inferred that Sudan's Omar Al Bashir is directly subjected to the ICC owing to resolution 1593 of the Security Council and Article 27(2) of the Rome Statute.[1724] Secondly, the defense of immunity accruing to President Al Bashir was implicitly lifted owing to the Council's decision that Sudan shall "cooperate fully" with the Court. Such a decision emanating from the Council Chapter VII mandate became the overriding law, the consequence of which, Sudan was bared from raising the defense of immunity due to its obligations under the UN Charter to comply with the Security Council orders to cooperate with the ICC.[1725]

Some scholars have provided a counter argument that the Security Council does not possess the legal authority to strip President Omar Al Bashir of his immunity based on the justification that a referral by the Council is simply a mechanism design to trigger the jurisdiction of the ICC.[1726] From a rational point of view, this argument is riddled with poor logical justification. It is obvious that the purpose of the referral authority stated under Article 13(b) of the Rome Statute is to set in motion the jurisdiction of the ICC and hence subdue alternative defenses that can prevent the Court from carrying out its legal duties as stipulated under the Rome Statute. Consequently, resolution 1593 of the Security Council did not only trigger the jurisdiction of the ICC, but as well, it serves as a measure for the maintenance of international peace and security. Given that the Resolution was adopted as a Chapter VII instrument, it was binding on all UN member states, including Sudan.

The ICC has on many occasions insisted that Resolution 1593 referring the Darfur situation to the Court was adopted as a Chapter VII mandate and hence imposed an obligation upon all UN member states to cooperate towards its full implementation. In the Pre-Trial Chamber II decisions of 18 September and 10 October 2013, the Court,

---

make determinations as to what measures would be appropriate to restore peace and security as provided for under Art. 39 of the UN Charter.

[1724] Trendafilova Africa and the International Criminal Court: A judge's perspective, G Werle *et al* (eds.) 30

[1725] Trendafilova Africa and the International Criminal Court: A judge's perspective, G Werle *et al* (eds.) 30

[1726] Trendafilova Africa and the International Criminal Court: A judge's perspective, G Werle *et al* (eds.) 31

after receiving information's about President Omar Al Bashir's intended travel to the USA, Ethiopia and Saudi Arabia, called on the three states to arrest and surrender Al Bashir should he enter their territory.[1727] The Chamber aligned its decision with the argument that as non-State Parties, the USA, Ethiopia and Saudi Arabia had no direct obligations towards the ICC arising from the Rome Statute.[1728] However, the Chamber pointed out that Security Council Resolution 1593 of (2005) imposed a duty on all UN member states, including the relevant regional and international organizations to cooperate fully with the Court.[1729]

Another serious challenge associated with Security Council referrals and the Council's task to fulfill its obligations arising from the Rome Statute is its inability to make a follow-up on its own referrals. The ICC's decision of 26 March 2013 expressed disappointment with the Security Council's passive position concerning the issue of non-compliance by Chad. Pre-Trial Chamber II clarified that it is the Council responsibility to make a follow-up on referrals that it initiated pursuant to Article 13(b) of the Rome Statute. Such follow-up actions undeniably support the ICC in fulfilling its mandate conferred by the Rome Statute.[1730] The Al Bashir case presents a clear example to say, without proper follow-up actions from the Security Council, Article 13(b) referrals will hardly achieve their ultimate goal which is to put an end to a culture of impunity for serious crimes in international law. Challenges to the cooperation regime of the ICC as evident in previous chapters of this thesis are some of the most significant obstacles encountered by the Court in carrying out its mandate.

6.4 CONCLUSIONS

Owing to the developments and changing dynamics in international law, states foresaw the need to create a system of accountability for individual perpetrators of the most serious crimes of concern to the international community as a whole. Fundamentally,

---

[1727] See *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber II, Decision regarding *Al Bashir's* potential travel to the USA, 18 September 2013. p. 6

[1728] See *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber II, Decision regarding *Al Bashir's* potential travel to the USA, 18 September 2013. para. 11

[1729] *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber II, Decision regarding *Al Bashir's* potential travel to the USA, 18 September 2013. para. 11

[1730] See *Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber II, Decision on the noncompliance of the Republic of Chad with the cooperation requests issued by the Court regarding the arrest and surrender of *Al Bashir*, 26 March 2013. para 22

that was what the idea of a permanent international criminal court was all about,[1731] the creation of rules by the international community, establishing standards of behaviour where any person could be held accountable for violating such standards involving the most serious offenses.[1732] At Nuremberg, the great powers agreed that irrespective of alternative justifications like state sovereignty and the defense of immunity, there was a need to prosecute and punish individual perpetrators for serious crimes in international law.[1733] This argument was supported by the fact that there was a duty to prosecute under customary international law.[1734] The Allied Powers argued, inter alia, that reference could be made to the 1923 Draft Treaty of Manual Assistance, the 1924 Geneva Protocol, the 1927 English League Assembly Resolution and the 1928 Kellog-Briand Pact as powerful evidence of the existence of a widely prevalent custom among civilized nations sufficient to energize a juristic climate for the prosecution of individuals for serious crimes in international law.[1735]

In establishing the principle of individual criminal responsibility in international law, the IMT Charter clarified that the state was not on trial but individuals who committed serious crimes. Justice Robert Jackson often-quoted that, the state as a whole was not on trial because:

> Crimes are always committed only by persons….. the charter recognize that one who has committed acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have therefore resulted in immunity for practically everyone concern in the really great crimes against peace and mankind…. Under the Charter, no defence based on either of those doctrines can be entertained. Modern civilization puts unlimited weapons of destruction in the

---

1731 See Giraudon 2015 *IJCM*

1732 See Draft Statute for an International Criminal Court with commentaries 1994, Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 91). The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1994, vol. II, Part Two. See also Erickson 2014 *EJCPS*

1733 See Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 17

1734 Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.) 17

1735 For general discussions on the Allies determination to punish serious crimes in international law, including acts of aggression, see *R v. Jones*, Appellant (On Appeal from the Court of Appeal (Criminal Division)), House of Lords Decision 2005-06, [2006] UKHL 16.

> hands of men. It cannot tolerate so vast an area of legal irresponsibility.[1736]

The judgment at Nuremberg made significant contribution in the development of international criminal jurisprudence by introducing and strengthening the principle of individual criminal responsibility in international law.[1737] Aside from this significant development, the Nuremberg and Tokyo Tribunals, including the ICTY, ICTR and the SCSL were criticized for being selective in the pursuit of international criminal justice as discussed in previous chapters. The findings of this study reveal that the practices of selectivity evident in these tribunals were triggered by political actors who aimed at achieving their political ambitions by using the international legal machinery as a political tool to deal with their opponents. However, the tribunals strengthened the rule of law and set in motion a progressive trend through which the idea of a permanent international criminal court became a reality.[1738] Given that these tribunals operated on an *ad hoc* basis, there was a need to create a court that would address the concerns of the international community as a whole.

The ICC was created to achieve this purpose and to function in accordance with the principle of complementarity stated under paragraph 10 and Articles 1 and 17 of the Rome Statute. Although the Court has been operating in accordance with its mandate arising from the Statute, the outcomes in most instances have been unsuccessful due to the repeated allegations of selectivity.[1739] Evidences of selectivity affecting the smooth functioning of the ICC have been elaborated upon in previous chapters and particularly, a summary of the selectivity debate has been provided in the section of 'major research findings' discussed above. The essence for identifying aspects of selectivity affecting the functioning of the ICC as discussed in this study is not meant to defeat the ends of international criminal justice or perhaps discourage membership to the Rome Statute. Rather, the study endeavoured to exhaust the selectivity debate so as to provide clarity concerning the operations of the Court and justify its presence or absence in conflict situations worldwide.

1736 The Avalon Project: Nuremberg Trial Proceedings, 21 November 1945, Vol. 2, 249. <http://avalon.law.yale.edu.imt/11-21-42.asp>

1737 Schabas *An Introduction* 1

1738 Schabas *An Introduction* 1

1739 Batohi *Africa and the International Criminal Court* Werle et al (eds.) 49

The Court has made significant strides in the realm of international criminal justice. It is acknowledged that the ICC has a deterrent effect and prevents future atrocities.[1740] By indicting heads of government, the ICC has signaled an end to the culture of impunity for leaders who are reluctant in taking the necessary steps to protect their citizens or perhaps take advantage of their leadership positions to commit serious crimes against their own citizens. Admittedly, the Court strengthens the concept of "responsibility to protect" adopted by the UN General Assembly in 2005.[1741] The continued presence of the Court encourages militia groups to reduce violence, national courts to afford justice to the perpetrators of serious crimes and leaders to change the politics of oppression. The work of the ICC can also have an impact on local and regional courts.[1742] For instance, the ICC sometimes monitors elections in order to gather evidence as was the case in the DRC in 2011.[1743] Also, the Court pushed Kenya to organize domestic trials for serious crimes committed during the 2007/8 post-election violence.[1744] Nigeria was encouraged by the ICC to organize trials to prosecute members of the terrorist group Boko Haram and perhaps, it is the work of the ICC that has pushed the AU to open discussions on the creation of a regional criminal court.[1745] By these developments, it is evident that international criminal law can influence domestic, regional and international politics.[1746] Therefore, it can be argued that the ICC has the potential of changing the global political landscape into an international environment governed by the dictates of law and the conscience of humanity.

Despite significant achievements recorded by the ICC towards strengthening the rule of law and the duty to prosecute under international law, the AU has called on its member states to pull out of the jurisdiction of the Court. The reason for the AU's decision as discussed in this study is based on the perception that only Africans have been subjected to prosecutions before the ICC since it came into force. Therefore, the Union

---

1740 Vinjamuri 2010 *EIA*

1741 UN General Assembly World Summit Outcome Document on the Responsibility to Protect, Doc. (A/RES/60/1), 2005. para. 139

1742 Bassiouni 2010 *VJIL*

1743 ICC, 2011 http://www.congoplanet.com/news/1904/international-criminal-court-monitoring-election-violence-in-dr-congo.jsp. [Accessed 12 September 2018].

1744 Kaye *Foreign Affairs*

1745 See Africa: leaders' summit to discuss regional war crimes court', *The Star*, 23 January (2013) cited in Gadget 2013 *TWQ*

1746 Sikkink *New York: Norton*

has continued to encourage member states to find African solutions to African problems. At the June 2014 AU summit held in Malabo, Equatorial Guinea, African Heads of State and Government adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Right (ACJHR), also referred to as the Malabo Protocol.[1747] The amendment called for a merger between the African Court on Human and Peoples' Right (ACHPR) with the African Court of Justice (ACJ) to form an expanded jurisdiction under the African Court of Justice and Human Right (ACJHR).[1748] The ACJHR has jurisdiction over inter-state disputes and human rights issues, including the mandate to prosecute serious crimes under international law.[1749]

It is indeed a noble gesture for African states to create a Court with criminal jurisdiction and having strong operational and constitutional backing. Such a Court would serve as an alternative institution to deliver justice to the perpetrators of serious crimes committed in Africa.[1750] The ACJHR has specific features that are not common in other judicial institutions. These include provision for an Office of Defense counsel established on an equal platform with the office of the prosecutor.[1751] Also, the inclusion of specific crimes peculiar to the Continent of Africa is of relevance. This would not only send a strong message to the authors of such offences but also, it would serve as deterrence to future perpetrators.[1752] The Protocol also creates a Victims and Witness Unit within the Registry to ensure the security of victims and other appropriate assistance.[1753] In addition to these innovative developments, Article 46M of the Protocol establishes a Trust Fund "for legal aid and assistance and for the benefit of victims of crimes or

---

1747 See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,' AU Doc. No. STC/Legal/Min. 7(1) Rev.1 (14 May 2014) [hereinafter 'Malabo Protocol']. The AU Assembly adopted the Malabo Protocol on 30 June 2014 at its 23rd Ordinary Session. See, AU Doc. No.assembly/AU/Dec.529 (XXIII) (2014)

1748 See, AU Doc. No. Assembly/AU/Dec.529 (XXIII) (2014).

1749 AU Doc. No. Assembly/AU/Dec.529 (XXIII) (2014).

1750 Sirleaf 2017 *IJTJ*

1751 See Malabo Protocol, Art. 2(4)

1752 Sirleaf 2017 *IJTJ*

1753 Malabo Protocol, Art. 22B(9)(a)

human rights violations and their families", an example drawn from the ICC's Victims and Witness Unit as well as the Trust Fund.[1754]

Owing to the developments discussed above, the Malabo Protocol seems promising towards advancing the rule of law in Africa.[1755] However, the Protocol contains pitfalls that are detrimental to the jurisdiction of the ACJHR. First, the jurisdiction of the Court seems too broad given that Article 28A of the Protocol adds ten additional crimes to the existing core crimes.[1756] Such additional crimes may seem too cumbersome for the Court to deal with. Also, the inclusion of such crimes under the Protocol may prove unhealthy to the Court for the fact that it is lobbying the cooperation of states to come into force yet these crimes are common within and across the governments of African states. Logically, such states may seem reluctant to entrap themselves by signing the Protocol.[1757] Perhaps, this may be the reason for the poor record of ratification by African States to the Malabo Protocol which makes it ineffective at the moment. The Protocol is said to be effective after ratification by 15 African states. So far, only 11 out of the 54 African states have signed but not ratified the Protocol. Admittedly, the Court's jurisdiction remains ineffective for the moment.[1758]

Another contention in the Malabo Protocol is associated with the provisions of Article 46A *bis* which grant immunity from prosecution for sitting Heads of States and senior government officials.[1759] The problem with Article 46A *bis* is the crimes protected by the shield of immunity often violate the norms of *jus cogens* protected under customary international law.[1760] From a logical perspective, individual conduct amounting to customary law offence do not qualify as part of the official functions of a Head of

---

1754 See Art. 46M of the Malabo Protocol read along with Art. 79 of the Rome Statute.

1755 See Report of Kenyans for Peace with Truth and Justice, 'Seeking justice or shielding perpetrators? An analysis of the Malabo Protocol on the African Court'. Available at: http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf [Accessed 15 April 2018].

1756 The crimes include: Unconstitutional Change of Government; Piracy, Terrorism, Mercenarism; Money Laundering; Trafficking in Persons; Trafficking in Drugs; Trafficking in Hazardous Wastes; Illicit Exploitation of Natural Resources.

1757 Sirleaf 2017 *IJTJ*

1758 Sirleaf 2017 *IJTJ*, pp. 71-91.

1759 AU, Protocol on the Statute of the African Court of Justice and Human Rights, July 2008.

1760 Abass *EJIL* 933-946

State.[1761] This position has been endorsed by the ICC Statute and the implication is the Statute does not deviate from the existing rules of customary international law.[1762] The International Criminal Tribunal for the Former Yugoslavia established that under customary international law individual persons may be prosecuted for the war crime of torture "whatever their official position, even if they are Heads of State or government ministers".[1763] In the Arrest warrant case,[1764] the ICJ held that immunity from prosecution does not mean impunity in respect of the crimes committed. The Court distinguished between criminal responsibility and jurisdictional immunity and went on to specify circumstances in which immunities enjoyed by certain public officials under international law would not bar a criminal prosecution. Among the points raised, the Court stressed that officials invoking immunity may be subject to criminal prosecution in certain international criminal courts such as the ICC.[1765]

The decision of the ICJ was reiterated in 2004 by the SCSL.[1766] The Court noted that the ICJ's decision affording sovereign immunity to the Minister of Foreign Affairs of the Democratic Republic of the Congo applied to prosecutions of an official of state A in state B; that the SCSL was not a national Court of Sierra Leone but an international criminal court;[1767] and that the principle of sovereign immunity was "derived from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community".[1768] Judge Van de Wyngaert noted in her dissenting opinion in

---

1761 See *re Goering & Others* (1946) 13 *International Law Reports* 203 221 (noting that sovereign immunity does not apply to 'acts condemned as criminal by international law').

1762 Van der Vyver *AHRLJ* 13

1763 *Prosecutor v. Anto Furund iya* Case IT-95-I-T, 199. para. 140

1764 *Democratic Republic of Congo v. Belgium,* dissenting judgment of Van den Wyngaert, ICJ 3, 2002. para. 60.

1765 *Democratic Republic of Congo v. Belgium,* dissenting judgment of Van den Wyngaert, ICJ 3, 2002. para 61.

1766 *Prosecutor v. Taylor* 128 International Law Reports 239, 2004.

1767 *Democratic Republic of Congo v. Belgium,* dissenting judgment of Van den Wyngaert, ICJ 3, 2002. para 42.

1768 *Democratic Republic of Congo v. Belgium,* dissenting judgment of Van den Wyngaert, ICJ 3, 2002. para 51.

the Arrest Warrant Case that, "immunity should never apply to [serious] crimes under international law, neither before international courts nor before national courts".[1769]

In like manner, the South African legislation implementing the ICC Statute provides that a person who "[i]s or was a Head of State or government, a member of government or parliament, an elected representative or a government official" can be prosecuted in a South African court for crimes within the subject matter jurisdiction of the ICC, "despite any other law to the contrary, including customary and conventional international law".[1770] However, the rules articulating sovereign immunity in the Arrest Warrant Case apply to prosecutions in a national Court. An *obiter dictum* in the Arrest Warrant Case[1771] and the *ratio decidendi* in the *Prosecutor v. Charles Taylor*[1772] made it clear that a head of state (and minister of foreign affairs) do not possess sovereign immunity against prosecution in an international tribunal.

Consequently, head of states and senior government officials do not enjoy immunity from prosecution under the jurisdiction of the ICC and Article 98(1) of the Rome Statute is instructive in this regard. Article 98 is interpreted to the understanding that, if the surrender of an official of a non-party state enjoying sovereign immunity is made to rest squarely upon a waiver of that immunity by the non-party state concerned, it could be interpreted in practice as (citing the exact wording of article 27(2)) 'bar the Court from exercising its jurisdiction over such a person', since the ICC Statute does not permit trials in absentia".[1773] This interpretation is justified by the argument that non-party states are not compelled to cooperate with the Court and cooperation evidently includes the waiver by a government of sovereign immunity of its officials.[1774] In the light of the arguments raised, it is evident that the provision of Article 46A *bis*-immunity from prosecution for sitting head of states and senior government officials only serves

---

1769 *Democratic Republic of Congo v. Belgium,* dissenting judgment of Van den Wyngaert, ICJ 3, 2002. para 36

1770 Implementation of the Rome Statute of the International Criminal Court, Act 27 of 2002, Sec 4(2)(a).

1771 *Democratic Republic of Congo v. Belgium,* dissenting judgment of Van den Wyngaert, ICJ 3, 2002

1772 *Prosecutor v. Taylor* 128 International Law Reports 239, 2004

1773 Van der Vyver *AHRLJ* 13

1774 Wenqi *IRRC* 87-110

as a hindrance to the progress made in the realm of international criminal jurisprudence.

Another issue of concern is the complementarity provision mentioned under Article 46H of the Protocol. The Article fails to provide a clause that connects the ACJHR with the ICC on the basis of complementarity.[1775] This gives the impression that the Court is not committed to work with the ICC and as well, African leaders are not willing to abide by the standards of international criminal justice.[1776] From the shortcomings listed above, it is clear that the Malabo Protocol is yet to attain the standard requirements for international criminal justice. Perhaps such is the reason why the Protocol has not come into force due to poor ratification by African States. Before the Malabo Protocol comes into existence, African states are encouraged to revert to their obligations arising from the Rome Statute despite minor setbacks posed by the challenge of selectivity. An imperfect system of justice is preferred to a perfect system yet to be established.

