The Future of Prosecutions under the International Criminal Court

A thesis submitted for the Degree of Doctor of Philosophy

By

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April 2015

Declaration

This is to certify that this thesis I have presented for examination for the PhD Law degree of Brunel University London is exclusively my work other than where I have clearly indicated that it is the work of others; I also undertake that any quotation or paraphrase from published or unpublished work of others have been duly acknowledged.

Acknowledgement

Special thanks to my supervisors Professor Benedict Chigara, without whom this would not have been possible, he went beyond the call of duty to mentor me not only academically but also emotionally during tough times from the inception of the programme and Professor Manisuli Ssenyonjo, Brunel University Law School Administrative Team; the University's Students finance team, Students office staff, Law School Academic Staff particularly Dr Gerard Conway, Dr Olufemi Amao, Dr Akalemwa Ngenda and of all Professor Abimbola Olowofoyeku *'Kabio osi'* of Brunel Law School London; Professor Abass Ademola 'special thanks' and to all Brunel PhD Law (baked, baking, and unbaked) candidates/colleagues.

To my Dad and Mum special thanks for your support, whilst Mum kept reminding me to put God first at all times, my late Dad would be in disbelieve of this accomplishment but he actually instilled the foundation of 'hard work and honesty' as the best policy.

My friends who provided unimaginable support all through the period, I am extremely grateful especially to Idowu Oyewole, Pastor and Pastor Lola Godwin Okorie, Charles Ajuchi, Femi Olupono, Commodore and Mrs Tunji Beckley, Reverend and Reverend Charmaine John Howard, Anthony and Emma Billington, Brett Jordan, Dennis, Paul, Mr and Mrs Olufalowo, Valerie, the diaconate of Northolt Park Baptist Church, Cosmas Anyakudo, Henry C. Uzokwe, Dr Kema Alexis Foua, Muath Al-Zoubi, and Dr Yahaya Alshammari.

To my wife 'Jokes' congratulations, because she will keep the certificate for life whilst I keep the copy, this is in honour of her invaluable support; to my children Jentegbe and Jenyokale congratulations also for all your survival strategies and understanding being unable to be with you at all times during this period.

Last but not the least, are my 'siblings' and their immediate families: Professor Jibowu Olubokun, Pastor Ireti Olubokun, Pastor Yinka Owoseje, Barrister Olakunle Olubokun, Mrs Colonel Famakinwa Bimbo and Debola Olubokun a massive thanks for all your support and contributions.

Thank you, thank you and thank you to everyone.

THIS AWARD IS DEDICATED TO

THE

CHIBOK GIRLS

Chibok, Borno State, North East of Nigeria

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The Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec 1948, 78 UNTS 277

The European Convention on Human Rights 1950

The Geneva Protocol of 1925, Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare

The Hague Convention IV Respecting the Laws and Customs of War on Land, Oct 18, 1907, 36 Stat. 2277, TS No 539

The Hague Declaration (IV 2) concerning asphyxiating gases of 1899; The Hague, 29 July 1899

The Kellogg–Briand Pact 1928

The Treaty of Washington of 1922; The treaty was agreed at the Washington Naval Conference, DC November 1921 to February 1922; signed on 6 February 1922 an attempt to prevent a naval arms race that began after World War I

Treaty of Peace between the Allied & Associated Powers and Turkey Signed at Sevres - August 10, 1920

Treaty of Peace with Italy (Paris, 19 February 1947)

Treaty of Versailles (Versailles, 28 June 1919)

Universal Declaration of Human Rights proclaimed and adopted by the General Assembly 10 December 1948

Vienna Convention on Diplomatic Relations (Vienna, 18 April1961)

Vienna Convention on the Law of Treaties (23 May 1969)

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Slave Trade Act 1824

Slave Trade Act 1843

Slave Trade Act 1873

The Act of Union England and Scotland 1707

The Act of Union England and Wales 1536 and 1543 is a series of laws passed in the English Parliament

The Human Rights Act 1998

The Criminal Justice and Public Order Act 1994

The Criminal Law Act 1977

The Football Offences Act 1991 (amended by the Football (Offences and Disorder) Act 1999) forbids indecent or racialist chanting at designated football matches

The Public Order Act 1986 England, Wales, and Scotland

The Racial and Religious Hatred Act 2006

European Conventions and Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)

European Convention on Extradition (13 December 1957)

European Convention on Mutual Assistance in Criminal Matters (20 April 1959)

The Amsterdam Treaty, officially the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, was signed on 2 October 1997, and entered into force on 1 May 1999; it made substantial changes to the Treaty of Maastricht, which had been signed in 1992. The Treaty of Amsterdam meant a greater emphasis on citizenship and the rights of individuals, an attempt to achieve more democracy in the shape of increased powers for the European Parliament, a new title on employment, a Community area of freedom, security and justice.

The European Economic Community (EEC) (1958) an international organisation created by the Treaty of Rome in 1957 to bring about economic integration (a common market) among its six founding members: Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. The EEC also known as the Common Market in the English-speaking world and sometimes referred to as the European Community even before being officially renamed in 1993 as such. It gained a common set of institutions along with the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EURATOM) as one of the European Communities under the 1965 Merger Treaty (Treaty of Brussels).

The Maastricht Treaty (formally, the Treaty on European Union or TEU) undertaken to integrate Europe was signed on 7 February 1992 by the members of the European Community in Maastricht, Netherlands. On 9–10 December 1991, the same city hosted the European Council which drafted the treaty. Upon its entry into force on 1 November 1993, it created the European Union and led to the creation of the single European currency, the euro. The Maastricht Treaty has been amended by the treaties of Amsterdam, Nice and Lisbon.

The Treaty of Lisbon (initially known as the Reform Treaty) is an international agreement which amends the two treaties which form the constitutional basis of the European Union (EU). The Treaty of Lisbon was signed by the EU member states on 13 December 2007, and entered into force on 1 December 2009. It amends the Maastricht Treaty (1993), which also is known as the Treaty on European Union, and the Treaty of Rome (1958), which also is known as the Treaty establishing the European Community (TEEC). At Lisbon, the Treaty of Rome was renamed to the Treaty on the Functioning of the European Union (TFEU).

The Treaty of Nice was signed by European leaders on 26 February 2001 and came into force on 1 February 2003. It amended the Maastricht Treaty (or the Treaty on European Union) and the Treaty of Rome (or the Treaty establishing the European Community which, before the Maastricht Treaty, was the Treaty establishing the European Economic Community). The Treaty of Nice reformed the institutional structure of the European Union to withstand eastward expansion, a task which was originally intended to have been done by the Amsterdam Treaty, but failed to be addressed at the time.

The Treaty of Rome, officially the Treaty establishing the European Economic Community (TEEC), is an international agreement that led to the founding of the European Economic Community (EEC) on 1 January 1958. It was signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. The word Economic was deleted from the treaty's name by the Maastricht Treaty in 1993

Table of Journal Abbreviations

American Journal of International Law	*AJIL*
American Society of International Law	*ASIL*
British Yearbook of International Law	*BYbIL*
Cambridge Law Journal	*CLJ*
Canadian Yearbook of International Law	*CYbIL*
Columbia Journal of Transnational Law	*Col JTL*
Columbia Law Review	*Col LR*
Criminal Law Forum	*Crim LF*
European Journal of International Law	*EJIL*
European Law Review	*EL Rev*
Fordham International Law Journal	*FILJ*
Georgetown Journal of International Law	*Geo JIL*
Harvard Human Rights Journal	*HHRJ*
Harvard International Law Journal	*HILJ*
Human Rights Quarterly	*HRQ*
ILSA Journal of International & Comparative Law	*ILSA JICL*
International and Comparative Law Quarterly	*ICLQ*
International Review of the Red Cross	*IRRC*
Journal	*J*
Journal of Conflict and Security Law	*JCSL*
Journal of International Criminal Justice	*JICJ*
Law and Contemporary Problems	*L&CP*
Law Quarterly Review	*LQR*
Leiden Journal of International Law	*LJIL*
Melbourne Journal of International Law	*Melb JIL*
Michigan Journal of International Law	*Mich JIL*
Modern Law Review	*MLR*
New England Law Review	*NELR*
New Law Journal	*NLJ*
New York University Journal of International Law and Politics	*NYJILP*