6.5 RECOMMENDATIONS

While the practice and politics of UN Security Council referrals have received much attention in the past years, the fact remains that each referral mechanism under Article 13 of the Rome Statute exposes the ICC to potential manipulations. Security Council referrals put the Court at risk of being manipulated by the narrow political interests of the Council's members, especially the permanent five veto-wielding members.[1777] Likewise, the Court's experience with self-referrals, as in the case of Uganda or the DRC for example, has exposed the potential of the ICC to be leveraged by the referring government.[1778] Consequently, the Court is often seen as pursuing one-sided justice against rebel groups while ignoring government perpetrated atrocities.[1779] Also, opening cases *proprio motu* – through the ICC Prosecutor's discretion – can be problematic given the arguments from states that the Prosecutor does not have the political

---

1775 See Malabo Protocol, Art. 46H.

1776 Report of Kenyans for Peace with Truth and Justice.

1777 See Kersten M, The politics of the ICC referrals-Aproposal Available at https://justiceinconflict.org/2012/11/13/the-politics-of-icc-referrals-a-proposal/

1778 Kersten M, The politics of the ICC referrals-A proposal Available at https://justiceinconflict.org/2012/11/13/the-politics-of-icc-referrals-a-proposal/

1779 Kersten M, The politics of the ICC referrals-A proposal Available at https://justiceinconflict.org/2012/11/13/the-politics-of-icc-referrals-a-proposal/

authority to intervene and that the Court lacks checks-and-balances in its mandate. In a nutshell, every mechanism available to bring a situation under investigation by the ICC is open to criticism and political maneuvers.

Therefore, this study recommends an amendment to Article 13 of the Rome Statute through the creation of an arm's length, independent body called a Referral Review Panel (RRP). The role of the panel would be to critically assess ICC referrals, be it from a state, the UN Security Council or in cases where the Prosecutor opened the investigation him/herself. In this regard, the Panel would examine the legality of a referral and its substantive content, referring to past experiences, rulings and academic analyses. The Panel would also address the potential legal and political risks to the Court's legitimacy and independence of each referral. Moreover, in situations where a state should be – but has not been – referred to the ICC, the Panel could convene to consider how best to engage the international community on referring the situation to the Court but doing so in such a way that does not hinder the institution's independence. Most importantly, the RRP would be independent from the Court itself. It could be established by the OTP or perhaps by the ICC's Registry.[1780] But once created, its composition would not be linked to members of the OTP or any other ICC staff.[1781] This would be particularly important because it would allow the OTP – and, more broadly the ICC – to insulate itself from any harsh findings that the RRP may have with regards to particular referrals. In other words, the independence of the RRP could protect the OTP from any significant disturbance in its relations with the state(s) in question.

In the absence of the suggested comprehensive referral mechanism, government officials should adopt a uniform approach as stipulated under Article 27 of the Rome Statute in the exercise of their referral authority under Article 13(a) of the Rome Statute. In like manner, UN Security Council members instigating referrals and prosecutions in accordance with Article 13(b) of the Rome Statute should not just act in accordance with the principles of equality and universality, but also they should be

---

[1780] See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9 (2002) Articles 43 and 54

[1781] The sole purpose will be to ensure the independent but inter-dependent communication and interactions with relevant organs of the Court and as well ensure the efficient functioning of the newly created subsidiary body.

encouraged to ratify the Rome Statute. The Security Council, with its permanent members, vetoes and other privileges of great powers seems to have weakened certain universal principles and compromise the effective response to possible transgressions where a superpower is involved.[1782] Also, the inclusion of Security Council referrals and deferrals into the Rome Statute provides an opportunity for the great powers, including non-signatories to the Statute to drive the activities of the ICC in tandem with international power politics. To address this issue, the Rome Statute needs to be amended such that the Council's referral and deferral authorities arising from Article 13(b) and 16 of the Rome Statute are transferred to the UN General Assembly as a function of all UN member states. By way of a 2/3 majority, the General Assembly should determine which situation actually warrants ICC intervention either by referral or deferral for which the Court would be directed to take the necessary actions.

The Rome Statute should also be amended such that the Prosecutor's *proprio motu* authority arising from Article 13(c) of the Rome Statute is subjected to proper scrutiny by the competent organs of the Court and, also advice should be obtained from the Principal Chambers of the Court before cases are admitted for investigations and subsequent prosecutions.

The question of admissibility continues to pose challenges to the ICC. Given the diverse nature of legal cultures practiced in different countries, it is imperative for the Court acting in accordance with the principle of complementarity to respect the discretionary decisions of domestic authorities. To have a case admitted before the ICC when domestic remedies have not been fully exhausted may result in conflict of applicable remedies.[1783] In the case of Kenya, for example, the Court ignored domestic efforts, including the committee set up to investigate post-election violence and the call for deferral in accordance with Article 16 of the Rome Statute. The government's quest to invoke Article 16 was linked to its efforts towards providing a peaceful and diplomatic solution to the crisis. Therefore, it imposed a duty upon the Court to support genuine domestic legal procedures, including the adoption of a new constitution aimed at restoring peace, law and order in Kenya. Admittedly, the Kenyan case was practically

---

[1782] Anderson 2009 *EJIL*

[1783] See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9 (2002) Article 15(2)

unsuccessful due to the imposition of criminal prosecution against the President and senior government officials, which undermined the legitimacy of the government and sovereignty of the state. By this example, there is a need for the ICC to observe that local remedies have been exhausted before a case can be admissible before the Court.[1784]

There is a need to establish a uniform mechanism with enforcement measures against lack of cooperation or non-compliance with the decisions of the ICC. With regards to President Omar Al Bashir's visit to Nigeria on 3 September 2013, Pre-Trial Chamber II of the ICC received the Government's explanation for failing to arrest Omar Al Bashir in good faith and refrained from making a finding on non-compliance with the Court's decisions.[1785] The Chamber simply called the attention of the competent authorities and requested their cooperation in future cases.[1786] A similar approach was followed when Abdel Raheem Muhammad Hussein, the Governor of Sudan's' Khartoum State visited Chad and the Central African Republic in November 2013.[1787] However, the Court adopted a different approach when Omar Al Bashir visited South Africa. After exiting the country, South Africa was indicted to appear before the ICC for failing to arrest Al Bashir.[1788] Given that cooperation is a decisive factor with regard to the execution of arrest warrants, it is important to emphasize the need for a special mechanism designed to serve this purpose. Without a defined mechanism of enforcement, the Court relies on state cooperation, the UN and other international actors, in the absence of which it cannot operate effectively. Such negative feedback affects the operational efficacy of the ICC.

1784 For general observations, See Rome Statute of the International Criminal Court. Doc. A/CONF.183/9 (2002) Article 19

1785 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, ICC-02/05-01/09-159, 2013. Decision on the co-operation of the Federal Republic of Nigeria regarding Omar Al Bashir's arrest and surrender to the Court. paras 10–13

1786 See Decision on the cooperation of the Federal Republic of Nigeria regarding Omar Al Bashir's arrest and surrender to the ICC (2013) p. 6

1787 *The Prosecutor v. Abdel Raheem Muhammad Hussein*, Pre-Trial Chamber II, ICC-02/05-01/12-20, 2013. Decision on the cooperation of the Republic of Chad regarding *Abdel Raheem Muhammad Hussein's* arrest and surrender to the Court, 2013; and Decision on the cooperation of the Central African Republic regarding *Abdel Raheem Muhammad Hussein's* arrest and surrender to the Court, 2013.

1788 *Southern Africa Litigation Centre v. Minister of Justice And Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (2015)

To close the impunity gap for which the ICC was created, the Court has to be universally responsive towards punishing the perpetrators of serious crimes in international law. At the Rome Conference of 1998, States turned their backs on impunity to say that never again would the perpetrators of serious crimes go unpunished. In essence, the Conference reached the agreement 'no more to crimes without accountability'.[1789] States expressed the view that "a new international system, backed by a strong court of last resort, could provide for criminal responsibility where impunity once reigned, acting for victims of past crimes while serving as a deterrent to future ones". However, the ICC cannot achieve its objectives without full cooperation from the states. Therefore, states cooperation is of crucial importance to the workings of the Court.[1790] The Court can only deliver justice and ensure peace and stability with the support and cooperation from the states. More states cooperating with the ICC mean more legitimacy and more states cooperation in implementing arrest warrants means the Court's work can be more effective. Therefore, it is necessary for states to show support and cooperation with the Court to enhance its proper functioning.

There is need to draw a distinction in terms of operation between the UN Security Council, the AU and the ICC. While the Security Council represents the arm of a political organization (UN), the AU itself is a political organization and both the Security Council and the AU operate in the realm of politics. Most often they engage in political controversies that define their position as global actors fighting against impunity. Operating in the realm of law, the ICC is positioned between the UN Security Council and the AU. The Council referred the Sudanese case to the ICC and ignored the AU's call for deferral under Article 16 of the Rome Statute. Also, the Council ignored a second call from the AU to defer investigations and prosecution of the Kenyan President. Therefore, the political dynamics of the relationship between the UN Security Council and the AU continues to oppose the proper functioning of the ICC. There is a need to augment this relationship in the interest of international justice. In this regard, the UN Security Council and the AU should adopt a more collaborative approach aimed at prioritizing international criminal justice. Both political bodies should work as equal

---

1789 Batoli Africa and the International Criminal Court G. Werle et al (eds.) 57

1790 See Rome Statute of the International Criminal Court . Doc. A/CONF.183/9 (2002) Article 86 of the Rome Statute deals with states obligation to cooperate towards enforcement while Article 89 deals with surrender of persons to the ICC.

partners in the fight against impunity without hegemonic interference. On the other hand, the ICC should adopt a more universal approach towards international criminal prosecutions such that all shall be equal before the law irrespective of nationality or official capacity. Also, the Court must ensure that the administration of justice complements efforts to promote political reconciliation.

The accusations that the ICC is biased against Africans have become a common phenomenon. However, there have been limited suggestions as to how such accusations can be addressed. It should be noted that the Court has been and still continues to operate in line with the provisions of the Rome Statute. The duty of the Court is not to second-guess the provisions of the Statute. The ICC is mandated to interpret the Rome Statute as it is and not as it ought to be. If there is a flawed construction in terms of jurisprudence, it is not the function of the Court to divert or change the interpretation of the cited provision/s. Therefore, the Court should not suffer so much criticism for carrying out its legal responsibilities as instructed by the Rome Statute. The ASP constitutes a competent forum to decide in a planned review conference to amend deficient provisions in the Statute which will, in turn, inform the proper functioning of the ICC. Consequently, the responsibility to counter the accusations of an African bias by the ICC lies not on the shoulders of the Court itself but on the ASP. The Assembly continues to be the best forum to suggest changes and remedy deficiencies arising from the operations of the ICC and further institute such changes to the Rome Statute.

In the absence of a judicial mechanism with enforcement powers against serious crimes committed in Africa, the ASP should encourage African states to domesticate the Rome Statute such that national courts are able to complement the ICC and prosecute the perpetrators of serious crimes within and outside their territories. Such initiatives can be adopted by individual states in their official capacities as parties to the Rome Statute or by a joint implementation plan initiated by a group of states in their respective regions. For instance, South Africa became the first state to enact an Act to domesticate the Rome Statute[1791] after which Mauritius, Kenya, Senegal and Uganda followed suit.[1792]

[1791] See Chinedu *Implementing the Rome Statute;* See also Implementation of the Rome

Besides national measures, regional efforts have come from the Southern African Development Community (SADC). In this regard, reference can be made to the Windhoek Plan of Action on the ICC Ratification and Implementation according to which SADC states agreed to give priority to the drafting of implementing legislations of the Rome Statute in order to effectively co-operate with the ICC and give effect to the principle of complementarity.[1793] Such measures already included into the Rome Statute should be enforced by the ASP as an obligation towards all and not just a small number of countries.

6.6 AREAS FOR FURTHER RESEARCH

The arguments advanced in this thesis do not bring to an end the criminal law debate on selective prosecutions and the question of accountability for serious crimes. It simply opens the way for relevant discussions pertaining to the subject matter. To advance scholarly debate and contribute towards the promotion of international criminal jurisprudence, the study proposes areas for further research.

Whereas the victims of serious crimes constitute a significant mainstream in the criminal law debate, their voices have either been supressed or completely ignored over the past years. Although the Rome Statute provides for victim's protection[1794] as well as a trust fund to cater for victims of serious crimes,[1795] the Statute does not properly address the issue of post-conflict reconstruction by way of providing appropriate protection and compensation mechanisms to reinstate the victims in a position as if they were not victimised. Perhaps their voices might have been supressed for fear of consequences that may ensue as a result of their participation in trial proceedings to provide evidence and/or witness testimony. This thesis encourages scholars to further research in the areas of victim's participation in trial proceedings before the ICC as well as their protection and compensation as a form of post conflict reconstruction

---

Statute of the International Criminal Court Regulations (GN R1089 in GG 23761 of 16 August 2002).

1792 See Du Plessis M 2010 *ASR*

1793 See Windhoek Plan of Action on ICC Ratification and Implementation in SADC, 2001. The Plan was adopted as a final document during the conference on international Criminal Court (ICC) Ratification and Implementation for the SADC region held at Windhoek Country Club Resort, Namibia on 28-30 May 2001.

1794 Rome Statute of the International Criminal Court, (1998). Art. 68

1795 Rome Statute of the International Criminal Court, (1998). Art. 79

mechanism to ensure their safety. Research can also be furthered in the area of African regional justice mechanisms with particular reference to the Malabo Protocol, the consequence of Article 46A *bis* on the general quest to bring to an end a culture of impunity.

BIBLIOGRAPHY

Books

Ambos K *Treaties on International Criminal Law*

Ambos K *Treaties on International Criminal Law, Volume 1: Foundations and General Part* (Oxford University press United Kingdom 2013)

Antonio C *et al The Rome Statute*

Antonio C *et al The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press Oxford 2002)

Arieh J. Kochavi *Prelude to Nuremberg*

Arieh J. Kochavi *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC, and London: (University of North Carolina Press 1998)

Badar M *The Concept of Mens Rea*

Badar M *The Concept of Mens Rea in International Criminal Law: The Case for a unified Approach* (Hart Publishing United State 2013)

Barnett L *The International Criminal Court*

Barnett L *The International Criminal Court: History and Role. Legal and legislative affairs division* (Library of Parliament 2008)

Barrat C *Statute of NGOs*

Barrat C *Statute of NGOs in International Humanitarian Law* (Martinus Nijhoff Publishers The Netherlands 2014)

Bassiouni C *International Criminal Law*

Bassiouni C *International Criminal Law: Sources, Subjects and Contents* (Martinus Nijhoff Publishers The Netherlands 2008)

Bassiouni M (ed.) *The Statute of the International Criminal Court*

Bassiouni M (ed.) *The Statute of the International Criminal Court: A Documentary History* (New York Transnational Publishers 1998)

Bassiouni M and Peter Manikas *The Law of the International Criminal Tribunal*

Bassiouni M and Peter Manikas *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York Transnational Publishers 1995)

Bassiouni M *Crimes against Humanity*

Bassiouni M *Crimes against Humanity in International Criminal Law,* 2nd rev. ed. (Cambridge Kluwer Law International 1999)

Bassiouni M *Crimes against Humanity*

Bassiouni M *Crimes against Humanity under International Criminal Law* (Martinus Nijhoff Publishers The Netherlands 1999)

Bassiouni M *Crimes Against Humanity*

Bassiouni M *Crimes Against Humanity: Historical evolution and Contemporary application.* (Cambridge University Press New York 2011)

Beigbeder Y *Judging War Criminals*

Beigbeder Y *Judging War Criminals: The Politics of International Justice* (St Martin's Press New York 1999)

Bendersky J *A History of Nazi Germany*

Bendersky J *A History of Nazi Germany: 1919–1945* (2nd ed.) (Chicago University Press Burnham, 2000)

Berry J and Berry C (eds) *Genocide in Rwanda*

Berry J and Berry C (eds) *Genocide in Rwanda: A Collective Memory.* (Washington DC Howard University Press 1999)

Bikundo E *International Criminal Law*

Bikundo E *International Criminal Law: Using or Abusing Legality?* (Ashgate Publishers USA 2014)

Bix H *Hirohito and the Making of Modern Japan*

Bix H *Hirohito and the Making of Modern Japan* (New York: Harper Collins Publishers 2000)

Boas G *et al International Criminal Law*

Boas G *et al International Criminal Law Practitioner Library Volume 1: Forms of responsibility in international criminal law* (Cambridge University Press New York 2007)

Boister N and Cryer R *The Tokyo International Military Tribunal*

Boister N and Cryer R *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press Oxford 2008)

Bonacker T and Safferling C *Victims of International Crimes*

Bonacker T and Safferling C *Victims of International Crimes: An Interdisciplinary Discourse* (Asser press The Hague The Netherlands 2013)

Bosco D *Rough Justice*

Bosco D *Rough Justice: The International Criminal Court's Battle to fix the world* (Oxford University Press New York 2014)

Boyle A and Chinkin C *The Making of International Law*

Boyle A and Chinkin C *The Making of International Law* (Oxford University Press Oxford 2007)

Brezina C *The Treaty of Versailles*

Brezina C *The Treaty of Versailles, 1919: A Primary Source Examination of the Treaty That Ended World War I*. Primary Sources of American Treaties (New York Rosen Central 2006)

Brown B *International Criminal Law*

Brown B *International Criminal Law: Nature, Origins and a Few Key Issues, in Research Handbook on International Criminal Law* (Bartram Brown ed.,) (Edward Elgar 2011)

Brown C and Ainley K *Understanding International Relations*

Brown C and Ainley K *Understanding International Relations* 4th *(ed.) Basingstoke*: (Palgrave Macmillan Publishers UK 2009)

Brownlie I *Principles of Public International Law*

Brownlie I *Principles of Public International Law* (Oxford University Press Oxford 1991)

Calvo-Goller K *The Trial Proceedings*

Calvo-Goller K *The Trial Proceedings of the International Criminal Court – ICTY and ICTR Precedents* (Martinus Nijhoff Publishers Netherlands 2006)

Carrier J *Positive Reinforcement*

Carrier J *Positive Reinforcement: Advocating for International Criminal Justice in Africa.* (Southern African Litigation Center Johannesburg, South Africa 2013)

Cassese A and Gaeta P *Cassese's international criminal law*

Cassese A and Gaeta P *Cassese's international criminal law* (Oxford University Press Oxford 2003)

Cassese A *The Role of the United Nations*

Cassese A *The Role of the United Nations in International Law* 2nd (ed.) (Oxford University Press New York 2005)

Cassese *et al International Criminal Law*

Cassese *et al International Criminal Law Cases and Comentary* (Oxford University Press New York 2011)

Cassese *et al International Criminal Law*

Cassese *et al International Criminal Law in (Cassese's 3rd ed.)* (Oxford University Press UK 2013)

Cerone J and SaCouto S *International Criminal Law*

Cerone J and SaCouto S *International Criminal Law: a discussion guide* (American University College of Law Washington D.C 2004)

Chan P *China, State Sovereignty*

Chan P *China, State Sovereignty and International Legal Order* (Hotei Publishing 2015)

Clark Roger S and Madeleine Sann (eds.) *The Prosecution of International Crimes*

Clark Roger S and Madeleine Sann (eds.) *The Prosecution of International Crimes. A Critical Study of the International Tribunal for the Former Yugoslavia. New Brunswick, NJ / London:* (Transaction Publishers 2002)

Courtney H *Domestic Politics*

Courtney H *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press New York 2014)

Creswell J.W *Research design*

Creswell J.W *Research design: Qualitative, quantitative and mixed methods approaches.* (London Sage Publications Ltd. 2014)

Cryer R *An introduction*

Cryer R *An introduction to international criminal law and procedure* (Cambridge University Press New York 2010)

Damgaard C *Individual Criminal Responsibility*

Damgaard C *Individual Criminal Responsibility for Core International Crimes: Selected pertinent Issues* (Springer Publications Denmark 2008)

Damplo D *More than Murder*

Damplo D *More than Murder: Prosecuting Crimes Against Humanity at the Nuremberg SS Einsatzgruppen Trial* (Columbia University Publication 2012)

David B *Rough Justice*

David B *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press Oxford 2014)

De Vos *et al Contested Justice*

De Vos *et al Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015)

De Vos *et al Research at Grass Roots*

De Vos *et al Research at Grass Roots: for Social Sciences and Human services professions* (Pretoria Van Schaik 2011)

De Vos *Research at Grass Roots*

De Vos *Research at Grass Roots: A Primer for the Caring Professions* (Pretoria Van Schaik 1998)

Dixit *et al International Criminal Jurisprudence*

Dixit *et al International Criminal Jurisprudence: Issues and Challenges* (Hope India Publications India 2009)

Du Plessis M *International Criminal Court*

Du Plessis M *International Criminal Court, the International Criminal Court and South Africa's Implementation of the Rome Statute* (Dugard J, International Law A South African Perspective 2005)

Duffy H *The 'War on Terror'*

Duffy H *The 'War on Terror' and the framework of international law* (Cambridge University Press Cambridge 2015)