New York University Law Review	*NYULR*
Oxford Journal of Legal Studies	OJLS
Proceedings of the American Society of International law	*ASIL Proceedings*
Stanford Journal of International Law	*Stan JIL*
Texas Law Review	*Tex LR*
Virginia Journal of International	*Law VJIL*
Yale Journal of International Law	*YJIL*
Yale Law Journal	*YLJ*
Yearbook of International Humanitarian Law	*YbIHL*

Table of Other Acronyms

Affirmed	*affd*
African Charter on Human and People's Rights	*ACHPR*
African Union Mission in Sudan	*AMIS*
African Union-United Nations Hybrid Operation in Darfur	*UNAMID*
And following	*ff*
Article/articles	*art/arts*
Cambridge University Press	*CUP*
Chapter/chapters	*ch/chs*
Chapter/chapters (of statutes)	*c/cc*
Consolidated Treaty Series	*CTS*
Convention Against Torture	*CAT*
Criminal	*Crim*
Criminal Law Review	*Crim LR*
Democratic Republic of Congo	*DRC*
Economic Community of West African States	*ECOWAS*
Economic Community of West African States Monitoring Group	*ECOMOG*
Edition	*edn*
Editor/editors	*ed/eds*
European	*Eur*
European Convention on Human Rights	*ECHR*
European Court of Human Rights	*ECtHR*

European Human Rights Reports	*EHRR*
European Treaty Series	*ETS*
European Union	*EU*
Extraordinary Chambers in the Courts of Cambodia	*ECCC*
Footnote/footnotes (internal to the work)	*n/nn*
For example	*eg*
Geneva Conventions I, II, III and IV	*GC I- IV*
Human Rights Watch	*HRW*
Inter-American Court of Human Rights	*IACtHR*
International	*Intl*
International and Comparative Law Quarterly	*ICLQ*
International Centre for Transitional Justice	*ICTJ*
International Court of Justice	*ICJ*
International Covenant on Civil and Political Rights	*ICCPR*
International Criminal Court	*ICC*
International Criminal Tribunal for Rwanda	*ICTR*
International Criminal Tribunal for the former Yugoslavia	*ICTY*
International Law Reports	*ILR*
International Legal Materials	*ILM*
International Military Tribunal	*IMT*
International Military Tribunal for the Far East	*IMTFE*
Iraqi High Tribunal	*IHT*
Law or Legal	*L*
Legal Studies	*LS*
NATO Stabilisation Force in Bosnia and Herzegovina	*SFOR*
Non-governmental Organisation	*NGO*
North Atlantic Treaty Organization	*NATO*
Number/numbers (of a Report etc)	*No/Nos*
Office of the Prosecutor	*OTP*
Oxford University Commonwealth Law Journal	*OUCLJ*
Oxford University Press	*OUP*
Paragraph/paragraphs	*para/paras*
Part/parts	*pt/pts*
Peace support operation	*PSO*

Pre-Trial Chamber	*PTC*
Public Law	*PL*
Quarterly	*Q*
Regulation/Regulations	*reg/regs*
Report(s)	*Rep*
Review	*Rev*
Rex/Regina	*R*
Rule/rules	*r/rr*
Rules of Engagement	*ROE*
Rules of Procedure	*ROP*
Schedule/schedules	*sch/schs*
Secretary-General (of the United Nations)	*SG*
Section/sections	*s/ss*
Special Court for Sierra Leone	*SCSL*
Special Representative of the Secretary-General	*SRSG*
Special Tribunal for Lebanon	*STL*
State Immunity Act	*SIA*
Subsection/subsections	*sub-s/sub-ss*
That is	*ie*
United Kingdom	*UK*
House of Lords	*HL*
United Nations	*UN*
United Nations Advance Mission in Cambodia	*UNAMIC*
United Nations General Assembly	*UNGA*
United Nations Integrated Mission in Timor-Leste	*UNMIT*
United Nations Mission in Bosnia and Herzegovina	*UNMIBH*
United Nations Mission in Côte d'Ivoire	*UNOCI*
United Nations Mission in Ethiopia and Eritrea	*UNMEE*
United Nations Mission in Kosovo	*UNMIK*
United Nations Mission in Liberia	*UNMIL*
United Nations Mission in Sierra Leone	*UNAMSIL*
United Nations Mission in the Sudan	*UNMIS*
United Nations Mission of Support in East Timor	*UNMISET*
United Nations Operation in Somalia	*UNOSOM*

United Nations Protection Force	*UNPROFOR*
United Nations Transitional Authority in Cambodia	*UNTAC*
United Nations Transitional Authority in East Timor	*UNTAET*
United Nations Treaty Series	*UNTS*
United States	*US*
United States Armed Forces	*USAF*
United States Freedom of Information Act	*FOIA*
Universal Declaration of Human Rights	*UDHR*
Vienna Convention on the Law of Treaties	*VCLT*
Volume/volumes	*vol/vols*
Yearbook	*YB*
Yearbook of the International Law Commission	*YBILC*

Abstract

This thesis examines prosecutorial challenges of the International Criminal Court (ICC/the court) in relation to the dwindling legitimacy prosecuting under Article 5 of the Rome Statute and other relevant international law principles. The study attempts a prognosis of the future shape of ICC prosecutions in light of the challenges and proposes reforms to the operations of the Court and its constitutive instrument to improve the dispensation of justice.

The focus of the study is substantive international criminal law, developments in relevant case laws of international courts and tribunals, structure and procedures of the ICC and relevant principles within the context of elements of the Crime of genocide, crimes against humanity, war crimes and the Crime of aggression. The thesis further evaluates the role of the Court as it ensures international cooperation with domestic efforts to promote the 'Rule of law', uphold the principles of international humanitarian law, human rights law and combat impunity being the first permanent treaty-based international criminal court with the intent and purpose of ending impunity for perpetrators of the most serious crimes of concern to the international community and thus contributes to the prevention of such crimes. Additionally, the International Criminal Court advances international criminal justice, particularly with regard to victims by providing not only legal justice but also participation in the process and restorative justice to rebuild the society after mass violence.

The thesis is an analysis of the prosecutorial challenges at the International Criminal Court, using its legal framework and jurisprudence to establish facts and reach new conclusions.

Chapter 1

Introduction

1.1 Preamble

This thesis examines the challenges affecting the effective functioning of the International Criminal Court (the Court/ICC); proffers probable solutions and the future shape of the Court under the Rome Statute.[1] Pursuant to the United Nations General Assembly Resolution 52/160 of 15 December 1997, the United Nations Diplomatic Conference of Plenipotentiaries in Rome, Italy, on the establishment of an International Criminal Court adopted the Rome Statute on 17th July 1998, and became operational, upon ratification and enforcement on 1st July 2002.[2] Year 2003 saw the first set of judges elected and the Prosecutor of the Court appointed.

The Creation of the Court is underpinned by the 'Rule of Law'[3] and meant to ensure that perpetrators of serious crimes are held accountable within the framework of a global jurisdiction, if they were beyond the reach of justice in their own country. The legal framework of the ICC created a permanent jurisdiction, to focus investigation and prosecution on the most serious crimes of international concern, the ambit of the Court to dispense not only legal justice but also transitional justice is enshrined in the Statute. As John Rawls has observed that justice is the bond of society without which any association of human beings would struggle to subsist.[4]

The Rome statute has become a necessary and fundamental tool in the campaign against impunity. It contains a comprehensive codification of the crime of genocide, crimes against humanity, war crimes and the crime of aggression, based on the free and voluntary consent of the international community, and reflects the development in international criminal law and