Dugard J *Possible Conflicts of Jurisdiction*

Dugard J *Possible Conflicts of Jurisdiction with Truth Commissions, in The Rome Statute: of the International Criminal Court: A Commentary.* (700 Antonio Casesse et al (eds.) 2002)

Egelston A *Sustainable Development*

Egelston A *Sustainable Development*: A history. (Springer Publishers New York 2013)

Falk R and Black C *The future of the International Legal order*

Falk R and Black C *The future of the International Legal order, Volume 4: The structure of the international environment* (Princeton University Press United States 2015)

Fiona T *Condemn to repeat?*

Fiona T *Condemn to repeat? The Paradox of Humanitarian Action* (Cornell University Press London 1999)

Forsythe D *The Humanitarian*

Forsythe D *The Humanitarian: The International Committee of the Red Cross* (Cambridge University Press New York 2005)

Fowler J *Genocide in Darfur*

Fowler J *Genocide in Darfur: Investigating the Atrocities in the Sudan* (Routledge Taylor and Francis Group New York 2006)

Francis G. Jacobs and Robin C. A. White *The European Convention on Human Rights*

Francis G. Jacobs and Robin C. A. White *The European Convention on Human Rights*, (2nd ed.) (Oxford Clarendon Press 1996)

Frank M *The US War Crimes Trial Program*

Frank M *The US War Crimes Trial Program in Germany, 1946–1955* (Westport CT Greenwood Press 1989)

Friedman I *British Miscalculation*

Friedman I *British Miscalculation: The Rise of Muslim Nationalism, 1918-1925* (Transaction Publishers 2012)

Gaeta P and Jones J *The Rome Statute*

Gaeta P and Jones J *The Rome Statute of the International Criminal Court: A Commentary*, Volume 11 (Oxford University Press Oxford 2002)

Glasius M *The International Criminal Court*

Glasius M *The International Criminal Court: A global achievement* (Taylor and Francis Publishers New York 2006)

Goldberg G *The Peace to End Peace*

Goldberg G *The Peace to End Peace: The Paris Peace Conference of 1919* (New York Harcourt Brace and World 1969)

Goldstone R and Smith A *International Judicial Institutions*

Goldstone R and Smith A *International Judicial Institutions: The Architecture of International Justice at home and abroad* (London and New York Rutledge Publishers 2009)

Goldstone R *For humanity*

Goldstone R *For humanity: Reflections of war crimes investigator. New Haven, Connecticut* (Yale University Press 2000)

Gregory S *The trial of Pete Von Hagenbach*

Gregory S *The trial of Pete Von Hagenbach: Reconciling History, Historiography and International Criminal Law.* (The Chinese University School of Law Hong Kong CUHK 2012)

Grotius H *De Jure Pradae*

Grotius H *De Jure Pradae of the Law (of Captures)* (Oxford University Press London 1604)

Grotius H *The Authority of The Highest Powers*

Grotius H *The Authority of The Highest Powers About Sacred Things*, (translated into English by C. B. M.A London: Printed by T.W for Joshua Kirton 1651)

Grotius H *The Law of War and Peace*

Grotius H *The Law of War and Peace*, translated by Louise P. Loomis (Roslyn New York: Walter Black 1949)

Hague Institute for the Internationalisation of law *General rules*

Hague Institute for the Internationalisation of law *General rules and principles of international criminal procedure and recommendations of the international expert framework* (Oxford University Press Oxford 2011)

Heller K and Simpson G *The hidden history*

Heller K and Simpson G *The hidden history of War Crimes Trials* (Oxford University Press, United State of America 2013)

Helmreich P *From Paris to Sèvres*

Helmreich P *From Paris to Sèvres: The partition of the Ottoman Empire at the Peace Conference of 1919-1920* (Columbus Ohio Ohio University Press 1974)

Higgins R *UN Peacekeeping*

Higgins R *UN Peacekeeping 1946-1967, Documents and Commentary* (III Africa 1980)

Horvitz L and Catherwood C *Encyclopedia of War Crimes*

Horvitz L and Catherwood C *Encyclopedia of War Crimes and Genocide*. (Library of Congress publications United States 2006)

James F. Willis *Prologue to Nuremberg*

James F. Willis *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport CT: Greenwood Press 1982)

Jean-Cloude F *The Red Cross*

Jean-Cloude F *The Red Cross and the Holocaust* (Cambridge University Press Cambridge 1999)

Jose Doria *et al The legal regime*

Jose Doria *et al The legal regime of the International Criminal Court: Essays in honour of Professor Igor Blishchenko* (Martinus Ninjhoff Publishers Netherlands 2009)

Joshua G, *Justice at Dachau*

Joshua G, *Justice at Dachau: The trials of an American Prosecutor* (New York, Broadway Publishers 2003)

Judith J *Necessity, Proportionality*

Judith J *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press Cambridge 2011)

Kegley C *World Politics*

Kegley C *World Politics: Trends and Transformation* (Wadsworth USA 2007)

Kelvin P *The Challenges of Conflict*

Kelvin P *The Challenges of Conflict: International Law Response* (Martinus Nijhoff The Netherlands 2006)

Kenneth S *The Principle of Legality*

Kenneth S *The Principle of Legality in International and Comparative Criminal Law: Legality as a Rule of Customary International Law Today and Conclusion: The Endurance of Legality* (Cambridge University Press Cambridge 2009)

Kepe T *Secrets that kill*

Kepe T *Secrets that kill: Crisis, custodianship and responsibility in ritual male circumcision in the Eastern Cape province* (South Africa Social Science and Medicine 2010)

King C *The Moldovans*

King C *The Moldovans: Romania, Russia, and the Politics of Culture* (Hoover Institution Press Publication No. 472 United States of America 2000)

Kochavi A *Prelude to Nuremberg*

Kochavi A *Prelude to Nuremberg: Allied war crimes policy and the question of punishment* (The University of North Carolina Press 1998)

Koh T Lin L and Koh J *50 Years of Singapore*

Koh T Lin L and Koh J *50 Years of Singapore and the United Nations: World Scientific Politics Series on Singapore's 50 years of Nation Building* (Oxford University Press 2015)

Lamb S in Cassese P Gaeta and J.R.W.D. Jones (eds.) *The Rome Statute*

Lamb S in Cassese P Gaeta and J.R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court* (Vol. 1, 2002)

Lanz D *The ICC's Intervention*

Lanz D *The ICC's Intervention in Northern Uganda: Beyond the simplicity of Peace vs. Justice* (The Fletcher School of Law and Diplomacy 2007)

Latigo D and Kaburache A *Traditional justice*

Latigo D and Kaburache A *Traditional justice and reconciliation after violent conflict: learning from African experiences* (IDEA Publishers Stockholm Sweden 2008)

Lenin *Left-Wing" Communism*

Lenin, '"Left-Wing" Communism: An Infantile Disorder', in V.I. Lenin, Collected Works, vol. 31 (1966)

Lin S *Charles Darwin and Evolution*

Lin S *Charles Darwin and Evolution* (Rose Publishing Group Inc, New York 2012)

Louise M *Amnesty, Human rights*

Louise M *Amnesty, Human rights and political transition: Bridging the Peace and Justice Divide* (Hart Publishing Canada 2008)

Luc R *Universal Jurisdiction*

Luc R *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press Oxford 2002)

Maine and Sumner H *Ancient Law*

Maine and Sumner H *Ancient Law: Its Connection with the early history of society and relation to modern ideas (1861 first ed.)* (London: John Murray 1888)

Malekian F *Jurisprudence of international criminal justice*

Malekian F *Jurisprudence of international criminal justice* (Cambridge Scholar Publishing, Cambridge 2014)

Mamdani M *When Victims Become Killers*

Mamdani M *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda* (Pincetown NJ: Princetown University Press 2001)

Mamdani *The Politics of Naming*

Mamdani *The Politics of Naming: Genocide, Civil War, Insurgency* (London Rev Books 2007)

Mandel M *How America gets away with murder*

Mandel M *How America gets away with murder: illegal wars, collateral damage and crimes against humanity* (London: Pluto Press 2004)

Mandelbaum M *The Fate of Nations*

Mandelbaum M *The Fate of Nations: The Search for National Security in the Nineteenth and Twentieth Century* (Cambridge University Press Cambridge 1998)

Manfred *et al The Treaty of Versailles*

Manfred *et al The Treaty of Versailles: A reassessment after 75 years* (Cambridge University Press Cambridge 1998)

Marczyk et al *Essentials of research design*

Marczyk et al *Essentials of research design and methodology: Essentials of behavioural science series* (Hoboken NJ US: John Wily and Sons Inc 2005)

Materu S *The Post-Election Violence*

Materu S *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (Springer 2014)

McCormack T and Blumenthal D *The Legacy of Nuremberg*

McCormack T and Blumenthal D *The Legacy of Nuremberg: Civilising Influence of Institutional Vengeance?* (Martinus Nilhoff Publishers The Netherlands 2008)

McCoubrey *International Humanitarian Law*

McCoubrey *International Humanitarian Law and United Nations Military Actions in the 'New World Order, in University of Nottingham, International Law and Armed Conflict: Commentary* (Anon 1994)

McDonald A "*The Year in Review*

McDonald A "*The Year in Review*" Yearbook of International Humanitarian Law. (ASSER PRESS The Hague Netherlands Anon)

McDonald Gabrielle Kirk and Olivia Swaak-Goldman (eds.) *Substantive*

McDonald Gabrielle Kirk and Olivia Swaak-Goldman (eds.) *Substantive and Procedural Aspects of International Criminal Law* (Martinus Nijhoff Publishers The Hague 2000)

Mega P *Judgement at Tokyo*

Mega P *Judgement at Tokyo: The Japanese War Crimes Trials* (University of Kentucky Press 2001)

Mendes P *Global Governance*

Mendes P *Global Governance, Human Rights and International Law: Combating the tragic flaw* (Routledge Taylor and Francis Publishers UK 2014)

Merriam S *Qualitative Research*

Merriam S *Qualitative Research: A Guide to Design and Implementation* (USA: Jossey Bass 2009)

Minear R *Victors' Justice*

Minear R *Victors' Justice: The Tokyo War Crimes Trial* (Princeton University Press Princeton 1971)

Morris V and Scharf M *An Insider's Guide*

Morris V and Scharf M *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (New York Transnational Publishers 1995)

Murphy M *Piracy and UNCLOS*

Murphy M *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy? in violence at sea: piracy in the age of terrorism* 163 (Peter Lehr, ed. 2007)

Myburgh and Poggenpoel *Qualitative methods*

Myburgh and Poggenpoel *Qualitative methods: A research approach worth considering* (Guest editors 2007)

Nigel D and Henderson C *Research handbook*

Nigel D and Henderson C *Research handbook on International Conflict and Security Law*. (Edward Elgar Publications UK 2013)

Olasolo H *The Triggering Procedure*

Olasolo H *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff Publishers The Netherlands 2005)

Phil Clark *et al Tensions in Transitional Justice*

Phil Clark *et al Tensions in Transitional Justice in after Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation In Rwanda and Beyond 381* (Phil Clark and Zachary D. Kaufman eds, 2009)

Piaget J *The moral judgment*

Piaget J *The moral judgment of the child* (Routledeg and Kegan Paul Publishers 1946)

Pierre H *Justice in a time of war*

Pierre H *Justice in a time of war: the true story behind the International Criminal Tribunal for the former Yugoslavia* (Texas A and M University Press College Station USA 2004)

Posner G. J. and Rudnitsky A. N *Course Design*

Posner G. J. and Rudnitsky A. N *Course Design: A Guide to Curriculum Development for Teachers* (5th edition New York: Longman 1997)

Project Report *Expeenditing Proceedings*

Project Report *Expeenditing Proceedings at the International Criminal Court:* War Crimes Research Office; *International Criminal Court Legal Analysis and Education Project* (Washington College of Law 2011)

Quach T *The crisis in Darfur*

Quach T *The crisis in Darfur: An analysis of its origin and storylines* (Virginia Polytechnic Institute and State University Virginia 2004)

Reinisoh A *The Convention*

Reinisoh A *The Convention on the Privileges and Immunities of the United Nations and its Specialised Agencies: A Commentary* (Oxford University Press Oxford 2016)

Resenberg *et al Reconstructing atrocity prevention*

Resenberg *et al Reconstructing atrocity prevention* (Cambridge University Press Cambridge 2015)

Robert O *Genocide in Darfur*

Robert O *Genocide in Darfur: Investigating the atrocities in the Sudan* (*Routledge Taylor and Francis Group* New York 2006)

Roberts and Kingsbury *Introduction*

Roberts and Kingsbury *Introduction: The UN's Roles* 2nd (ed.) (1993)

Röling B *Introduction in: J.W. Dower*

Röling B *Introduction in: J.W. Dower, Embracing defeat: Japan in the wake of World War II* (New York: Norton 1999)

Roosevelt *et al Moscow Declaration*

Roosevelt *et al Moscow Declaration on atrocities* (United Nations Information Organisation London: United Nations 1945)

Sandholtz W *Creating Authority*

Sandholtz W *Creating Authority by the Council: The International Criminal Tribunals in the UN Security Council and the Politics of International Authority* (Bruce Cronin and Ian Hurds eds. 2008)

Schabas A *Genocide in International Law*

Schabas A *Genocide in International Law: The Crime of Crimes* (Cambridge University Press Cambridge 2000)

Schabas and Bernaz *Routledge Handbook*

Schabas and Bernaz *Routledge Handbook of International Criminal law* (Taylor and Francis Publication New York 2011)

Schabas W *An Introduction*

Schabas W *An Introduction to the International Criminal Court* (Cambridge Cambridge University Press 2001)

Schiffer B *Building the International Criminal Court*

Schiffer B *Building the International Criminal Court* (Cambridge University Press Cambridge 2008)

Schomerus M *The Lord Resistance Army*

Schomerus M *The Lord Resistance Army in Sudan: A history and overviews* (The Small Arms Survey Publishers Geneva Switzerland 2007)

Shakespeare W *The Life of Henry the Fifth*

Shakespeare W *The Life of Henry the Fifth* (act III, sc. vi 1599)

Shaw M *International Law*

Shaw M *International Law* (Cambridge University Press Cambridge 1998)

Shelton D *Remedies in International Law*

Shelton D *Remedies in International Law* (Oxford University Press Oxford 2000)

Shire W *The Rise and Fall*

Shire W *The Rise and Fall of the Third Reich: A History of Nazi Germany* (New York: Simon and Schuster; 1st Touchstone edition New York 1990)

Steinke R *The Politics of International Criminal Justice*

Steinke R *The Politics of International Criminal Justice: German perspectives from Nuremberg to the Hague* (Hart Publishing United Kingdom 2012)

Strydom *et al International Human Rights Standards*

Strydom *et al International Human Rights Standards: "Administration of Justice".* Volume 1, (Butterworths 1997)

Sudan Bar Association *Statement of the Sudan Bar Union*

Sudan Bar Association *Statement of the Sudan Bar Union to all People, 19 July 2008, in Sudan Bar Association (ed.), Legal Studies of the Impact of a Memorandum Submitted by the Prosecutor of the ICC on Darfur* (2008)

Sunga L *The Emerging system*

Sunga L *The Emerging system of International Criminal Law: Developments in codification and implementation* (Martinus Nijhoff Publishers The Netherlands 1997)

Tabeau E *Conflict in numbers*

Tabeau E *Conflict in numbers: Casualties of the 1990 wars in the Former Yugoslavia (1991-1999)* Testimonies Volume 33, Published by the (Helsinki Committee for Human Rights in Serbia 2009)

Takemura H *International Human Rights*

Takemura H *International Human Rights to Conscientious objections to Military Service and Individual Duties to Disobey Manifestly illegal orders* (Library of Congress Germany 2009)

Taylor T *Final Report*

Taylor T *Final Report of the Secretary of the Army on the Nuremberg War Crimes Trial under Control Council Law No. 10*. (Brigadier General USA Chief of Council for War Crimes Washington D.C 1949)

Taylor T *The Anatomy of the Nuremberg Trials*

Taylor *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf 1992)

Tolsty L *The Security Council*

Tolsty L *The Security Council: A study in Adolescence* (Macmillan Publishers New York 1973)

Tomuschat C *The United Nations at Age Fifty*

Tomuschat C *The United Nations at Age Fifty: A Legal Perspective* (Martinus Nijhoff Publishers The Netherlands 1995)

Totani Y *The Tokyo War Crimes Trial*

Totani Y *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*. (Cambridge Mass: Harvard University Press 2009)

Van Ransburg G *Research in the social sciences*

Van Ransburg G *Research in the social sciences* (University of South Africa Pretoria: Muckleneuk 2009)

Von Habel H and Robinson D *Crimes within the jurisdiction of the Court*

Von Habel H and Robinson D *Crimes within the jurisdiction of the Court in R.S. Lee (ed.), The International Criminal Court. The Making of the Rome Statute* (Anon 1999)

Weiss *et al The Reality*

Weiss *et al The Reality of UN Security Efforts During the Cold War in The United Nations and Changing World Politic* (Boulder Publishers Westview 1994)

Werle G and Jessberger *Principles of International Criminal Law*

Werle G and Jessberger *Principles of International Criminal Law* (Oxford University Press Oxford 2014)

Werle G *Principles of International Criminal Law*

Werle G *Principles of International Criminal Law* (Published by T.M.C. ASSER PRESS The Netherlands 2005)

Chapters in books

Adriaan Bos "From the International Law Commission to the Rome Conference"

Adriaan Bos "From the International Law Commission to the Rome Conference" *(1994–1998)',* in Antonio Cassese, Paola Gaeta and John R. W. D. Jones, (eds.),

The Rome Statute of the International Criminal Court: A Commentary (Oxford: Oxford University Press 2002)

Adriaan Bos, "The International Criminal Court: A Perspective,"

Adriaan Bos, "The International Criminal Court: A Perspective," *in Roy S. Lee (ed.). The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results.* (The Hague: Kluwer law International 1999)

Asaala "Prosecuting Crimes Related to the 2007 Post-Election Violence"

Asaala E "Prosecuting Crimes Related to the 2007 Post-Election Violence" in Kenyan Courts: Issues and Challenges, cited in Van der Merwe H, International Criminal Justice in Africa, Issues, Challenges and Prospects. HJ Van der Merwe Gerhard Kemp (eds), (Strathmore University Press 2016)

Asaala *The African Court of Justice* Van der Merwe (eds.)

Asaala E *The African Court of Justice and Human and People's Right: An Opportunity for International Criminal Justice* Van der Merwe's (eds.) International Criminal Justice in Africa; Challenges and Opportunities (Konard Adenauer Stifting, 2014)

Bachmann S "Today's Quest for International Criminal Justice"

Bachmann S "Today's Quest for International Criminal Justice" - *a Short Overview of the Present State of Criminal Prosecution of International Crimes. INTERNATIONAL LAW AND ARMED CONFLICT,* Quénivet N. and Shah-Davis S. eds., (T.M.C.ASSER PRESS 2010)

Bassiouni M, "Historical Survey: 1919–1998,"

Bassiouni M, "Historical Survey: 1919–1998," in ed. M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Transnational Publishers Ardsley N.Y. 1998)

Batohi *Africa and the International Criminal Court* G. Werle *et al* (eds.)

Batoli S "*Africa and the International Criminal Court: A prosecutor's perspective* in G. Werle *et al* (eds.), Africa and the International Criminal Court, International Criminal Justice Series, (Springer Publishers, Accer Press, 2014)

Benzing M *The Complementarity Regime*

Benzing M *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity.* A. Von Bogdandy and R. Wolfrum (eds.) (Max Plank Yearbook of United Nations Law 2003)

Blaksley "Jurisdiction Issue and Conflict of Jurisdiction"

Blaksley C "Jurisdiction Issue and Conflict of Jurisdiction" *in Bassiouni M (ed.) Legal Responses to International Terrorism: U.S. Procedural Aspects,* Dordrecht: (Matinus Nijhoff publishers Boston 1998)

Bloxham D and Devin P *Punishment as Prevention?*

Bloxham D and Devin P *Punishment as Prevention? The Politics of Punishing Génocidaires. In The Oxford Handbook of Genocide Studies, ed. Donald Bloxham and A. Dirk Moses* (New York Oxford University Press 2010)

Boas "What's in a Word"

Boas G "What's in a Word"*: The Nature and Meaning of International Criminal Justice, in Gideon Boas, William A. Schabas and Michael P. Scharf (eds.), International Criminal Justice*: Legitimacy and Coherence, (Edward Elgar 2012)

Brown "Ethnic and Internal Conflicts Causes and Implications"

Brown M "Ethnic and Internal Conflicts Causes and Implications" *cited in Crocker et al., TURBULENT PEACE The Challenges of Managing International Conflict* (United States Institute of Peace United States 2006)

Cassese cited in Brown B "International criminal law"

Cassese A cited in Brown B "International criminal law"*: nature, origins and a few key issues.* (Edward Elgar Publishing Limited USA 2011)

Clark "Grappling in the Great Lakes"

Clark "Grappling in the Great Lakes": *The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda*', in B. Bowden, H. Charlesworth, and J. Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (Anon 2009)

Clark "Law, Politics and Pragmatism"

Clark P "Law, Politics and Pragmatism": The ICC and Case Selection in Uganda and the Democratic Republic of Congo', in Waddell N and Clark P (eds), Courting Conflict? Justice, Peace and the ICC in Africa (London: Royal Africa Society 2008)

De Waal "Darfur, the Court and Khartoum"

De Waal "Darfur, the Court and Khartoum": The Politics of State Non-Cooperation', in N. Waddell and P. Clark (eds), *Courting Conflict?* (Justice, Peace and the ICC in Africa 2008)

Dormann "War Crimes under the Rome Statute of the International Criminal Court"

Dormann K "War Crimes under the Rome Statute of the International Criminal Court" *with a Special Focus on the Negotiations on the Elements of Crime.* A von Bogdandy and R. Wolfrum (eds.) (Max Planck Year Book of United Nations Law Volume 7 2003)

Dunbabin J "The United Nations in International Relations since 1945"

Dunbabin J "The United Nations in International Relations since 1945"*: A History in Two Volumes*, *Vol.2 The Post-Imperial Age: the Great Powers and the Wider World* 2nd (ed.) (Longman Publications 2007)

Forsythe "Human Rights in International relations"

Forsythe P. David "Human Rights in International relations", *Cambridge University Press*, 200, cited in Birdsall A., The International Politics of Judicial intervention: Creating a more just order, The New International Relations Series Routeledge London and New York 2009)

Gerhard W "Principles of International Criminal Law"

Gerhard W "Principles of International Criminal Law" *(*2005), Part One (A); Antonio Cassese, From Nuremberg to Rome: International Military Tribunals to the International Criminal Court, in: Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of an International Criminal Court: A Commentary* (Vol. 1, 2002)

Glasius "Expertise in the Cause of Justice"

Glasius M "Expertise in the Cause of Justice"*: Global Civil Society Influence on the Statute for an International Court,* in Marlies Glasius, Mary Kaldor ve Helmut Anheier (eds.), *Global Civil Society 2002* (Oxford: Oxford University Press, 2002)

Guaqueta *The way back* Berdal and Ucko (eds.)

Guaqueta A, *The way back in: reintegrating illegal armed groups in Colombia then and now* Berdal and Ucko (eds.) Reintegrating Armed Groups After Conflict: Politics, Violence and Transition, Abingdon (Routledge, 2009)

Howard M "The United Nations and International Security"

Howard M "The United Nations and International Security" in Roberts, A. and B. Kingsbury (eds.), *United Nations, Divided World: The UN's Roles in International Relations* 2nd (ed.), (Oxford University Press Clarendon 1993)

Jeßberger Africa and the International Criminal Court, then and now

Jeßberger F Africa and the International Criminal Court: then and now, G Werle et al (eds.) 155Africa and the International Criminal Court, International Criminal Justice Series, (Springer Publishers, Accer Press, 2014)

Jules Deschênes "Toward International Criminal Justice,"

Jules Deschênes "Toward International Criminal Justice," in Roger S. Clark and Madeleine Sann, (eds.) The Prosecution of International Crimes (New Brunswick NJ: Transaction Publishers 1996)

Kemp *Tacking stock of International Criminal Justice* Van der Merwe (eds.)

Kemp G *Tacking stock of International Criminal Justice in Africa-Three inventories considered* Van der Merwe (eds), International Criminal Justice in Africa: Challenges and Opportunities (Konrad Adenauer Stiftung and Authors, 2014)

Kleffner J *et al* The Relationship between Internationalized Courts

Kleffner J *et al* "The Relationship between Internationalized Courts and National Courts"*, in: C. Romano et al. (eds.), Internationalized Criminal Courts and Tribunals* (Anon 2004)

Kolb "The Exercise of Criminal Jurisdiction over International Terrorists"

Kolb R "The Exercise of Criminal Jurisdiction over International Terrorists" *in A. Bianchi (ed.), Enforcing International Law Norms Against Terrorism* (Hart Publishers Oxford 2004)

Mattioli and Woudenberg *"Global Catalyst for National Prosecutions"*

Mattioli G and Woudenberg A. *"Global Catalyst for National Prosecutions"? The ICC in the Democratic Republic of Congo,* cited in Nicholas W and Phill C. Courting Conflicts? Justice, Peace and the ICC in Africa. Royal Africa Soceity (The Hague The Netherlands 2008)

Maunganidza *Uganda's International Crimes Division* Van der Merwe (eds.)

Maunganidza O, *Uganda's International Crimes Division: A Step in the Right Direction* Van der Merwe (eds.) International Criminal Justice in Africa; Challenges and Opportunities (Konard Adenauer Stifting, 2014)

Miyazaki S "The Martens Clause and international humanitarian law"

Miyazaki S "The Martens Clause and international humanitarian law"*,* in Swinarsky C (ed.), *Studies and Essays in Honour of Jean Pictet* (ICRC Geneva 1984)

Monageng S "Africa and the International Criminal Court"

Monageng S Africa and the International Criminal Court: then and now, G Werle e*t al* (eds.) International Criminal Justice Series Volume 1 Springer Publication (Accer Press 2014)

Murithi "Between political justice and judicial politics"

Murithi T Between political justice and judicial politics: Charting a way forward for the African Union and the International Criminal Court, G Werle et al (eds.) International Criminal Justice Series Volume 1 Springer Publication (Accer Press 2014)

Obura *Duty to prosecute international crimes* in C. Murungu and J. Biegon (eds.)

Obura K Duty to prosecute international crimes under international law in C. Murungu and J. Biegon (eds.), Prosecuting International Crimes in Africa (Pretoria University Law Press, 2011)

Odero *Politics of International Criminal Justice* C. Murungu and J. Biegon (eds.)

Odero S *Politics of International Criminal Justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis* in C. Murungu and J. Biegon (eds.), Prosecuting International Crimes in Africa (Pretoria University Law Press, 2011)

Okoh "Africa, the United Nations Security Council"

Okoh J "Africa, the United Nations Security Council" and the International Criminal Court: The Question of Deferrals; Werle G et al. (eds.), Africa and the International Criminal Court, International Criminal Justice Series, Volume 1, (Asser Press The Netherlands 2014)

Olugbo *Nigeria and the International Criminal Court* Van der Merwe (eds.)

Olugbo B, *Nigeria and the International Criminal Court: Challenges and Opportunities* Van der Merwe (eds.) International Criminal Justice in Africa; Challenges and Opportunities (Konard Adenauer Stifting, 2014)

Olugbuo Positive complementarity in C. Murungu and J. Biegon (eds.)

Olugbuo B Positive complementarity and the fight against impunity in Africa in C. Murungu and J. Biegon (eds.), Prosecuting International Crimes in Africa (Pretoria University Law Press, 2011)

Overy "The Nuremberg Trials"

Overy R "The Nuremberg Trials"*: International Law in the Making in P Sands (ed) From Nuremberg to The Hague. The Future of International Criminal Justice* (Cambridge University Press Cambridge 2003)

Per Saland "International Criminal Law Principle"

Per Saland "International Criminal Law Principle" *in Roy S. Lee (Ed), "The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results"*. (Kluwer Law International 1999)

Reason "Doing co-operative inquiry"

Reason P "Doing co-operative inquiry" In Smith, J. (ed.). 2001. Qualitative Psychology: A Practical Guide to Methods (London: Sage 2001)

Roberts A and Kingsbury B (eds.) "Introduction"

Roberts A and Kingsbury B (eds.) "Introduction"*: The UN's Roles in a Divided World in United Nations, Divided World: The UN's Roles in International Relations* 2nd (ed.) (Oxford University Press Clarendon 1993)

Roy Lee "The Rome Conference and Its Contributions to International Law"

Roy Lee "The Rome Conference and Its Contributions to International Law", in Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International 1999)

Sarooshi *"The peace and justice paradox"*

Sarooshi D. *"The peace and justice paradox": the international criminal court and the UN Security Council* in McGoldrick *et al* (eds) The permanent International Criminal Court: legal and policy issues (Anon 2004)

Schwarzenberger G "The Judgement of Nuremberg"

Schwarzenberger G "The Judgement of Nuremberg" *cited in Mettraux G, Perspective on the Nuremberg Trial* (Oxford University Press New York 2008)

Seibert-Fohr The relevance of the Rome Statute

Seibert-Fohr A "The relevance of the Rome Statute of the International Criminal Court" *for Amnesties and Truth Commissions, von Bogdandy and R Wolfrum (eds.)* (Max Plank Yearbook of United Nations Law Volume 7 2003)

Tiba "The Trial of Mengistu"

Tiba F 2011, *The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions in Ethiopia, in Prosecuting International Crimes in Africa*, (Pretoria University Law Press, 2011)

Trendafilova "Africa and the International Criminal Court"

Trendafilova E Africa and the International Criminal Court: A judge's perspective, G Werle et al (eds.) International Criminal Justice Series Volume 1 Springer Publication (Accer Press 2014)

Weiss and Kalbacher "The United Nations"

Weiss T and Kalbacher D "The United Nations" *in Williams, P.D (ed.) Security Studies: An Introduction* (Routledge Publishers Abingdon OX 2008)

Werle G and Burghardt B "Establishing Degrees of Responsibility"

Werle G and Burghardt B "Establishing Degrees of Responsibility"*: Modes of Participation in Article 25 of the ICC Statute (February 9, 2013). Van Sliedregt, E./Vasiliev, S. (eds.), Pluralism in International Criminal Law* (Oxford University Press Oxford 2014)

Yves Beigbeder "Judging War Criminals"

Yves Beigbeder "Judging War Criminals"*: The Politics of International Justice* (New York: St. Martin's, 1999), pp. 4-5, cited in *Paul Bowers, The International Criminal Court Bill* (HL, Bill 70 of 2000-2001)

Zimmermann A "The International Criminal Court"

Zimmermann A, "*The International Criminal Court – The making of the Rome Statute: Issues, Negotiations and Results"*, Roy S. Lee (ed.), (Max Planck Yearbook of United Nations Law, Volume 4, Issue 1, 2000)

Conference Contributions

Pio W and Timo M A Resolution

Pio W and Timo M "A Resolution for a Quiet Revolution: From the QCPR to Sustainable Development "Beyond Aid"" *German Development Institute Discussion Paper 12* (2013) Anon

Somavia J The Humanitarian Responsibility

Somavia J "The Humanitarian Responsibility of the United Nations Security Council: Ensuring the security and wellbeing of the people" *Socum Policy Forum,* (New York 1996) Anon

McCormack T and Simpson G The International Law

McCormack T and Simpson G "The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions" *5 Criminal Law Forum 1* (1994) 21

Viout J-O The Klaus Barbie

Viout J-O "The Klaus Barbie Trial and Crimes against Humanity" *Hofstra Law and Political Symposium, Volume 3* (1999) 155

Linton S Cambodia, East Timor

Linton S "Cambodia, East Timor and Sierra Leone: Experiments in international justice" *Criminal Law Forum 12: Kluwer Academic Publishers* (The Netherlands 2001) 185-246

Scheffer D US Ambassador-at-large

Scheffer D "US Ambassador-at-large for War Crimes and Head of the US Delegation to the UN Conference" *Press Conference at the Foreign Press Center* (July 1998 Washington D.C) 12

Bensouda F International Media Conference

Bensouda F "International Media Conference on the Battle against Impunity: Chinks in the Armor – Does the ICC Target Africa: Is the ICC Selectively Prosecuting Cases?" (6 July- 2011 Gaborone) 5

Roger C The Mental Element

Roger C "The Mental Element in Interna-tional Criminal Law: The Rome Statute of the International Criminal Court and the Elements of the Offences" *Criminal Law Forum* (2001)

Hoover V Universal Jurisdiction

Hoover V "Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court" *Cornell Law School Inter-University Graduate Student Conference Papers* (2011) 52

Bujra A African Conflicts

Bujra A "African Conflicts: Their causes and their political and social environment", Development Policy Management Forum Occasional Papers, No. 4, (2002) 1

Thesis and dissertations

Chinedu O *Implementing the Rome Statute*

Chinedu O *Implementing the Rome Statute of the International Criminal Court domestically: a comparative analysis strategies in Africa* (LLM-dissertation University of the Western Cape 2003)

Endoh F *The Efficacy of the United Nations*

Endoh F *The Efficacy of the United Nations in conflict resolution: A study of the response of the Security Council to the Darfur conflict in the Sudan.* (LLM-dissertation University of Fort Hare 2012)

Mutabazi E *The United Nations*

Mutabazi E *The United Nations ad hoc Tribunals' effectiveness in prosecuting international crime.* (PhD-thesis University of South Africa, 2014)

Raimondo F *General principles of law*

Raimondo F *General principles of law in the decision of international courts and tribunals,* (PhD-thesis University of Amsterdam 2007)

Rosa R *The duty to prosecute*

Rosa R *The duty to prosecute under International Human rights Law versus Prosecutions Under Transitional Justice: The needed convergence of theoretical and normative concepts, and practical obstacles for victims' right to justice.* (LLM-dissertation Tilburg University 2014)

Sjostrom M *The initiation of an investigation*

Sjostrom M *The initiation of an investigation Proprio Motu by the Prosecutor of the ICC-A Reasonable Basis to Proceed?* (LLM-dissertation Uppsala University 2014)

Taddese A *Jurisdiction of the ICC*

Taddese A *Jurisdiction of the ICC on Nationals of Non-party States to the Rome Statute.* (LLM-dissertation University of Addis Abbaba 2014)

Wilson H *An action research case study*

Wilson H *An action research case study of active learning through dialogue, action and structure in self-study distance education packages* (Unpublished Masters dissertation University of South Africa 2003)

Articles

Abass 2013 *EJIL*

Abass A "Prosecuting international crimes in Africa: Rationale, Prospects and Challenges" 2013 *EJIL* 934

Abtahi and Arrigg Koh 2012 *CILJ*

Abtahi and Arrigg Koh "The Emerging Enforcement Practice of the International Criminal Court" *CILJ* 1-23

Adeagbo 2011 *JPL*

Adeagbo A "Post-Election Crisis in Kenya and Internally Displaced Person: A Critical Appraisal" *JPL* Anon

Adudans *et al* 2011 *AJRH*

Adudans *et al* "Prevalence of forced sex and associated factors among women and men in Kisumu, Kenya" *AJRH* 8

Akande 2003 *JICJ*

Akande D "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and limits" *JICJ* 618-650

Akhavan 1996 *AJIL*

Akhavan P "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment" *AJIL* 501

Akhavan 2005 *AJIL*

Akhavan "Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court" *AJIL* 404

Akhavan 2003 *AJIL*

Akhavan, "The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability" *AJIL* 716

Allen 1991 *A*

Allen T, "Understanding Alice: Uganda's Holy Spirit Movement in context" *A* 370-399

Allott 1999 *EJIL*

Allott P "The Concept of International Law" *EJIL* 31-50

Ambos 1996 *EJIL*

Ambos K "Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint" *EJIL* 519-544

Ambos 2006 *JICJ*

Ambos K, "Remarks on the General Part of International Criminal Law"*, JICJ* Anon

Anderson 2009 *EJIL*

Anderson K "The Rise of International Criminal Law: Intended and Unintended Consequences." *EJIL* 331-358

Andreasen 2000 *ILR*

Andreasen S "The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?" *ILR* 703

Annacker 1994 *AJPIL*

Annacker C "The Legal Regime of 'Erga Omnes' Obligations and International Law" *AJPIL* 131

Annan 1997 *FILJ*

Annan K "Advocating for an International Criminal Court" *FILJ* 363

Anne-Sophie 2006 *BJIL*

Anne-Sophie M "NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion" *BJIL* 610

Araujo 2000 *FILJ*

Araujo F "Sovereignty, Human Rights, and Self-Determination: The meaning of international law" *FILJ* 1477

Arbour 1999 *WUJLP*

Arbour L "The Prosecution of International Crimes: Prospects and Pitfalls" *WUJLP* 16

Aremu 2010 *ARR*

Aremu J "Conflicts in Africa: Meaning, Causes, Impact and Solution" *ARR* Anon

Arieff 2009 *CRS*

Arieff *et al* "International Criminal Court Cases in Africa: Status and Policy Issues" *CRS* Anon

Arimatsu 2010 *CH*

Arimatsu L "*Universal Jurisdiction for International Crimes: Africa's Hope for Justice" CH Anon*

Armstead 1998 *SCLR*

Armstead J "The International Criminal Court: History, Developments and Status" *SCLR* 745-835

Armstrong 2014 *DC*

Armstrong K "Justice without Peace? International justice and conflict resolution in Uganda" *DC* 589-607

Arnault 2003 *VJIL*

Arnault D "When in Rome? The International Criminal Court and the Avenues for U.S. participation" *VJIL* 193-199

Babatunde 2015 *ASR*

Babatunde A "Youth uprising and the quest for political reform in Africa" *ASR* 107-121

Bachmann 2007 *JSAL*

Bachmann S "The quest for international criminal justice-the long road ahead" *JSAL* 716-734

Bachmann 2007

Bachmann S "The legacy of the Nuremberg trials 60 years on" *JSAL* 532-550

Badar 2013 *JICJ*

Badar M "The concept of mens rea in international criminal law: The case for a unified approach" *JICJ* 933-936

Baker 2010 *EJIL*

Baker R "Customary International Law in the 21st Century: Old Challenges and New Debates" *EJIL* 173-204

Barria 2005 *IJHR*

Barria L and Roper S "*How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR" IJHR* 349-368

Barnes 2011 *FILJ*

Barnes G "The International Criminal Court's Ineffective Mechanisms: The Indictment of President Omar Al Bashir" *FILJ* 1585

Barrie 2012 *SAYIL*

Barrie G "A bird's view of international law in the twentieth century: Frome the Hague Peace Conference to the Kyoto Protocol: notes and comments" *SAYIL* 216-231

Bassiouni 2010 *VJIL*

Bassiouni M, "Perspectives on international criminal justice" *VJIL* 318

Bassiouni 1999 *CILJ*

Bassiouni M "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" *CILJ* 443

Bassiouni 1997 *DJILP*

Bassiouni M "Observations Concerning the 1997–98 Preparatory Committee's Work" *DJILP* 397

Bassiouni 1990 *MJIL*

Bassiouni M "A Functional Approach to "General Principles of International Law" *MJIL* 801-09

Bassiouni 1997 *HHRJ*

Bassiouni M "From Versailles to Rwanda in *Seventy-Five* Years: The Need to Establish a Permanent International Court" *HHRJ* 8

Bassiouni 1996 *LCP*

Bassiouni M "International Crimes: Jus Cogens and Obligations Erga Omnes" *LCP* 63-74

Bassiouni 2003 *CWRJIL*

Bassiouni M "Justice and peace: the importance of choosing accountability over realpolitik" 2003 *CWRJIL* 196

Bassiouni 2002 *VJIL*

Bassiouni M "Universal Jurisdiction for International Crimes: Historical Perspective and Contemporary Practice" *VJIL* 81

Beard 2011 *GMEJ*

Beard M "The Children of Northern Uganda: The Effects of Civil War" *GMEJ* 4-18

Becker 2010 *RIDP*

Becker S.W "The objections of large nations to the International Criminal Court" *RIDP* 47

Bekou and Cryer 2007 *ICLQ*

Bekou O and Cryer R "The International Criminal Court and Universal Jurisdiction: A Close Encounter?" *ICLQ* 49