[1] 2187 UNTS 3; 37 ILM 999 (1998) adopted 17 July 1998, Rome, Italy, entered into force 01 July 2002 (ICCSt).
[2] ibid, Article 126 (1) entry into force, 'This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations'.
[3] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th edn, London 1885); Thomas Bingham, *The Rule of Law* (Penguin, London 2010) 3-6; Bingham also accredits the Rule of Law to Aristotle by a quote: 'that it is better for the law to rule than one of the citizen'.
[4] John Rawls, *A Theory of Justice* (Harvard University Press, Reissued edition, , US 2005) 3; 'Justice is the first virtue of social institutions .... A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. ...Justice is not subject to political bargaining or to the calculus of social interests.

justice. The Court will only prosecute those accused of these crimes if the State is unwilling or genuinely unable to carry out the investigation or prosecution.[5] The Rome Statute does not expressly lay claims to universal jurisdiction as of itself, but the Substantive crimes enumerated in Article 5 of the Statute are customary in nature, thereby subject to universal jurisdiction.[6]

This research understudy's how the ICC became engulfed in circumstances that tend to compromise its credibility and or legitimacy. How and what can be done to improve the 'State of affairs'? To accomplish the intent and purpose underlining its establishment, ruminating on these, the research will examine three main issues such as: how has the jurisdiction of the Court been established after the enforcement of the Rome Statute? What are the Challenges facing the Court? And in what ways if any, has the jurisprudence of the Court contributed to the current 'state of affairs?' The thesis sets out to establish the need to further augment the Rome Statute, either through amendments or creation of an additional legal framework in light of new realities to enhance the capacity of the Court in order to actualise the purpose and intent of the Statute. Noting Louis Henkin's contentions that enforcement is a weak link in the International Legal System,[7] the Significance therefore, is the focus on the limits within the legal framework of the Court reverberating external challenges; delegitimating the authority of the Court; leading to compromising it credibility and performance.

The research attempts to underscore the Intrinsic and Extrinsic problems, affecting internal and external motivations towards the Court. It seeks to make a contribution to scholarship in the area of international criminal law. The distinctiveness of this dissertation is the focus on the behaviour (theory of Organisations) of the Court as an entity. Although, this is not the first research on the jurisdiction of the International Criminal Court, nor will it be the last, but, it adds to the reservoir of knowledge in the subject area and to that end maintains the impetus of the discussion on the important enquiry that affects the dispensation of justice by the Court.

[5] ICCSt (n I) Article 17 (1) (a), (3); Hans-Peter Kaul, 'The International Criminal Court Current Challenges and Perspectives' Salzburg Law School on International Criminal Law (USA 2011).
[6] Abass Ademola, 'Prosecuting International Crimes in Africa, Rationale, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933.
[7] Louis Henkin, 'Human Rights and State Sovereignty' (1995) 25 *Georgia Journal of International and Comparative Law* 31, 41.

1.2 Overview and Methodology

The International Military Tribunal (IMT) 1946 Judgment at Nuremberg[8] and the setting up of the International Law commission (ILC) to codify the 7 point decision of the Nuremberg Trials accepted today as customary in international law, favours the argument that State sovereignty has been challenged.[9] The traditional precept of State sovereignty is the exclusivity of national claims to jurisdiction over her citizens, but part of the Codification declared that 'international crimes are committed by individuals and any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.'[10]

This thesis critically evaluates the Challenges associated with the enforcement of international criminal law by the International Criminal Court and argues that there are some fundamental weaknesses in the Enforcement Mechanisms applicable to the law, an unconscious offshoot deliberately calibrated into the legal framework establishing the Court on the notion that States Sovereignty should always prevail, against the backdrop that once an organisation is formed such an organisation should be allowed to grow if the intent and purpose for creating it is still relevant. A vivid example of such organisation and growth is the European Union which has grown from mere cooperation between States to Supra-nationalism.[11]

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[8] 82 UNTS 279; 59 Stat 1544; 3 Bevans 1238; 39 *American Journal of International Law* 258 (1945); United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis 'London Agreement', 8 August 1945.

[9] 1950 International Law Commission Year Book Vol 11, 374; UN Doc A/CN 4/SER.A/1950/Add 1; 44 *American Journal of International Law* (Supp) 15 (1950) Principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal 1950; In Resolution 177 (II) of 21 November 1947, the General Assembly instructed the International Law Commission to formulate the principle of international law recognised in the Charter of the IMT and in the judgment of the Tribunal. The commission determined that as the General Assembly had affirmed the principle, it should not evaluate the principle qua principle of international law but merely formulate them. The seven Nuremberg principles have aided much of the development in international criminal law.