Bento 2011 *BJIL*

Bento L "Towards an International Law of Piracy Sui Generis: How the dual Nature of Maritime Piracy law enables piracy to flourish" *BJIL* 401

Beresford 2001 *ICLR*

Beresford S "Unshackling the paper tiger-the sentencing practice of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda" *ICLR* 41

Bettez 1988 *RJ*

Bettez J "Unfulfilled Initiative: Disarmament Negotiations and the Hague Peace Conferences of 1899 and 1907" *RJ* 57–62

Bianchi 1999 *EJIL*

Bianchi A "Immunity versus Human Rights: The Pinochet Case" *EJIL* 237-277

Bibas and Burke-White 2010 *DLJ*

Bibas S and Burke-White W "International Idealism Meets Domestic-Criminal-Procedure Realism" *DLJ* 637

Binder 1986 *YLJ*

Binder G "Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie" *YLJ* 1321

Bisongo *et al* 2015 *EJC*

Bisongo *et al* "The international classification of crime for statistical purposes: A new instrument to improve comparative criminology research" *EJC* 5

Black 2009/2010 *AYIHL*

Black C, "Some reasons for considering why the ICC may not be considered as an anti-African institution" *AYIHL* 19

Blumenson 2006 *CJTL*

Blumenson E "The Challenge of a Global Standard of Justice: Peace, Pluralism and Punishment at the International Criminal Court" *CJTL* 801-874

Bosco 2011 *MSJIL*

Bosco D "The International Criminal Court and crime prevention: By product or conscious goal?" *MSJIL* 163

Brook Sari Moshan 1998 *FILJ*

Brook Sari Moshan "Women, War, and Words: The Gender Component in the Permanent international Criminal Court's Definition of Crimes against Humanity" *FILJ* 165

Bujra 2002 *DPMF*

Bujra A "African Conflicts: Their Causes and their Political and Social Environment" *DPMF* Anon

Burke-White 2011 *MJIL*

Burke-White W "A Community of Courts: Toward a System of International Criminal Law Enforcement" *MJIL* 15–16

Burke-White 2008 *HILJ*

Burke-White W "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" *HILJ* Anon

Cassese 1999 *EJIL*

Cassese A "The Statute of the International Criminal Court: Some Preliminary Reflections" *EJIL* 144-177

Chirwa 1998 *SAJCJ*

Chirwa D "The Implications of the Emerging Jurisprudence in International Criminal Law for Penal Regimes in Post-independent Africa" *SAJCJ* 193-219

Clark 2010 *GJIL*

Clark R "Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court" *GJIL* 689

Claude 1994 *FILJ*

Claude I "The United Nations of the Cold War: Contributions to the Post-Cold War Situations" *FILJ* 789

Coban-Ozturk 2014 *ESJ*

Coban-Ozturk E, "The International Criminal Court, Jurisdiction and the Concept of Sovereignty" *ESJ* 141-155

Cole 2014 *MJIL*

Cole R "Africa's Relationship with the International Criminal Court: More Political than Legal" 2014 *MJIL* 4

Conklin 2012 *EJIL*

Conklin W, "The Peremptory Norms of the International Community" *EJIL* 837-861

Corell 2013 *WUGSR*

Corell H "Reflections on International Criminal Justice: Past, Present and Future" *WUGSR* 621

Corell 1995 *MLR*

Corell "Nuremberg and the Development of an International Criminal Court" *MLR* 99

Crane 2006 *AUILR*

Crane D "International Criminal Tribunals in the 21st Century: Terrorists, Warlords, and Thugs" *AUILR* 505 and 515

Crawford 1994 *AJIL*

Crawford J "The International Law Commission's Draft Statute for an International Criminal Tribunal" *AJIL* 404

Christine 2006 *FEUI*

Christine B "Towards the effective prosecution of international crimes : evolving norms and state practice in Argentina, Chile and Peru" *FEUI* Anon

Dana 1009 *JCLC*

Dana S "Beyond Retroactivity to Realising Justice: A theory on the principles of legality in international criminal law sentencing" *JCLC* 857

Danner 2003 *AJIL*

Danner A "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court" 2003 *AJIL* 510, 511, 535-37

Daryl Mundis and Knut Dörman 2004 *JICJ*

Daryl A Mundis and Knut Dörman, with Contributions by Louise Doswald-Beck and Robert Kalb "Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary" *JICJ* 929-930

Davidson 2010 *AULR*

Davidson L "No Shortcuts on Human Rights: Bail and the International Criminal Trial" *AULR* 59

De Beer and Arnold 2004 *EN*

De Beer and Arnold "Communication research: Building bridges, burning fences: Sacomm panel discussion" *EN* 9

Degan 2005 *CJIL*

Degan V "On the Sources of International Criminal Law" *CJIL* 45-83

DeGuzman 2012 *MJIL*

DeGuzman M "Choosing to Prosecute: Expressive Selection at the International Criminal Court" 2012 *MJIL* 33

Derbal 2008 *UND*

Derbal A "The ICC's involvement in the situation in Darfur: Not a threat to peace" *UND* 2.

Dickinson 2003 *NELR*

Dickinson L "The Relationship between Hybrid Courts and International Courts: The case of Kosovo" *NELR* 1059-1072

Dommisse and Joubert 2009 *SAFP*

Dommisse and Joubert "Profile of research methodology and statistics training of undergraduate medical students at South African universities: Original research" *SAFP.* Anon

Donovan 2005 *AISA*

Donovan P "The nature of the Conflict in Sudan: A brief overview of the causes and conduct of conflict in Sudan" *AISA* 7

Du Plesis *et al*, 2013 *CH*

Du Plesis *et al*, "Africa and the International Criminal Court" *CH* Anon

Du Plessis *et al* 2012 *ISS*

Du Plessis *et al* "African efforts to close the impunity gap: Lessons for complementarity from national and regional actions" *ISS Paper* 241, 1

Du Plessis 2003 *SACJ*

Du Plessis M "Bringing the International Criminal Court home: The implementation of the Rome Statute of the International Criminal Court Act" *SACJ* 1

Du Plessis and Gevers 2005 *ASR*

Du Plessis M and Gevers C "Darfur Goes to the International Criminal Court (Perhaps)" *ASR* 23-34

Du Plessis 2008 *ISS*

Du Plessis M "Africa Guide to International Criminal Justice" *ISS* 1

Du Plessis 2003 *ASS*

Du Plessis M "The Creation of the ICC: Implications for Africa's despots, crackpots and hotspots" *ASS* 1

Du Plessis 2010 *ISS*

Du Plessis M "The International Criminal Court that Africa wants" *ISS* 8

Dubois 1997 *IRRC*

Dubois O "Rwanda's National Criminal Courts and the International Tribunal" *IRRC* 717

Ebegbulem 2011 *T*

Ebegbulem C "The failure of collective security in the Post World Wars I and II international systems" *T* Anon

Elizabeth 2015 *ILJ*

Elizabeth B "Big Fish, Small Ponds: International Crimes in National Courts" *ILJ* 1-22

Ellen 2015 *ISP*

Ellen E, "Youth Narratives of the Conflict in Northern Uganda" *ISP* 6

Elliott 1985 *CLR*

Elliott E "The Evolutionary Tradition in Jurisprudence" *CLR* Anon

Ellis 2002 *FJIL*

Ellis M "The International Criminal Court and its implication for domestic law and national capacity building" *FJIL* 215, 223

Endoh and Mbao 2016 *ASR*

Endoh F and Mbao M "Political Dynamicd in Kenya's Post-electoral violence: justice without peace or political compromise?" *ASR* 275-287

Endoh 2014 *MJSS*

Endoh F "Genocide Determination and the Question of Responsibility for the Darfur Victims of International Crimes" *MJSS* 51-59

Erickson 2014 *EJCPS*

Erickson M, "Civilization and War" *EJCPS* 110-112

Fairlie 2011 *BJIL*

Fairlie M "The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage" *BJIL* 528

Farrell 2003 *SJHR*

Farrell B "The Right to a Speedy Trial Before International Criminal Tribunals" *SJHR* 90-117

Felice 1990 *IA*

Felice W "The Viability of the UN Approach to Economic and Social Human Rights in a Globalized Economy" *IA* 563-598

Ferdinandusse 2004 *EJIL*

Ferdinandusse W "The Interaction of National and International Approaches in the Repression of International Crimes" *EJIL* 1042

Ferencz 1997 *PILR*

Ferencz B "International Criminal Courts: The Legacy of Nuremberg" *PILR* 210

Fischer 2006 *FILJ*

Fischer M "Applicability of the Geneva Convention to "Armed Conflict" in the war on Terror" *FILJ* 509

Freeland 2015 *DC*

Freeland V "Rebranding the State: Uganda's strategic use of the International Criminal Court" *DC* 293-319

Galbraith 2009 *MJIL*

Galbraith J "The Pace of International Criminal Justice" *MJIL* 79

Galetta 2013 *EJLT*

Galetta A "The changing nature of the presumption of innocence in today's surveillance societies: rewrite human rights or regulate the use of surveillance technologies?" *EJLT* 1

Gadget 2013 *TWQ*

Gagout C, "The International Criminal Court: limits, potential and Conditions for the Promotion of Justice and Peace" *TWQ* 800-818

Geib and Bulinckx 2006 *IRRC*

Geib R and Bulinckx N "International and Internationalized Criminal Tribunals: a synopsis" *IRRC* 49

Galvin 2005 *UMICLR*

Galvin R "The ICC Prosecutor Collateral Damage, and NGOs: Evaluating the Risk of a Politicized Prosecution" 2005 *UMICLR* 48-80

George 1907 *AJIL*

George B Davis "Doctor Francis Lieber's Instructions for the Government Armies in the Field" *AJIL* 13-25

Ginsburg 2008 *CJIL*

Ginsburg T "The Clash of Commitment at the International Criminal Court" *CJIL* Anon

Giraudon 2015 *IJCM*

Giraudon B, "Civilization and War (1st ed.)", International Journal of Conflict Management" *IJCM* 117-123

Glashausser 1994 *DLJ*

Glashausser A "The Treatment of Foreign Country Convictions As Predicates For Sentence Enhancement Under Recidivist Statutes" *DLJ* 134

Gonshak 2008 *JAC*

Gonshak H "Does Judgment at Nuremberg Accurately Depict the Nazi War Crimes Trial?" *JAC* 153-163

Graefrath 1990 *EJIL*

Graefrath B "Universal Criminal Jurisdiction and an International Criminal Court" *EJIL* 67

Greenawalt 2009 *VJIL*

Greenawalt A "Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court" *VJIL* 107

Greenwalt 2011 *ILJ*

Greenwalt A "The Pluralism of International Criminal Law" *ILJ* 1064

Greppi 1999 IRRC

Greppi E "The evolution of individual criminal responsibility under international law" *IRRC* 129

Grimmett 2011 *CRS*

Grimmett R "Instances of Use of United States Armed Force Abroad" *CRS* 21

Grosswald 2013 *MJIL*

Grosswald C "Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v. Royal Dutch Petroleum Co." *MJIL* 76

Grover 2010 *EJIL*

Grover L "A call for Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court" *EJIL* 543-583

Guan 2010 *PSILR*

Guan J "The ICC's jurisdiction over War Crimes in Internal Armed Conflicts: An insurmountable obstacle for China's accession?" *PSILR* 703

Gutto 2003 *ASR*

Gutto S "Created and Limited by Politics: A view of the ICC from Africa" *ASR* 127-128

Guymon 2000 *BJIL*

Guymon C "International legal mechanisms for combating Transnational Organised Crimes: The need for a Multilateral Conevention" *BJIL* 53-101

Hall 1998 *IRRC*

Hall C "The First Proposal for A Permanent International Criminal Court" *IRRC* 57-74

Hall 2013 *ACMM*

Hall J "African Leaders vs. The International Criminal Court Efforts to undermine a way to make war Criminals accountable" *ACMM* 4-9

Hall 1998 *IRRC*

Hall K Christoper "The First Proposal for A Permanent International Criminal Court" *IRRC* Anon

Happold 2007 *MJIL*

Happold M "The International Criminal Court and the Lord's Resistance Army" *MJIL* 3

Hazan 2006 *IRRC*

Hazan P "Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice" *IRRC* 861

Hemi 2012 *CH*

Hemi M, "The UN Security Council and the International Criminal Court, International Law Meeting Summary, with Parliamentarians for Global Action" *CH* Anon

Henham 2003 *JICJ*

Henham R "The Philosophical Foundation of International Sentencing" *JICJ* 75

Hentie 2004 *P*

Hentie W "Towards rich and valid qualitative design and analysis, finding your way in qualitative research. E Henning, W Van Rensburg and B Smith: Book review" *P* Anon

Higgins 1995 *EJIL*

Higgins R "Peace and Security: Achievements and Failures" *EJIL* 445-460

Hintjens 1999 *JMAS*

Hintjens H "Explaining the 1994 genocide in Rwanda" *JMAS* 241- 286

Hoover 2015 *LCP*

Hoover J "Moral Practices: Assigning Responsibility in the International Criminal Court" *LCP* 263

Horwitz 1950 *IC*

Horwitz S "Document 465: The Tokyo Trial" *IC* 473-496

Hossain 2005 *SCJIL*

Hossain K, "The Concept of Jus Cogens and the Obligation Under The U.N. Charter" *SCJIL* 72-98

Hwang 1998 *FILJ*

Hwang P "Defining Crime Against Humanity in the Rome Statute of the International Criminal Court" *FILJ* 457-504

Ibrahim *et al* 2014 *IJHSSE*

Ibrahim *et al* "Resource based conflicts and political instability in Africa: major trends, challenges and prospects" *IJHSSE* 71-78

Igwe 2008 *CILJSA*

Igwe C "The ICC's favourite Customer: Africa and International Criminal Law" *CILJSA* 294-323

Ingraham 1996 *JCLC*

Ingraham B "The right of silence, the presumption of innocence, the burden of proof and a modest proposal: A reply to O'Reilly" *JCLC* 560

Jalloh 2013 *AULR*

Jalloh C 'What makes a crime against humanity a crime against humanity" *AULR* 381

Jalloh 2012 *NCCLR*

Jalloh C "Africa and the International Criminal Court: Collision course or cooperation" *NCCLR* 203

Jalloh 2010 *CLF*

Jalloh C "Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction" 2010 *CLF* 29–49

Jalloh 2009 *ICLR*

Jalloh C "Regionalizing International Criminal Law?" 2009 *ICLR* 445, 462-65

Jalloh 2011 *MJIL*

Jalloh C "Special Court for Sierra Leone: Achieving Justice?" *MJIL* 395

Jamison 1995 *DJILP*

Jamison S "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections" *DJILP* 419

Janine 2011 *JICJ*

Janine Natalya Clark, Peace "Justice and the International Criminal Court: Limitations and Possibilities" *JICJ* 521-545

John A and Jones 1997 *EJIL*

John A and Jones J "A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind" *EJIL* 100

Johnson 1955 *ICLQ*

Johnson D "Draft Code of Offences against the Peace and Security of Mankind" *ICLQ* 445

Johnson 2003 *VJIL*

Johnson "The American Service member's Protection Act: Protecting Whom?" *VJIL* 405

Kamunyan *et al* 2013 *JETEMS*

Kamunyan *et al* "Causes and effects of post-election violence on agricultural production in Kesses Division, Uasin Gishu County, Kenya" *JETEMS* 5

Katja 2015 *FBP*

Katja C "The ICC Under Political Pressure" *FBP* 4

Kaufman 2010 *JMLR*

Kaufman Z "The Nuremberg Tribunal v. The Tokyo Tribunal: Design, Staff and Operations" *JMLR* 753

Kaufman 2005 *AIR*

Kaufman Z "The Future of Transitional Justice" *AIR* 56

Keith 2008 *HICLR*

Keith A "Sixty years in the making: The definition of Aggression for the International Criminal Court" *HICLR* 531-547

Kelly 2013 *CWRJIL*

Kelly M "The Pre-History of Piracy as a Crime & its Definitional Odyssey" *CWRJIL* 30

Kelly 2010 *JHR*

Kelly J "The Moral Foundations of International Criminal Law" *JHR* 502

Kenny 2017 *UJIEL*

Kenny C, "Prosecuting Crimes of International Concern: Islamic State at the ICC?" *UJIEL*120–145

Khadduri 1986 *AUILR*

Khadduri M "War and Peace in the Law of Islam, cited in Solf W, "Protection of civilians against the Effects of Hostilities under Customary International Law and under Protocol I" *AUILR* 117

Kim 2011 *AI*

Kim S "Maintaining the Independence of the International Criminal Court: The Legal and Procedural Implications of an Article 16 Deferral Request" *AI* 175-212

Kirsten 2011 *CRIA*

Kirsten A "The International Criminal Court on trial" *CRIA* 309-333

Knottnerus 2012 *JAS*

Knottnerus A "How to reconcile the African Union and the International Criminal Court" 25-45

Knowles 2006 *ICLR*

Knowles P "The Power to Prosecute: The Special Court for Sierra Leone from a Defence Perspective" *ICLR* 387-405

Kuehn 2000 *PLR*

Kuehn T "'Human 'Wrongs'?: The US Takes an Unpopular Stance in Opposing a Strong International Criminal Court, Gaining Unlikely Allies in the Process" *PLR* 299-320

Kurczy 2010 *CSM*

Kurczy "Sudan Vote is "a Hitler Election," says ICC Prosecutor Ocampo" *CSM* 23

Latore 2002 *BCICLR*

Latore R "Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court" *BCICLR* 162

Lemkin 1947 *AJIL*

Lemkin R "Genocide as a Crime under International Law" *AJIL* 147

Lepard 2010 *JMLR*

Lepard B "How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles" 2010 *JMLR* 553, 558-63, 564, 566-67

Lippman 1993 *IICLR*

Lippman M "The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany" *IICLR* 2

Lippman 1992 *IICLR*

Lippman M "The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany" *IICLR* 8

Louise Arbour 1999 *UTFLR*

Louise Arbour interviewed in Llewellyn and Raponi, "The Protection of Human Rights through International Criminal Law: A Conversation with Madame Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda" *UTFLR* 97

Lynch 2013 *CH*

Lynch G "The ICC Intervention in Kenya, Africa/International Law" *CH* Anon

Mamdami 2008 *IJPSS*

Mamdami M. (2008). "The New Humanitarian Order" 2008 *IJPSS* 81-95

Mantovani 2003 *JICJ*

Mantovani F "The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer" *JICJ* 26-38

Margaret and deGuzman 2012 *MJIL*

Margaret M and deGuzman M "Choosing to Prosecute: Expressive Selection at the International Criminal Court" *MJIL* 265

Marler 1999 *DLJ*

Marler M "The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute" *DLJ* 829

Marzen 2010 *CLR*

Marzen C "The Furundzija judgment and its continued vitality in international law" *CLR* 506

Matanga 2009 *AI*

Matanga F.K "The Challenges facing the International Criminal Court in prosecuting cases of Genocide, Crimes Against Humanity and War Crimes" *AI* 83

Matas 1989 *FILJ*

Matas D "Prosecuting Crimes against Humanity: The Lessons of World War I" *FILJ* 86-104

Meernik and King 2001 *ICLR*

Meernik J and King K "The Effectiveness of International Law and the ICTY – Preliminary Results of an Empirical Study" *ICLR* 344

Meernik 2005 *JPR*

Meernik J "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia" *JPR* 14

Memeti and Nuhija 2013 *NBP*

Memeti A and Nuhija B, "The concept erga omnes obligations in international law" *NBP* 31-47

Meng Fork 2011 *BCICLR*

Meng Fork "Pro-Choice:Achieving the goals of the International Criminal Court through the Prosecutor's Proprio Motu Power" *BCICLR* 53

Meron 2000 *AJIL*

Meron T "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience" *AJIL* 5

Meron 2006 *AJIL*

Meron T "Reflections on the Prosecution of War Crimes by International Tribunals" *AJIL* 551-579

Morris 1999 *JICL*

Morris M "The Jurisdiction of the International Criminal Court over nationals of Non-Party States" *JICL* 363

Moy 2006 *HILJ*

Moy A "The International Criminal Court arrest warrants and Uganda's Lord's Resistance Army: Renewing the debate over amnesty and complementarity" *HILJ* 267

Mueller 2014 *JEAS*

Mueller S "Kenya and the International Criminal Court (ICC): politics, the elections and the law" *JEAS* 25-42

Mugwanya 2006 *AHRLJ*

Mugwanya G "Criminal Justice through International Criminal Tribunals: Reflections on some Lessons for National Criminal Justice Systems" *AHRLJ* 26-63

Murithi 2008 *AR*

Murithi T "The structural violence of elections: reflections on the post-election crisis in Kenya" *AR* Anon

Murithi 2013 *IJRPB*

Murithi T "The African Union and the International Criminal Court: An Embattled Relationship?" *IJRPB* Anon

Mutiso *et al* 2010 *JETERPS*

Mutiso *et al* "Factors leading to domestic violence in low-income residential areas in Kenya: a case study of low-income residential areas in Kisumu City" *JETERPS* 29

Mutua 2001 *HILJ*

Mutua M, "Savages, victims and saviors: the metaphor of human rights" *HILJ* 201–242

Myburgh and Poggenpoel 2007 *SAPR*

Myburgh and Poggenpoel "Qualitative methods: A research approach worth considering: Guest editors" *SAPR* Anon

Nagan 1995 *DJCIL*

Nagan W "International Criminal Law and the Ad Hoc Tribunals for the Former Yugoslavia" *DJCIL* 127-165

Naqvi 2003 *IRRC*

Naqvi Y "Amnesty for War Crimes" *IRRC* 851

Neuman 2003 *EJIL*

Neuman G "Humanitarian Law and Counterterrorist Force" *EJIL* 288

Nkansah 2014 *AJICJ*

Nkansah L "International Criminal Court in the Trenches of Africa" *AJICJ* 8

Nouwen and Werner 2011 *EJIL*

Nouwen S and Werner W "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" *EJIL* 941-965

Nouwen 2006 *ULR*

Nouwen S "'Hybrid courts': The hybrid category of a new type of international crimes courts" *ULR* 190

Nsereko 2005 *JICJ*

Nsereko D "Prosecutorial Discretion before national courts and international tribunals" *JICJ* 124-127

Nsereko 2004 *AJHRL*

Nsereko D "Triggering the jurisdiction of the International Criminal Court" *AJHRL* 256-274

Nsereko 1994 *UBCLR*

Nsereko D *"Victims of abuse of power, with special reference to Africa" UBCLR* Anon

O'Brien 1993 *AJIL*

O'Brien J "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia" *AJIL* 639–640

O'keefe 2004 *JICL*

O'keefe R "Universal Jurisdiction: Clarifying the Basic Concept" *JICL* 735-760

Obel 2012 AJHR

Obel H *"The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and their Implications for the Future of International Justice" AJHR* 187–217

Obura 2015 *SLJ*

Obura K "The Security Council and the International Criminal Court: When can the Security Council defer a case? *SLJ* 118-140

Odinkalu 2003 *JAL*

Odinkalu C *"Back to the future: The imperative of prioritizing for the protection of human rights in Africa" JAL* 1-24

Oko 2007 *FILJ*

Oko O "The Challenges of International Criminal Prosecutions in Africa" *FILJ* 344

Olafsodottir and Bragadottir 2006 *EJC*

Olafsodottir H and Bragadottir R "Crime and Criminal Policy in Iceland Criminology on the Margins of Europe" *EJC* 221-253

Olaosibikan 2010 *ARR*

Olaosibikan A "Conflicts in Africa: Meaning, Causes, Impact and Solution" *ARRB* 549-560

Open Society Foundations 2015 *IJM*

Open Society Foundations "Kenya Cases at the International Criminal Court" *IJM* 3

Parrott 2006 *AJPS*

Parrott L "The Role of The International Criminal Court in Uganda: Ensuring that the Pursuit of Justice does not come at the Price of Peace" *AJPS* 3

Payam, *et al* 1998 *AUILR*

Payam, *et al* "The Contribution of the Ad Hoc Tribunals to International Humanitarian Law" *AUILR* 1509-1539

Pedaliu 2003 *JCH*

Pedaliu E "Britain and the 'Hand over' of Italian War Criminals to Yugoslavia 1945-48" *JCH* 503-529

Phillippe 2006 *IRRC*

Phillippe X "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?" *IRRC* 375

Phooko 2011 *NDJICHRL*

Phooko M "How effective the International Criminal Court has been: Evaluating the work and progress of the International Criminal Court" *NDJICHRL* Anon

Posner and Yoo 2005 *CLR*

Posner E and Yoo J "Judicial independence in international tribunals" *CLR* 21

Posner 2005 *DLJ*

Posner E "Political Trials in Domestic and International Law" *DLJ* 75

Randall 1988 *TLR*

Randall K, "Universal jurisdiction under international law" *TLR* 785-8

Rasulov 2018 *EJIL*

Rasulov, A Marxism for international law: A new agenda. *EJIL* 631-655

Reeves 2000 *HRB*

Reeves T, A "Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification" *HRB* 15

Régime and Shilaho 2013 *JAE*

Régime A and Shilaho W "Old Wine in New Skins: Kenya's 2013 Elections and the Triumph of the Ancient Regime" *JAE* 13

Richard *et al* 1987 *ASIL*

Richard *et al* "Disentangling Treaty and Customary International Law" *ASIL* 157-164

Robinson 1999 *AJIL*

Robinson D "Defining 'Crimes Against Humanity' at the Rome Conference" *AJIL* 43-57

Robinson 2008 *LJIL*

Robinson "The Identity Crisis of International Criminal Law" *LJIL* 925

Rodgers 1923 *AJIL*

Rodgers W "Suggestions as to Changes in the International Law for Maritime Warfare" *AJIL* 17

Roger 2001 *CLF*

Roger S. Clark "The Mental Element in International Criminal Laws: The Rome Statute of the International Criminal Court and the Elements of Offences" *CLF* 291

Russel-Brown 2003 *BJIL*

Russel-Brown S "Rape as an Act of Genocide" *BJIL* 350-374

Ruth 1999 *EJIL*

Ruth W "The International Criminal Court: An American View" *EJIL* 97-107

SaCouto and Cleary 2008 *AJIL*

SaCouto S and Cleary K "The Gravity Threshold of the International Criminal Court" *AJIL* 807–54

Safferling 2004 *GLJ*

Safferling C "Can Criminal Prosecution be the Answer to massive Human Rights Violations?" *GLJ* 1470

Sammons 2003 *BJIL*

Sammons A "The under-theorization of universal jurisdiction: implications for legitimacy on trials of war criminals by national courts" 2003 *BJIL* 125–137

Schabas 2003 *NELR*

Schabas W "Mens Rea and The International Criminal Tribunal for the Former Yugoslavia" *NELR* 1015

Schabas 2008 *JICJ*

Schabas W "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court" *JICJ* 7 48

Schabas 2008 *JCLC*

Schabas W "State Policy as an Element of International Crimes" *JCLC* 953

Schabas 2013 *JICJ*

Schabas W, "The Banality of International Justice" *JICJ* 545-551

Schabas 2004 *EJIL*

Schabas W "United States Hostility to the International Criminal Court: It's all about the Security Council" *EJIL* 701-720

Schabas 2010 *JMLR*

Schabas W "Victor's Justice: Selecting "Situations" at the International Criminal Court" 2010 *JMLR* 535, 549

Scharf 2001 *LCP*

Scharf M "The ICC's jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position" *LCP* 67-98

Scharf 1996 *LCP*

Scharf M "The letter of the law: The scope of the international legal obligation to prosecute human rights crimes" 1996 *LCP* 41-46

Scharf 2012 *HILJ*

Scharf M "Universal Jurisdiction and the Crime of Aggression" *HILJ* 358

Scheffer 1999 *AJIL*

Scheffer D "The United States and the International Criminal Court" *AJIL* 18

Schrag 1995 *DJCIL*

Schrag M "The Yugoslav Crimes Tribunal: A Prosecutor's View" *DJCIL* 190

Sellars 2010 *EJIL*

Sellars K "Imperfect Justice at Nuremberg and Tokyo" *EJIL* 1085-1102

Shenkman 2012 *NYULR*

Shenkman C "Catalysing National Judicial Capacity: The ICC's first Crimes against Humanity outside armed conflict" *NYULR* Anon

Simonovic 1999 *FILJ*

Simonovic I "The Role of the ICTY in the Development of International Criminal Adjudication" *FILJ* 440

Sirleaf 2017 *IJTJ*

Sirleaf M, "The African Justice Casade and the Malabo Protocol" *IJTJ* 71-91

Sivakumaran 2011 *EJIL*

Sivakumaran S "Re-envisaging the International law of Internal Armed Conflict" *EJIL* 219-264

Solf 1986 *AULR*

Solf W "Protection of Civilians against the Effects of Hostilities Under Customary International Law and Under Protocol I" *AULR* 117-135

Southwick 2005 *YJIA*

Southwick K "Investigating War in Northern Uganda: Dilemmas for the International Criminal Court" *YJIA* 108

Sperfeldt 2017 *IJHR*

Sperfeldt C "The trial against Hissène Habré: networked justice and reparations at the Extraordinary African Chambers" 2017 *IJHR* 1243-1260

Stahn 2005 *JICJ*

Stahn C "Complementarity, Amnesties and Alternative Forms of Justice" *JICJ* Anon

Teitel 2005 *CILJ*

Teitel R "The Law and Politics of Contemporary Transitional Justice" 2005 *CILJ* 841

Tiba 2007 *JICJ*

Tiba F "The Mengusti Genocide Trial in Ethiopia" 2007 *JICJ* 2

Tiemessen 2014 *IJHR*

Tiemessen A "The International Criminal Court and the Politics of Prosecutions" *IJHR* 444-461

Timothy 1997 *ALR*

Timothy L McCormack "Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law" *ALR* 690-92

Tladi 2009 *SAYIL*

Tladi D "The African Union and the International Criminal Court: the battle for the soul of international law" *SAYIL* 61

Tom 2009 *CJIL*

Tom G "The Clash of Commitments at the International Criminal Court" *CJIL* 499-514

Tom 2015 *IJM*

Tom M "ICC Confirms Meshak Yebei Was Once Under Its Protection" *IJM* 11

Totten and Tyler 2008 *JCLC*

Totten D and Tyler N "Arguing For An Integrated Approach To Resolving The Crisis In Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court" *JCLC* 1080-1081

Trahan 2011 *ICLR*

Trahan J "The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference" *ICLR* 58

Udombana 2005 *HRQ*

Udombana N "When Neutrality is a sin: The Darfur crisis and the crisis of Humanitarian intervention in Sudan" *HRQ* 1149-1199

United Nations 2005 *UN*

United Nations "Yearbook of the United Nations. Sixtieth Anniversary Edition" *UN* 1

Van der Vyver 2011 *AHRLJ*

Van der Vyver J "Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court" *AHRLJ* 684

Verhoeven 2002 *NYIL*

Verhoeven J "Article 21 of the Rome Statute and the ambiguities of applicable law" *NYIL* 2-22

Vinjamuri 2010 *EIA*

Vinjamuri L, "Deterrence, democracy, and the pursuit of international justice" *EIA* 191–211

Vuong 2003 *BJIL*

Vuong Q "U.S. Peacekeeping and Nation-Building: The Evolution of Self-Interested Multilateralism" *BJIL* 804

Wagner 2009 *SAJHE*

Wagner C "The future of teach research in the Social Sciences" *SAJHE* 826-838

Wald 2005 *AJIL*

Wald P "Justice in a time of war: The true story behind the International Criminal Tribunal for the Former Yugoslavia" *AJIL* 720-726

Wallach 1999 *CJTL*

Wallach E "The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?" *CJTL* 851

Walter 1997 *DJCIL*

Walter Gary Sharp "International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia" *DJCIL* Anon

Washburn 1999 *PILR*

Washburn J "The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century" *PILR* 361

Watts and Ibaba 2011 *AS*

Watts M and Ibaba I "Turbulent Oil: Conflict and Insecurity in the Niger Delta" *AS* 1-19

Wessel 2006 *CJTL*

Wessel "Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication" *CJTL* 377

Whiting 2009 *HILJ*

Whiting A "In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered" *HILJ* 323

Whiting 2008 *RCN*

Whiting L "Semi-Structured interviews: Guidance for novice researchers. Nursing Standard" *RCN* 35-40

Williams 2013 *JICJ*

Williams S "The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?" 2013 *JICJ* 1139

Wise 1989 *DLR*

Wise E "International Crimes and Domestic Criminal Law" *DLR* 923

Yacoubian 2003 *WA*

Yacoubian G "Evaluating the Efficiency of the International Tribunals for Rwanda and Yugoslavia" *WA* Anon

Yannis 2002 *EJIL*

Yannis A "*The Concept of Suspended Sovereignty in international law and its implications in international politics" EJIL* 1037

Yuval 2009 *ASILP*

Yuval S "The Role of National Courts in advancing the goals of International Criminal Tribunals, Symposium on The impact of International Criminal proceedings on national prosecutions in mass atrocity cases" *ASILP* 210 – 215

Zeck 1948 *NCLR*

Zeck W "Nuremberg: Proceedings subsequent to Goering et al" *NCLR* 70

Zuppi 2006 *LLR*

Zuppi "Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert" *LLR* 495

Zwanenburg 1999 *EJIL*

Zwanenburg M "The Statute for an International Criminal Court and the United States: Peacekeepers under fire?" *EJIL* 124-143

Zwanenburg 1998 *LJIL*

Zwanenburg *"Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces" LJIL* Anon

Newspaper articles

Benjamin *International Justice Tribune* 5

Benjamin D "Ruto and Sang Trial Could Close Early, as Prosecution Flounders" *International Justice Tribune* (2014) 5

Bosco *The Washington Post* 9

Bosco "Why is the International Criminal Court picking only on Africa?" *The Washington Post* (29 March 2013) 9

Darfur Rebels *Sudan Tribune* 4

Darfur Rebels "Vow Full ICC Cooperation Ahead of Ruling on Bashir Case" *Sudan Tribune* (2 March 2009) 4

Darfur rebels back ICC *Sudan Tribune* 2

Darfur rebels back ICC "promise to capture "anybody" *Sudan Tribune* (2 Mar. 2009) 2

Hoge *International Herald Tribune* 2

Hoge "UN Gives Suspect List to Prosecutor" *International Herald Tribune* (7 April 2005) 2

Kaye *Foreign Affairs*

Kaye D, "Who's afraid of the International Criminal Court?" *Foreign Affairs*, May–June (2011)

Kuwonu *ICC: Beyond the threats of withdrawal*

Kuwonu F "ICC: Beyond the threats of withdrawal, African Countries in dilemma over whether to leave or support the international criminal Court" *Africa Renewal* (May-July 2017) 29

Macmillan and Otte *The Times Literacy Supplement* 3

Macmillan M and Otte T, "Peacemakers-The Paris Peace Conference of 1919 and its attempts to War" *The Times Literacy Supplement.* No. 5143, (2000) 3

Mugisa and Nsambu *Saturday Vision* Anon

Mugisa and Nsambu, "ICC Clears UPDF in the North" *Saturday Vision,* (30 Aug. 2008) Anon

Norman and Spencer *Peace Magazine* Anon

Norman D and Spencer M "Prosecuting War Criminals: An Interview with Madam Justice Louise Arbour of Canada's Supreme Court" *Peace Magazine*, (16 April 2000) Anon

Pallister D *Human Rights 2*

Pallister D *Human Rights: Growing Clamor to Remove the Hague Prosecutor Who Wants Sudanese President Arrested, The Guardian* (2008) 2

Phillip de Wet *Mail and Guardian* 7

Phillip de Wet, "SA will suffer no consequences for failing to deliver Al-Bashir to Justice", *Mail and Guardian,* (07 July 2017) 7

Scheffer D "Address at the Annual meeting of the American Society of international law" *US Department of State*, Washington DC (26 March 1999) Anon

Scheffer *US Department of State* Anon

Sikkink K, The Justice Cascade: How Human Rights Prosecutions are Changing World Politics, *New York: Norton* (2011)

Sikkink *New York: Norton*

Suzuki T "Soul Federation" *World Government Institute, Japan* (2010) 43

Suzuki *World Government Institute, Japan* 43

Thakur *Daily Yomiuri*

Thakur R, "ICC's competing ethics of conviction, responsibility" *Daily Yomiuri*, 31 July (2008)

Internet sources

Angela Mudukuti, The arduous road to global justice. Available at https://www.iol.co.za/mercury/the-arduous-road-to-global-justice-1893131 Accessed 20 March 2018.

Bateman B and White R, 2017 "ICC: SA violated ICC agreement when it failed to arrest Al Bashir", Eyewitness news http://ewn.co.za/2017/07/06/icc-sa-violated-icc-agreement-when-it-failed-to-arrest-al-bashir Accessed 07/07/2017.

Branch A, 2017 "Kony Part II: accountability, not awareness" http://www.aljazeera.com/indepth/opinion/2012/04/201247943869166.html. Accessed 12 September 2018.

Cases and Situations: Kenya. 2015 "*Coalition for the International Criminal Court*. http%3A%2F%2Fwww.iccnow.org%2F%3Fmod%3Dkenya. Accessed 04/06/2017.

Christiano T, 2015 "The Problem of Selective Prosecution and the legitimacy of the ICC". Christiano_The_Problem_of_Selective_Prosecution_and_the_Legitimacy_of_the_ICC_2.pdf Access 12 September 2018.

Cobb C, 2003 "West Africa: Nigeria Will Hand Over Charles Taylor Predicts War Crimes Prosecutor" ALLAFRICA (Sept. 24, 2003), Interview by Charles Cobb Jr. with

David Crane, Chief Prosecutor for the SCSL. Available at: http://allafrica.com/stories/200309250972.html. Accessed 24 July 2018.

Jurisdiction and Admissibility 2014 *International Criminal Court*, http%3A%2F%2Fwww.icccpi.int%2Fen_menus%2Ficc%2Fabout%2520the%2520court%2Ficc%2520at%20%2520a%2520glance%2F%20Pages%2Fjurisdiction%2520and%2520admissibility.aspx. Accessed 03/06/2017.

Annette L, 2012 Khartoum's Pattern of Neglect Continues in Eastern Sudan as Government Expels Aid Group. http://enoughproject.org/blogs/Khartoum-pattern-neglect-continues-eastern-sudan-government-expels-aid-groups Accessed 28/05/2017.

Anthony D, 1962 "Treaties As a Source of General Rules of International Law." Faculty Working Papers http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/120 Accessed 28/06/2016.

Anthony D, 2010 *"Human Rights as Part of Customary International Law: A Plea for Change of Paradigms." Faculty Working Papers,* Paper 88. http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88

Aryeh Neier, 1998 War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice (New York: Times Books http://www.theguardian.com/world/2013/sep/10/kenya-william-ruto-icc Accessed 11/02/2014.

Bateman B and White R, 2017 "ICC: SA violated ICC agreement when it failed to arrest Al Bashir", Eyewitness news http://ewn.co.za/2017/07/06/icc-sa-violated-icc-agreement-when-it-failed-to-arrest-al-bashir Accessed 07/07/2017.

BBC News, 2008 Vow to pursue Sudan over 'crimes', http://news.bbc.co.uk/2/hi/africa/7639046.stm.

BBC News, 2013 Kenya election: Uhuru Kenyatta wins presidency http:www.bbc.com/news/world-africa-21723488 Accessed 11/08/2014.

BBC News, 2015 *"ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence"*, http%253A%252F%252Fwww.bbc.com%252Fnews%252Fworld-africa-30347019. Accessed 03/06/2017.

Beginning of ICC Trial Against Ruto and Sang Is a Historical Opportunity for Victims and for the Kenyan Society to Face the Truth and Find Justice." 2015 https%3A%2F%2Fwww.fidh.org%2FInternational-Federation-for-Hum%20an-ights%2FAfrica%2Fkenya%2Fkenya-%20icc%2Fbeginning-of-icc-trial-against-ruto-and-sang-is-a-histor%20icalopportunity-13921. Accessed 04/06/2017.

Blight G *et al*, 2011 Arab Spring: an interactive timeline of Middle East protests, http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline [Accessed 14 March 2018]

Boyle F, Reversing the Gains of Nuremberg. http://www.atlantic.net/-odin/netline/hypocrisy.html Accessed 11/08/2016.

Branch 2004 International Justice, Local Injustice, 51(3) *Dissent*, unnumbered pages http://www.dissentmagazine.org/article/?article=336 Accessed 24/05/2017.