[10] ibid, Principle 1.

[11] George Bermann *et al*, *Cases and Materials on European Union Law* (West Academic Publishing, 3rd edn, USA 2011); The success of the European Coal and Steel Community (ECSC) led the Political Leadership of the initial six member States to enter into the Treaty of Rome on 25 March 1957 which launched in 1958 the European Economic Community (EEC) subsequently, the Treaty of Maastricht created the European Union (EU) as an over-arching structure in 1993, and modified substantially the EEC, renamed the European Community (EC), the Treaties of Amsterdam in 1999 and Nice in 2003 made important amendments. The Treaty of Lisbon, effective 1December 2009, substantially amended the initial Maastricht Treaty on European Union and absorbed the EC into the European Union. Comprehensive treatise on the law, history, and structure of the European Union co-authored by *Fordham International Law Journal*, faculty advisor Professor Roger Goebel Fordham Law Library, European Union Legal Research Guide; <http://lawlib1.lawnet.fordham.edu/research/eu.pdf > Accessed 30 April 2014.

Another argument central to this thesis is the lack of adequate authority accompanying delegated responsibilities (proportionality theory) to the International Criminal Court for enforcement of justice consequent upon a breach of substantive international criminal law; incongruent with the achievement of global justice for mankind. In the words of Blaise Pascal, 'Justice without force is [no justice] powerless…'[12] The thesis also argues that the administration of international criminal law requires the International Criminal Court to develop acceptable standards on the issue of gravity and admissibility for coherent application in situations, and that the Court ought to remain apolitical. Further arguments are that prosecution of heinous crimes committed in a territory cannot be properly executed by heavy reliance on the State Party because of their common interest with the perpetrators of the Crime, assuming they are not in themselves guilty of the Crime. Prior to the ICC enforcement of judgments of international tribunals have been through cooperation and use of co-opted States coercive powers, which the ICC recognises through the Complementarity principle.[13] However, the Court being majorly dependent on the 'Host State' for access to collection of evidence, initial detention and arrest of the accused has severely thwarted proper undertaking of the Court's functions.[14]

However, this thesis is a doctrinal study,[15] a traditional theoretical legal analysis, the orientation and designed is to enable its findings to be useful in ensuring utmost credibility and legitimacy in the jurisdiction, decisions and improve current implementation regime of international criminal law and justice by the Court. Different areas of law theories contributed to the research, namely public international law, international criminal law, international humanitarian law, international human rights law, domestic criminal law, commercial law and such other theories like Organisational Behaviour (OB) became relevant. The thesis engages textual analysis of legislations, treaties, case laws and legal academic writings, with directions and motivations highly influenced by the authorship and knowledge of academics such as Dapo Akande, Benedict Chigara, William Schabas, Abimbola Olowofoyeku,

[12] Blaise Pascal, *Thoughts on Religion and Philosophy* (William Collins edition, Glasgow 1838).
[13] ICCSt (n 1) Article 17; para 10 of the preamble to the Statute which states that: Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.
[14] William A Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forums* 5.
[15] Alan Bryman, *Social Research Methods* (Oxford University Press, 4th edn, Oxford 2012)19-20; Saul Becker and others *Understanding Research for Social Policy and Social Work Themes, Methods and Approaches, Understanding Welfare Social Issues, Policy and Practice* (Series Policy Press, 2nd edn, UK 2012) 12 – 15.