Branch, 2010 'What the ICC Review Conference Can't Fix', http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/. Accessed 25/05/2017.

Burke-White W, *"Regionalization of International Criminal Law Enforcement: A Preliminary Exploration"* (2003). Faculty Scholarship. Paper 959 http://scholarship.law.upenn.edu/faculty_scholarship/959.

Business Day, 2010 Warrant 'subverts peace and solidarity' in Africa, http://www.businessday.co.za/articles/content.aspx?id=115923 Accessed 18/08/2014.

Cardona C, 2013 Kenya's Withdrawal from the ICC, JURIST http://jurist.org/dateline/2013/09/christopher-cardona-kenya-icc.php.

Carofiglio D, 2015 "To what extent have politics restricted the ICC's effectiveness", http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-ffectiveness/ Accessed 28/06/2017.

Casey A and Rivkin D, *The International Criminal Court vs. the American People*',http://www.heritage.org/research/reports/1999/02/theinternational-criminal-court-vs-the-american-people Accessed 16/04/17.

Cerone J, 2005 The Nature of International Criminal Law and Implications for Investigations. http://ssrn.com/abstract=1647218 Accessed 21/06/2016.

Clapham A, "The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement", Ownership of Norms Project – Towards a Better Protection of Civilians in Armed Conflicts, Feb. 2010, at 39–41, http//:papers,ssrn.com. Accessed 24 July 2018.

Cobb C, 2003 "West Africa: Nigeria Will Hand Over Charles Taylor Predicts War Crimes Prosecutor" ALLAFRICA (Sept. 24, 2003), Interview by Charles Cobb Jr. with David Crane, Chief Prosecutor for the SCSL. Available at: http://allafrica.com/stories/200309250972.html. Accessed 24 July 2018.

Crane D, 2013 US Prosecutor Condemns Hague trials of Kenyan leaders. www.theguardian.com>News>Law>InternationalCriminal Court. Accessed 11/08/2014.

Christiano T, The problem of selective prosecution and the legitimacy of the ICC, 2015 https://www.law.berkeley.edu/files/TChristiano_The_Problem_of_Selective_Prosecution_and_the_Legitimacy_of_tthe_ICC_2.pdf Accessed 20/07/2017

Declaration (IV, 1) to prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature 1899 http://www.icrc.org/ihl-nsf/FULL/160?OpenDocument.

Desmond Tutu and Tony Blair, 2011 PhD Studies in Human Rights, *Big Improvement at ICC as Prosecutor Moves Fast on Libya*, http://humanrightsdoctorate.blogspot.com/%0b2011/03/big-improvement-at-icc-as-prosecutor.html.

Dimitrakos D, 2014 *The Principle of Universal Jurisdiction and the International Criminal Court.* Published 22 January 2014. Available at http://ssrn.com/abstract=2383587 Accessed 21/06/2016.

Dlamini V, 2012 Deep Read: Justice? That's rich, coming from the ICC http://mg.co.za/article/2012-07-03-icc-credibility.

Donovan D, 2012 *"International Criminal Court: Successes and Failures."* http://intpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/ Accessed 20/06/2016.

DRC–Uganda: Deadly LRA Attacks Prompt Exodus in Northeastern DRC, 2008 *IRIN,* http://www.irinnews.org/Report.aspx?ReportId=82140, Accessed 24/05/2017.

Du Plessis C, 2017 *"S.A government to explain reasons for not arresting Omar Al-Bashire."* Eyewitness news. http://ewn.co.za/2017/04/07/sa-govt-appears-in-icc-over-al-bashir-case Accessed 16/04/17.

Du Plessis M and Stone L, The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries. http://www.issafrica.org/cdromestatute/pages/document.pdf Accessed 11/08/2014.

Edmond G, 1995 The freedom of histories : reassessessing Grotius on the sea, Law Text Culture, 2, http://ro.uow.edu.au/ltc/vol2/iss1/9 Accessed 11/06/2016.

Eichstaedt 2009 'Uganda: Offensive against Kony Backfires', *Institute for War and Peace Reporting,* www.friendsforpeaceinafrica.org/news/17-lra-updf-war/332-offensive-against-kony-backfires-iwpr.html. Accessed 24/05/2017.

Erwa E. 'Statement of the Sudanese Representative after the passing of Security Council Resolution 1593. http://www.un.org/News/Press/docs/2005/sc8351.doc htm Accessed 11/08/2014.

Gompert *et al, The Iraq War, Bush's Biggest Blunder.* Newsweek, Available at: www.newsweek.com/iraq-war-bushs-biggest-blunder-294411 [Accessed 14 March 2018]

Goodenough P, U.S. Pays $3B for UN--More Than 185 Other Countries Combined. Available at: ttp://www.cnsnews.com/news/article/patrick-goodenough/us-pays-3b-un-more-185-other-countries-combined Accessed 30 July 2016.

Grono *et al,* 2008 "Justice in conflict? The ICC and the Peace Process," in Courting Conflict? Justice, Peace and the ICC in Africa, eds. Nicholas Weddell and Phil Clark. London: Royal African Society http://www.royalafricansociety.org/index.php?option=comcontent&task=view&id=415 Accessed 11/08/2014.

Helfer R and Meyer T, *"The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence. Custom's Future: International Law in a Changing World"* (Curtis Bradley ed., 2015 Forthcoming). ; UGA Legal Studies Research Paper No. 2015-8 http://ssrn.com/abstract=2585608 Accessed 14 March 2018

Heinrich M, 2015 One war, Many Reasons: The US Invasion of Iraq. Available at: http://www.e-ir.info/2015/03/09/one-war-many-reasons-the-us-invasion-of-iraq/ Accessed 14 March 2018

Hissène Habré trial; charges droped against Chadian defendants. Available at https://trialinternational.org/latest-post/saleh-younous/ Accessed 20 March 2018

Human Rights Watch, 2004 "Bringing Justice: The Special Court For Sierra Leone: Accomplishments, Shortcomings, And Needed Support". Available at: https://www.hrw.org/report/2004/09/08/bringing-justice-special-court-sierra-leone/accomplishments-shortcomings-and Accessed 24 July 2018.

Human Rights Watch, 2004 The International Criminal Court: How Nongovernmental Organization can contribute to the prosecution of war criminals. https://www.hrw.org/legacy/backgrounder/africa/icc0904/icc0904.pdf Accessed 20/06/2016.

Human Rights Watch, 2006 The selection of situations and cases for Trial before The International Criminal Court**.** Available at: http://www.hrw.org/en/news/2006/10/26/selection-situations-and-cases-trial-internationalcriminal-court Accessed 26 March 2018.

Human Rights Watch, 2008 When Peace Talks Undermine Justice. Published in International Herald Tribune <http://hrw.org/english/docs/2008/07/04/global19268.htm> Accessed 25/05/201.

Human Rights Watch, 2017 "Zambia Support International Criminal Court; ICC crucial for atrocity victims, global justice, https://www.hrw.org/news/2017/04/10/zambia-support-international- criminal-court Accessed 23/06/2017.

ICC, "Report on Preliminary Examination Activities"http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf Accessed 12 September 2018.

ICC, "Letter from the Prosecutor" http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf Accessed 12 September 2018.

ICC, "Investigating the use of child soldiers in Sri Lanka http://www.sundaytimes.lk/050807/news/2.html Accessed 12 September 2018.

ICC, 2011 "monitoring pre-election violence in DR Congo', Congo Planet http://www.congoplanet.com/news/1904/international-criminal-court-monitoring-election-violence-in-dr-congo.jsp. Accessed 12 September 2018.

ICC Background Information [hereinafter United Nations Document http://www.un.org/icc/overview.htm. Accessed 11/08/2016.

ICC Press Release, 2004 President of Uganda refers Situation concerning the LRA to the ICC. <www.icc-cpi.int/pressrelease details&id=16.html> Accessed 25/05/2017.

ICRC website http:// www.icrc.org/Web/Eng/siteeng0.nsf/html/party_main_treaties Accessed 17 March 2018.

Jamshidi M, 2013 "The enforcement gap: How the International Criminal Court failed in Darfur". http://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html Accessed 23/06/2017.

Julie and De Waal A, 2009 Case Closed: A Prosecutor Without Borders WORLD **AFF** Available at: http://www.worldaffairsjoumal.org/articles/2009-Spring/full-DeWaalFlint.html Accessed 17 March 2018.

Justin S, 2015 *"ICC Prosecutor Requests Investigation into Kenyan Post-Election Violence." Human Rights Brief*. N.p., 5 http%3A%2F%2Fhrbrief.org%2F2010%2F02%2Ficc-prosecutorrequests-investigation-into-kenyan-post-election-violence%2F. Accessed 3/06/2016.

Kahl C 2017 America's big risk in Syria? War with Russia http://www.chicagotribune.com/news/opinion/commentary/ct-trump-syria-airstrikes-russia-war-20170410- story.html Accessed 20/07/2017.

Kenyan Ministry of Foreign Affairs, 2013 Full Statement by the Ministry of Foreign Affairs, Kenya, on the Negative UN Security Council Vote,

http://whereiskenya.com/full-statement-ministry-foreign-affairs- kenya-negative-un-security-council-vote/ Accessed 19/July 2017.

Kersten M, 2012 The politics of the ICC referrals-Aproposal https://justiceinconflict.org/2012/11/13/the-politics-of-icc-referrals-a-proposal/ Accessed 29/09/2017.

Kersten M, 2013 Trading Justice for Temporary Peace: Not Just a Bad Idea http://justiceinconflict.org/…/trading-justice-for-temporary-peace-not-just-a-bad-idea Accessed 11/08/2014.

Kagwanja P, 2013 Assertive turn for Kenya's diplomacy', Daily Nation http://www.nation.co.ke/oped/Opinion/Assertive-turn-for-Kenyas-diplomacy-/-/440808/2127868/-/iqsl2azindex.html Accessed 20/06/2016.

Kimenyi M, 2011 "The International Criminal Court: a time of reckoning for Kenya and Africa', Brookings Institution" http://www.brookings.edu/opinions/2010/1217_africa_crime_kimenyi.aspx; and 'Kenya: ICC warns Ocampo six over hate speech', Nairobi Star, 8 April 2011, at http://allafrica.com/stories/printable/201104080858.html. Accessed 12 September 2018.

Kofi Annan 2002 Press conference in Rome, Italy, following the 60th ratification of the Rome Statute Available at: http://www.iccnow.org/documents/KofiAnnanPressConf11April02.pdf [Accessed 14 March 2018]

Lamb S, Genocide since 1945: Never again? http://www.spiegel.de/international/genocide-since-1945-never-again-a-338612.html Accessed 20/06/2016.

Lattimmer *et al*, 2015 *A Step towards Justice: Current accountability options for crimes under international law committed in Syria.* Syria Justice and Accountability Centre, https://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf Accessed 15/07/2016.

Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC, to The Hague. Available at: http://www2.icc-cpi.int/NR/rdonlyres/F596DO8D-D810-43A2-99BB-B899B9C5BCD2/277422/OTPletter to senders reIraq_9 February_2006.pdf. [Accessed 26 March 2018.

Lilley F, The Superpower the World loves to hate. http://www.sovereignty.net/p/gov/rome7-6.htm Accessed 10/08/2016.

Madhomu B, 2017 As it happened: SA appears before the ICC over failure to arrest Sudan's Bashire News http://www.news24.com/Africa/News/live-sa-appears-before-icc-over Accessed 10/08/2016.

Mamdani M, 2008 The new Humanitarian Order, *The Nation,* http://www.thenation.com/doc/20080929/mamdani. Accessed 10/08/2016.

Marschner *et al*., 2010 "The first review conference of the International Criminal Court", http://perso.unifr.ch/derechopenal/assets/files/obrasportales/op_20101107_01.pdf Accessed 28/06/2017.

McDonald and Haveman R, 2003 Prosecutorial discretion-some thoughts on 'objectifying' the exercise of prosecutorial discretion by the Prosecutor of the ICC. Available at: http://www.issafrica.org/anicj/uploads/McDonald-Havemanissues-relevant.pdf. Accessed 26 March 2018.

Michael P, Result of the Rome Conference for an International Criminal Court, August 1998. http://www.asil.org/insigh23.cfm. Accessed 31/03/2017.

Montreal Holocaust Memorial Centre, A brief history of the holocaust: A reference tool, Montreal, 2016 edition http://museeholocauste.ca/app/uploads/2017/01/brief-history-holocaust.pdf
Accessed 20/07/2017.

Moss L, 2012 "*The UN Security Council and the International Criminal Court: Towards a more principled relationship." International Policy Analysis*.
http://library.fes.de/pdf-files/iez/08948.pdf. Accessed 17 September 2016.

Nzwili F, 2004 "The Forgotten War," Catholic World News, April 2004, http://www.cwnews.com/news/viewstory.cfm?recnum=29396 Accessed 23/06/2017.

Netsanet Belay, 2015, Impunity vs Immunity: Africa and the ICC, Available at: https://www.amnesty.org/en/latest/news/2015/06/impunity-vs-immunity-africa-and-the-icc/ [Accessed 22 March 2018]

Omer-Men E*, 2015 "Palestine's ICC bid is only as threatening as Israel makes it.* http://972mag.com/palestines-icc-bid-is-only-as-threatening-as-israel-makes-it/100882/ Accessed 11/08/2016.

Orzag P, Annual Report on United States Contributions to the United Nations. Office of Management and Budget, 7 June 2010, http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/us_contributions_to_the_un_06112010.pdf Accessed: 9 September 2016.

Osgood E, 2013 "Kenya's ICC withdrawal: The wrong face for ICC-Africa relationship debates". http://www.jurist.org/dateline/2013/10/jess-kyle-icc-kenya.php Accessed 23/06/2017.

OTP quoted in Glassborow, 2008 'Uganda Insists Peace not at Odds with ICC', *Institute for War and Peace Reporting*, http://iwpr.net/report-news/uganda-insists-peace-not-odds-icc. Accessed 25/05/2017.

Pace W, We Won!, Rome Treaty Conflict Monitor. http://www.igc.apc.org/icc/html/monitor.htm Accessed 11/08/2016.

Piccigallo P, The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951 (1979). Available at http://www.archives.gov/iwg/japanese-war-crimes

Portman R, Report on US Contributions to the United Nations System. Office of Management and Budget, 31 July, 2006, http://www.eyeontheun.org/assets/attachments/documents/OMB_report_on_US_contributions_to_UN.pdf Accessed: 9 September 2016.

Press Release, 2010 ICC Watch, Why Won't the ICC Move Against Tony Blair on War Crimes? Available at: http://www.iccwatch.org/pdf/Press%20Release%2004FeblO.pdf Accessed 17 March 2018.

Press Release, ICC OTP, ICC Prosecutor: Alleged War Crimes in the Territory of the Republic of Korea Under Preliminary Examination, ICC-CPI-20101206-PR608. Available at: http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20 releases %20(2010)/pr608?lan=en-GB. [Accessed 26 March 2018]

President Bashir in Dealy, 2009 'Interview: Sudan's President Omar Al-Bashir', *Public Broadcasting Service,* www.pbs.org/newshour/bb/africa/july-dec09/bashir-full_08-13.html Accessed 10/08/2016.

Press Briefing by Deputy Legal Adviser, UN Mission in East Timor, Press Briefing 2000 <http://www.un.org/peace/etimor/DB/DB20000419.htm>

Press Release, 2005 International Criminal Court, Warrant of Arrest Unleashed Against Five LRA Commanders http://www.icc-cpi.int/press/pressreleased/114.html. Accessed 11/08/2014.

Ramakrishnan M, 2016 War Crimes Tribunal finds Bush and Blair Guilty, Press TV and Global Research Avaible at: http://www.globalresearch.ca/war-crimes-tribunal-finds-bush-and-blair-guilty/5478367[Accessed 14 March 2018]

Sadat L, 2012 *"Emerging from the shadow of Nuremberg: Crimes against humanity in the morden age."* WASH UNIVERSITY IN ST.LOUIS SCHOOL OF LAW, at 16-18 (Wash. Univ. in St. Louis Legal Studies Paper Ser. No. 11-11-04). http://papers.ssrn.com/so13/papers.cfm?abstract_id=2013254 Accessed 16/04/17.

Scheffer D, "The Security Council's Struggle over Darfur and International Justice,"- Forum (Jurist University of Pittsburgh School of Law), http://jurist.law.pitt/forumy/2008/08/security-council-struggle-over-darfur.php

Shelton D, 2013 "Reparation for victims of international crimes". Chapter in International Crimes, Peace, and Human Rights: The Role of the International Criminal Court. GWU Legal Studies Research Paper No. 36 SSRN: http://ssrn.com/abstract=2226071. Accessed 10/08/2016.

Smith D. 2013. Kenyan MPs vote to quit International Criminal Court. The guardian news http://www.theguardian.com/world/2013/sep/05/kenya-quit-international-criminal-court. Accessed 10/08/2016.

Southern African Litigation Center 2013, Chapter 4: International Criminal Justice and Africa; The State of Play http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/International-Criminal-Justice-and-Africa.pdf

Stanton G, The International Alliance to end Genocide, Genocide Watch. http://www.genocidewatch.org/genocide/whatisit.html Accessed 10/08/2016.

Statement of Defence Minister Mbabazi', 2004 *Hansard* www.parliament.go.ug/index.php?option=com_wrapper&;Itemid=33 Accessed 24/05/2017.

Sterling F. 2014 "The Nanjing Atrocities: Crimes of War." A facing history Publication, https://www.facinghistory.org/sites/default/files/publications/The_Nanjing_Atrocities_Crimes_of_War_0.pd Accessed 10/08/2016.

Sudan Tribune, 2010 AU Chief challenges ICC to arrest Sudanese president, http://www.sudantribune.com/spip?articles35748 Accessed 10/08/2016.

Tribunal Memorandum of Understanding between the United Nations and the Royal Government of Cambodia, PHNOM PENH POST, No. 9/22, 27 October–9 November 2000. <http://www.yale.edu/cgp/tribunal/mou_v3.htm>.

The Case of Hissène Habré before the Extraordinary African Chambers in Senegal, Questions and Answers. Available at: https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal Accessed 31 March 2018.

Uganda: Interview with President Yoweri Museveni', 2005, www.irinnews.org/Report.aspx?ReportId=54853 Accessed 24/06/2017.

United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945, 82 U.N.T.C. 280, http://www.refworld.org/docid/47fdfb34d.html

United Nations, *Treaty Series,* vol. 2187. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en Accessed 10/08/2016.

United States' State Department Fact Sheet on the International Criminal Court http://www.state.gov/s/wci/rls/fs/2002/9978.htm. Accessed 16/04/1.

US Congress Passes Anti-ICC Hague Invasion Act' Coalition for the International Criminal Court, Press Release, 26 July 2002 http://www.iccnow.org/documents/ 07.26.02ASPAthruCongress.pdf Accessed 15 May 2018.

Van Schaack B, 2011 The Principle of Legality in International Criminal Law, http://digitalcommons.law.scu.edu/facpubs/634 Accessed 28/06/2016.

Viebig P, *"Illicitly Obtained Evidence at the International Criminal Court," International Criminal Justice Series 4,* DOI 10.1007/978-94-6265-093-0_2. Accessed 28/04/2017.

Waki and Philip, Report of the Commission of Inquiry into Post Election Violence in Kenya (CIPEV). https://searchworks.stanford.edu/view/7911942 Accessed 29/06/2017.

Wouters J, *America v. Its Allies,* ABCNEWS.Com: http://www.abcnews.com/sections/world/DailyNews/ICC980715.html. Accessed 10/08/2016.

Yvonne D, *"Commitment to the International Criminal Court: Do States View Strong Enforcement Mechanisms as a Credible Threat?", One Earth Foundation Working Paper*. http://www.oneearthfuture.org/siteadmin/images/files/file_43.pdf/. Accessed 26/06/2017.

Sirleaf M, *"The African Justice Casade and the Malabo Protocol", 11 International Journal of Transitional Justice* (forthcoming) http://scholarship.pitt.edu/30678/1/African%20Justice%20Cascade%20and%20Malabo%20Protocol%20Copy%20of%20SSRN%20Submission%201-17-16.pdf Accessed 18/07/2017.