Manisule Ssenyojo, Abass Ademola, Illias Bentakers, Gerard Conway, Nicholas Tsagorius, Anthony Cassese, Akalemwa Ngenda and Laila Sadat to mention a few.[16]

The principles' underlining the jurisprudence of international criminal prosecution up to and after the advent of the ICC has been examined. The thesis analyses in the first place the substantive crimes within the Rome Statute to fully understand the developments in international criminal law to the present day. It is argued that the ICC Statute reflects a *sui generis* legal regime in respect of these crimes. Theoretically, the research progresses towards analysing the ICC as a legal entity inundated with prosecutorial challenges in the process of redressing injustice and establishing responsibility for the most serious crimes of concern to humanity.[17]

When an assertion is made, the researcher attempts to produce the evidence; in so doing present arguments to establish the assertion through critical examination of primary and secondary sources of data. Consequently, a summation is reached through rigorous analysis of legislative Acts, bills, commentaries and debates by notable authorities present during the drafting of the Statute which provides an in-depth insight into the factual intentions and importance behind the Articles of the Statute. Legislations and their *travaux préparatoires* most times are obtained in their original form and in English. Analysing the *travaux préparatoires* of the ICC Treaty is aimed at establishing the legal reasoning, opinions, intentions and reservations of States that participated during the 1998 Rome Conference.

Furthermore, the assessment of relevant reports, journals and reviews as secondary sources of data was crucial; in the process, consideration was given to factors like, the authenticity of

[16] ibid.

[17] Article 4 of the Rome Statute specifies that the Court shall have 'international legal personality'. The ICC's international legal personality flows also from the doctrine by the International Court of Justice that an International Organisation must be deemed to have those powers which are essential to the Performance of its duties. Similarly, it can be concluded that the ICC is an international organisation ie a new form of integrated international judicial organisation, in that it is not subject to instructions from governments of States Parties. Under the Statute the Court is composed of various organs vested with either legislative or executive powers. Lastly, the ICC has supranational powers, it can, for instance, issue arrest warrants with binding force for National Authorities; Sascha Rolf Lüder, 'The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice' (2002) 84 *International Review of the Red Cross* 79; Ian Brownnlie, *Principles of Public International Law* (8th ed, Oxford University Press, Oxford 2012) 58-59; Jennings and A Watts (ed), *Oppenheim's International Law I* (Longman , 9th edn, London 1996)119-120.

documents through cross-referencing to identifying its origin. Again, credibility of issues raised in such documents is examined to ascertain accuracy or sincerity, bearing in mind that reports sometimes reflect the views of those responsible for producing it; it was therefore essential to conceptualise the information gathered. Representativeness is a natural consequence of this approach, leading to systematic and rigorous evaluation to objectively interpret the information and accordingly, attribute to it the appropriate weight.

Consequently, an empirical investigation was not undertaken for this research due to sufficiently available empirical data, the basis for which a classical doctrinal analysis was engaged. The need to explore different opinions at national and international levels in pertinent subject areas arose due to the legitimacy challenge facing the ICC. In order to examine these, critical analysis of theories are undertaken to compare the *status quo* with the original intent of the Court's design. Hence, it became apparent in the course of this research that the ICC was limited in its capacity to fully understand some of the crimes peculiar to some State Parties in which it is to adjudicate over, therefore, the current situation falls short of the goals and ideals of the Court. Suggestions reached to alleviate some of the difficulties encountered by the Court, are deduced from the doctrinal approach to the investigation, which is devoid of quantitative analysis. The method of systematic analysis does not include physical observation, collection and analysis of data, field interviews and or collation of questionnaires.

A close examination of the legal framework of the ICC enables the Court to act where possible to forestall the execution of crimes under its jurisdiction. The ICC is a permanent court with the capacity to intervene in ongoing conflict situations – even prior to the outbreak of conflict in some cases – CAH assumes a preventive role at the ICC that it could not assume at the *ad hoc* tribunals,[18] given that jurisdiction over its commission attaches prior to the outset of war.[19] The Court currently has 123 member States (as of January 2015) of which 34 are African Union (AU) members. A number of crimes are peculiar to Africa; one of such is the Unconstitutional Change of Government (UCG), undoubtedly a common sources of conflict in Africa, examples are that of: Mubarak of Egypt and the situation in Côte d'Ivoire

[18] UN Doc S/RES/827 (1993): 32 ILM1203 (1993) (ICTY); UN Doc S/RES/955 (1994): 33ILM 1598 (1994) (ICTR).
[19] David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, New Jersey 2011) 5-7.