UN refuses to defer Kenya hearing 2011 http://news.uk.msn.com/world/articles.aspx?cp-documentid=156942638 Accessed 14 August 2017

Table of Treaties

Atlantic Charter, Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom (1941).

AU, Protocol on the Statute of the African Court of Justice and Human Rights (2008).

African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, adopted by the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–15 May 2012, Addis Ababa, EXP/MIN/Legal/VI.

*African Charter on Human and Peoples' Rights, adopted 26 June 1981, OAU Doc CAB/LEG/67/3 Rev 5 (entered into force 21 October (*1986).

Charter and Judgment of the Nuremberg Tribunal-History and Analysis Memorandum Submitted by the Secretary General. Doc: A/CN.4/5.

Charter of the International Military Tribunal for the Far East, on the basis of directive from the Commander-in Chief of the Allied Forces (1946).

Charter of the United Nations (1945).

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, 31 January (1946).

Convention Against Torture and other Cruel, Inhuman or Degrading Treatments, Adopted and Opened for Signature, ratification and accession by UN General Assembly Resolution 39/46 of 10 December 1948 and entered into force (1987).

Convention Concerning the Laws and Customs of War on Land (Hague IV), 3 Martens Nouveau Recueil (3d) 461. For the 1899 treaty, see Convention (II) with Respect to the Laws and Customs Of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 British Foreign and State Treaties 988 (1899).

Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. Supp. No. 156 (1936), LN Doc. C.547(I).M.384(I).1937.V (1938).

Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980).

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, General Assembly Res. 2391, (1968).

Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December (1948).

Convention on the Privileges and Immunities of the United Nations, UN Doc. A/64 of 1 July, adopted by the UN General Assembly on 13 February (1946).

*Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, entered into force 26 January (*1973).

*Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, adopted on 10 March (*1988).

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, entered into force 20 Febuary (1977).

*Convention for the Suppression of Unlawful Seizure of Aircraft, entered into force 14 October (*1971).

Covenant of the League of Nations (1919).

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

Draft Code of Offences against the Peace and Security of Mankind, 504th Plenary Meeting, 4 December 1954. GA Res. 897 (IX) (1954).

Draft Code of Offences against the Peace and Security of Mankind. Text adopted by the UN International Law Commission at its sixth session, (1945).

Draft Convention for the Establishment of a United Nations War Crimes Court, UN War Crimes Commission, Doc. C.50(1) (1944).

Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, (The Malabo Protocol) ' AU Doc. No. STC/Legal/Min. 7(1) Rev.1 (14 May 2014).

Draft Statute for an International Criminal Court with commentaries (1994).

Elements of Crimes, Published by the International Criminal Court as Doc. ICC-PID-LT-03-002/11 (2011).

European Convention on Human Rights (ECHR) (1950).

Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan and the Justice and Equality Movement, Doha (2010).

General Comment 13/21', UN Doc. A/39/40.

Geneva Convention for the Amelioration of the Condition of the Wounded and Armies in the Field. 940, T.S. No. 377 (1864).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31, (Geneva Convention I 1949).

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3368, 75 U.N.T.S. 85 (Geneva Convention II 1949).

Geneva Convention Relative to the Protection of Civilians Persons in Time of War of 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S 287 (*Geneva Convention IV* 1949).

Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (Geneva Convention III 1949).

Hague Convention (II) with Respect to the Laws and Customs of War on Land, 26 Marten Nouveau Recueil (ser. 2) 949: for the 1907 Hague Convention IV. (1899).

Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of Land. (1907).

Hague Declaration (IV, 2) Concerning Asphyxiating Gases (1907) UKTS 32, Cd. 3751. (1899).

Hague Declaration (IV, 3) Concerning Expanding Bullets (1907) UKTS 32, Cd. 3751. (1899).

Havana Convention adopted at the Havana Conference held in Havana (1928).

International Criminal Court Rules of Procedure and Evidence (2002).

Implementation of the Rome Statute of the International Criminal Court Regulations GN R1089 in GG 23761 of 16 August (2002).

Interagency Working Group (IWG), Trial of the major war criminals before the International Military Tribunal Nuremberg. Volume 1. Published at Nuremberg, Germany (1947).

Inter-American Convention to Prevent and Punish Torture (OEA/ser A /42 (1986).

*International Convention Against the Taking of Hostages, GA Res 34/146, UN Doc A/34/146, entered into force 4 June (*1983).

International Convention for the Suppression of Terrorist Bombings, Doc. GA Res. 52/164. (1997).

*International Covenant on Civil and Political Rights, Adopted 19 December 1966 and entered into force 23 March (*1976).

International Covenant on the Suppression and Punishment of the Crime of Apartheid, Adopted by UN General Assembly Resolution 3068(XXVIII), 28 UN. GAOR Supp.(No. 30) at 75, UN. Doc. A/9030 (1974), 1015 U.N.T.S. 243, (1976).

Kellogg–Briand Pact (or Pact of Paris, official General Treaty for Renunciation of War as an Instrument of National Policy) (1928).

Laws of War: the Geneva Convention for Amelioration of the Condition of the Wounded on the Field of Battle (also known as the Red Cross Convention), (1864).

London Charter, Agreement for the Prosecution and Punishment of major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), Annex, 82 UNTS 279 (1951).

Model Agreement between the United Nations and Member States contributing personel and equipment to United Nation peacekeeping operations, UN Doc. A/46/185 (1991).

Montevideo Convention on the Rights and Duties of States, signed at Montevideo (1933).

Nuremberg Trial Proceedings Rules of Procedure, adopted by the tribunal in accordance with Article 13 of the Tribunal Charter, 29 October (1945).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977).

Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925).

*Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March (*1988).

Protocol II Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977).

Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, (1951).

Rules of Procedure and Evidence of the International Criminal Court, Doc. ICC-PIDS-LT-02-002/13_Eng, (2013).

The Inter-Allied Declaration Signed at St. James Palace, London (1942).

The Treaty of Versailles signed and open for ratification on 28 June 1919 and came into force (1920).

The Treaty of Westphalia Signed 15 May-24 October (1648).

Treaty of Lausanne between Principal Allied and Associated Powers and Turkey (1923)
Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), (1919).

Treaty of Sèvres, Post-World War I pact between the victorious Allied Powers and representatives of the government of Ottoman Turkey (1920).

United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (UNTOC), General Assembly resolution 55/25, (2000).

United Nations Charter and judgment of the Nuremberg Tribunal-History and Analysis: Memorandum Submitted by the Secretary-General. Doc.A/CN.4/5 Anon.

United Nations Convention on the Law of the Sea, 1833 UNTS. (1982).

United Nations Treaty Series, Vol. 1155.

United Nations Treaty Series, Vol. 2187.

United Nations War Crimes Commission (1943).

UN General Assembly World Summit Outcome Document on the Responsibility to Protect, Doc. (A/RES/60/1), 2005.

United Nations War Crimes Commission: Summary of AG-042 United Nations War Crimes Commission (UNWCC) (1943-1948).

Vienna Convention on the Law of Treaties. (1969).

Yalta Conference also referred to as the Crimea Conference and codenamed the Argonaut Conference was held from February 4 to 11, (1945).

Resolutions

Resolution RC/Res.6 on the Crime of Aggression. Resolution adopted by consensus at the 13th plenary meeting of the Assembly of State Parties. (2010).

Resolution XXII 'Expanded Functions of the Inter-American Commission on Human Rights' Final Act of the Second Special Inter-American Conference, OAS/serE/XIII 1, 45-46 (1965).

Security Council Resolution 1422 of 2002 and also Security Council Resolution 1487 (2003).

United Nations Security Council Resolution 1564, Press Release: SC/8191 (2004).

United Nations Security Council Resolution 1564, Press Release: SC/8191 (2004).

United Nations Security Council Resolution 1593, Press Release: SC/8351 (2005).

United Nations General Assembly Resolution 1(1) entitled "Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy", adopted on recommendation by the First Committee (1946).

*United Nations General Assembly Resolution 174(II) adopted in its hundred and twenty-third plenary meeting (*1947).

United Nations General Assembly Resolution 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

United Nations General Assembly resolution 260 B (III) of 9 December 1948 on the Establishment of a Committee to contribute in drafting the Statute of the International Criminal Court. (1948).

United Nations General Assembly Resolution 36/106 (1981).

United Nations General Assembly Resolution 43/233, Doc. A/RES/47/233. (1993).

United Nations General Assembly Resolution 43/233, Doc. A/RES/47/233. (1993).

United Nations General Assembly Resolution 44/89.

United Nations General Assembly Resolution 52/135.

United Nations General Assembly Resolution 95(1) "Affirmation of the principles of international law recognised by the Charter of the Nuremberg Tribunal" Doc. A/RES/1/95 (1946).

United Nations General Assembly Resolution 96(1) titled "The Crime of Genocide". (1946).

United Nations General Assembly Resolution 96(1), adopted by the General Assembly during its first session on 24 January (1946).

United Nations General Assembly Resolution. 3314 (XXIX) (1974).

United Nations General Assembly Resolutions: 41/213 (1986).

United Nations General Assembly Resolutions: 42/211 (1987).

United Nations General Assembly Resolutions: 45/248 (1990).

United Nations General Assembly Rules of Procedure embodying amendments up to September 2007. United Nations Publications, Doc. A/520/Rev. (2008).

United Nations Resolution 3314 (XXIX), Annex, UN GAOR, 29th Sess., Supp. No. 31, at 142, UN Doc. A/9631 (1974).

United Nations Security Council Resolution 1265 Adopted by the Security Council at its 4046th meeting, (1999).

United Nations Security Council Resolution 1593, S/RES/1593 (2005).

United Nations Security Council Resolution 1918, UN Doc S/RES/1918 (2010).

United Nations Security Council Resolution 955 (1994).

United Nations Security Council Resolution 808 (1993).

Official publications

Africa Union Assembly, Decision on International Jurisdiction, Justice and the International Criminal Court, Doc. Assembly/AU/13 (XXI), 26-27 May (2013).

Africa Union Assembly, Discussion on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec (2013).

African Union Peace and Security Council Communiqué, PSC/PR/COMM(CLXXV) (2009).

Assembly of State Parties to the Rome Statute of the International Criminal Court's First Session, U.N. Doc. ICC-ASP/1/3, (2002).

Assembly of States Parties, Sixth Resumed Session, side event for African States (2008).

Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec.245 (XIII), Sirte (2009).

AU Doc, Assembly/AU/Dec.111-133(VII) (2006).

AU Doc. Assembly/AU/Dec.103 (VI).

AU-EU Expert Report on the Principle of Universal Jurisdiction, Doc. 8672/1/09 Rev. 1, 16 April (2009).

Commentary on Parts 2 and 3 of the Zutphen Intersessional Draft: General Principles of Criminal Law' (1998).

CRS Report, "International Criminal Court Cases in Africa: Status and Policy Issues" Congressional Research Service, 7-5700, RL34665, (2011).

Dakar Declaration for the establishment of the International Criminal Court in (1998).

Decision Initiating Proceedings under Article 19, requesting Observations and Appointing Counsel for the Defence, ICC-02/04-01/05-320 (2008).

Decision of the Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia. Decision No. Ext/Assembly/AU/Dec.1 (2013).

Decision on Africa's Relationship with the International Criminal Court (ICC), AU Extraordinary Session, 2013 Addis Ababa, Ext/Assembly/AU/Dec. 1 (Oct. 2013).

Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/731(XXI), AU 19th session, 2012 Addis Ababa, Doc. Assembly/AU/Dec. 420 (XIX).

Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/640(XVIII), AU 16th session, 2011 Addis Ababa, Assembly/AU/ /Dec. 335 (XVI).

Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/606(XVII), AU 15th session, 2010 Kampala, Assembly/AU/Dec. 292 (XV).

Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/540(XVI), AU 14th session, 2010 Addis Ababa, Assembly/AU/Dec. 271 (XIV).

Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, Pre-Trial Chamber II, (2009).

Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, Pre-Trial Chamber I (2010).

Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, DOC. Assembly/AU/3(XII), AU 12th session, 2009 Addis Ababa, Assembly/AU/Dec. 213 (XII).

Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, Pre-Trial Chamber I (2009).

Decision on the Prosecutor's Application under Article 58, ICC-02/05-02/09-1, Pre-Trial Chamber I (2009).

Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14(XI), AU 11th session, 2008 Sharm El-Sheik, Assembly/AU/Dec. 199 (XI).

Declaration Concerning the Defeat of Germany, Department of State Bulletin, Volume 12, (1945).

Doc. Assembly/AU/11(XIII), AU 13th session, 2009 Sirte, Assembly/AU/Dec. 243 (XIII) Rev. 1.

Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005).

Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan and the Justice and Equality Movement, Doha (2010).

Geneva Declaration Secretariat, Global Burden of Armed Violence (2015).

German War Trials, Report of Proceedings Before the Supreme Court in Leipzig, London: His Majesty's Stationery Office (1921).

ICC, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC', ICC-20040129-44-En (2004).

ICC-OTP, 'Prosecutor Receives List Prepared by Commission [sic] of Inquiry on Darfur', ICC-OTP-20050405-97-En (2005).

International Committee of the Red Cross, International Red Cross Handbook 407 (1983).

Law Reports of War Criminals selected and prepared by the United Nations War Crimes Commission and published in London by the Majestty's Stationery Office, Volume 1, (1947).

Lawyers Committee for Human Rights, 'Fairness to Defendants at the International Criminal Court', (1996).

Moreno-Ocampo, 'Remarks by the Prosecutor of the International Criminal Court', Chicago, (2008).

Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UN Security Council Resolution 1593 (2005 (2009).

OECD, Development Co-operation Report 2015: Making Partnership Effective Coalition for Action. (2015).

Openeing statement by Justice Robert Jackson, the US led prosecutor for Nuremberg, The Department of State Bulletin. Dir. of publ. Department of State. 25.11.1945, n° 335; vol. XIII; publication 2432. Washington: US Government Printing Office. "International Military Tribunal"(1945).

Postdam Conference also referred to as the Berlin Conference of the Three Heads of Government of the USSR, USA and UK was held at Cecilienhof in occupied Germany from 17 July to 2 August (1945).

Preparatory Committee on the Establishment of the International Criminal Court, Press Release L/2846 (1997).

Press Release of the Chambers, JL/.I.S./627e, The Hague, 9 October (2001).

Press Release of the Office of the Prosecutor, F.H./P.I.S./598e, The Hague, 29 June (2001).

Press Release of the Registry, CC/P.I.S./597e, The Hague, 29 June (2001).

Press Release of the Registry, CC/P.I.S./617e, The Hague, 6 September (2001).

Public Redacted Version of the Prosecutor's Application under Article 58, ICC-02/05-157-AnxA, OTP (2008).

Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 40 UN ESCOR Comm'n on Hum Rts (32d mtg), UN Doc E/CN 4/1984/72.

Refugee Law Project, 'What About Us? The Exclusion of Urban IDPs from Uganda's IDP Related Policies and Interventions', Briefing Paper (2007).

Regulations of the Office of the Prosecutor. Official Journal Publication Doc. ICC-BD/05-01-09. (2009).

Report 29/92 (Argentina) 82nd Session OEA/LV/II.82 Doc24 (2 Oct 1992).

Report 29/92 (Uruguay) 82nd Session OEA/LV/II.82 Doc25 (2 Oct 1992).

Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22.

Report of the African Union High-Level Panel on Darfur. Peace and Security Council 207th meeting of the Heads of States and Government, AU Doc. PSC/AHG/2(ccvii) (2009).

Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2135 (1952).

Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2645 (1954).

Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135.

Report of the Human Rights Committee, UN Doc E/CN 4/Sub 2/Add 1/963 (1982).

Report of the ICJ on Legality of the Use by a State of Nuclear Weapons (1996).

Report of the Internal Law Commission on the work of its Forty-Sixth Session, UN Doc. A/49/10, Chapter II, (1994).

Report of the International Commission of Inquiry in Darfur to the UN Secretary-General, ICID report (2005).

Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars, Washington: Carnegie Endowment for International Peace, (1914).

Report of the International Criminal Court to the United Nations General Assembly; Sixty-sixth session, Item 75 of the provisional agenda, Doc. A/66/309. (2011).

Report of the International Law Commission on the work of its Forty-Sixth Session, 49 UN GAOR Supp. (No. 10), UN Doc. A/49/10.

Report of the International Law Commission on the Work of Its Forty-Eighth Session, UN Doc. A/51/10 (1996).

Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc. A/AC.249/1998/L.13. (1998).

Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22.

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum UN Doc. A/CONF.183/2/Add.1.

Report of the Prosecutor of the ICC to the Second Assembly of States Parties to the Rome Statute of the International Criminal Court (2003).

Report of the Secretary General on the work of the organisation [A/60/1] (2005).

Report of the Secretary-General on arrangements concerning the status of the UN Emergency Force in Egypt, UN Doc. A/3526 (1957).

Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000).

Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. UN Doc. S/2004/616 (2004).

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993).

Report of the Unite Nations Secretary General, UN Doc. S/25704. (1993).

Report of the United Nations High Commissioner for Human Rights, General Assembly official records, sixty-third session, supplement no. 36 (2008).

Report of the United Nations Human Rights Office of the High Commission on the "International Legal Protection of Human Rights in Armed Conflicts." (2011).

Report of the United Nations Secretary General, UN Doc. S/2000/915. (2000).

Report of the Working Group on a Draft Convention Against Torture, UN Doc E/CN 4/1367 (1980).

Report of the Working Group on the Draft Convention Against Torture, UN Doc E/CN 4/1982/L.

Report on preliminary examination activities, 'International criminal tribunals', Leitner Center for International Law and Justice at Fordham Law School, The Office of the Prosecutor at the International Criminal Court (2013).

Request for Expedited Decision on the Prosecution's Application Pursuant to Article 58, ICC-02/05- 207, OTP, (2009).

Statute of the International Court of Justice annexed to the Charter of the United Nations adopted at the United Nations Conference at San Francisco (1945).

Second Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UN Security Council 1593 (2005).

Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties, ICC-02/04-01/05-67 (2005).

Statement by the President of the Security Council, 22 December 2008 Doc. S/PRST/2008/48.

Statement of Abdulbasit Sabderat, Minister of Justice in the Republic of the Sudan before the AU Peace and Security Council (2008).

Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UN Security Council Resolution 1593 (2005).

Status of Forces Agreement for Peacekeeping Operations. UN Doc. A/45/594 (1990).

Summary Prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) 35 UN ESCOR Comm'n on Hum Rts 16, UN Doc E/CN 4/1314 (1978).

Summary Records of the 32nd Meeting, UN Doc E/CN 4/1984/SR.

Summary study on the experience derived from the establishment of UNEF I, UN Doc. A/3943 (1958).

Tenth Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UN Security Council 1593 (2005).

The Refugee Law Project's paper position on the announcement on the formal investigations of the LRA by the Prosecutor of the ICC and the implications on the search for peaceful solutions to the war in Northern Uganda (2004).

Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UN Security Council Resolution 1593 (2006).

Trial of the Major War Criminals before the International Military Tribunal, vol. I, N *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (UNTOC), General Assembly resolution 55/25, 2000* Nuremberg (1947).

Rome Statute of the International Criminal Court. Doc. A/CONF.183/9 (1998).

U.N. Doc. S/25704 at 36, annex (1993).

U.N. Doc. S/RES/827 (1993).

UN Doc CCPR/C21/Rev 1/Add 3.

UN Doc E/CN 4/Sub 2/Add1/963 (1982).

UN Doc. A/66/309 of 19/08/2011.

UN Doc. A/CONF.183/C.1/L.76/Add.3.

UN Doc. A/CONF.183/C.1/WGGP/L.4/Corr.1.

UN Doc. IT/32 (1994).

UN Doc. S/RES/1034 (1995).

UN Doc. S/RES/1329 (2000).

UN Doc. S/RES/827 (1993).

United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (UNTOC), General Assembly resolution 55/25, (2000).

United Nations Security Council 7060th Meeting, S/PV. 7060 "Peace and Security in Africa" (2013).

United Nations War Crimes Commission: Summary of AG-042 United Nations War Crimes Commission (UNWCC) (1943-1948).

Washington College of Law, Project Report; Expeenditing Proceedings at the International Criminal Court: War Crimes Research Office; International Criminal Court Legal Analysis and Education Project. Washington College of Law (2011).

Windhoek Plan of Action on ICC Ratification and Implementation in SADC (2001).