(Gbagbo) to mention a few.[20] The unconstitutional takeover of government and its direct impact on the peace and stability in African countries and their communities are evidence of situations and cases under investigations by the Court.[21] The Rome Statute is limited to the most serious international crimes, which, although common to the whole of humanity, are often committed in the aftermath of the breakdown of law and order.[22] Hence, while the ICC prosecutes crimes mostly committed after violence or disorder being already ensued (it has no jurisdiction over UCG) in a State, by criminalising UCG the ICC could aim to prevent the occurrence of such crimes *ab initio* through the proscription of acts that may precipitate violence and disorder in member states.[23]

A limitation of this research is that although the crime of aggression has been defined and awaiting ratification and enforcement, analyses of the crime have been purely based on the Statute, commentaries and other secondary sources of data. There has been no real situation or cases in this regard. Interestingly, the Russian/ Ukraine, Crimea case would have been a wonderful opportunity to test the jurisdiction of the Court in this regard but unfortunately the research would have been completed before the entering into force on 1 January 2007 of the crime of aggression under the jurisdiction of the ICC.

1.3 Structure of the Study

The thesis consists of six chapters. Chapter 2 starts with the presumption that international criminal law entails basic understanding of the workings of national criminal law concepts, the Criminal laws of States limit anti-social behaviour to guarantee a safer community.[24] The Chapter further evaluates the theoretical basis for the practice of modern international criminal law exemplified through the legal framework of the ICC. Therefore, the chapter provides much of the background to the thesis and should be read first as a foundation to subsequent chapters. It elaborates basic definitional terms and clarifies some phrases that will be commonly used throughout the study, thorough examination of some concepts such as: complementarity, admissibility, gravity, *ne bis idem* and other core theories underlining the establishment, operation and acceptance of the Court are made, illuminating further on

[20] Abass Ademola, 'Prosecuting International Crimes in Africa, Rationale, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933; see also Nicholas Tsagourias, 'Introduction the Application of Public International Law to the Crisis in Libya' (2012)14 *International Community Law Review* 305-307.
[21] ibid.
[22] ibid.
[23] ibid.
[24] Jonathan Herring, *Criminal Law*, (Palgrave Macmillan, 8th edn, London 2013) 3-5; Larry May, *Crimes against Humanity A Normative Account*, (Cambridge University Press, Cambridge 2005) 80-90.

current state and practice of international criminal law. The Chapter also introduces the theory of Organisational Behaviour, a concept if properly understood and implemented within the Court could to a reasonable extent minimise some of the prosecutorial challenges facing the Court.

Chapter 3 critically examines the substantive crimes (Article 5) of the Rome Statute, the subject matter jurisdiction of the Court and 'as is' established under public international law to date. The Chapter is presented in four parts; each part evaluates a substantive crime under the Court's jurisdiction enumerated below:

Part one: War Crimes

Article 8 of the Rome Statute defines war crimes as grave breaches of the Geneva Conventions of 1949 as well as other serious violations of the Laws and Customs of war. A war crime can be committed within the framework of both national and international conflicts. War crimes and crimes against humanity are the inescapable odious consequence of the ruthless use of armed forces.[25] The ICC will typically pass sentences in three dimensions: imprisonment, fining and confiscation. Imprisonment is the principal sanction for war crimes, confiscation and fining being accessory punishments, it can be an adjunct to the primary sanction but cannot be imposed independently.

Part two: Crimes Against humanity

Article 7 of the Rome Statute defines crimes against humanity as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Murder, Extermination, Enslavement, Deportation or forcible transfer of population, Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, Torture, Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilisation, or any other form of sexual violence of comparable gravity, Persecution against any identifiable group or collectively on Political, Racial, National, Ethnic, Cultural, Religious and Gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of

[25] Hans-Peter Kaul, 'The International Criminal Court Current Challenges and Perspectives' [2011] *Salzburg Law School on International Criminal Law*; United Nations Charter Article 2 (4)

the Court enforced disappearance of persons, the Crime of Apartheid, Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.

Following the Nuremberg and Tokyo trials,[26] crimes against humanity became recognised as a category of offenses under international law by the General Assembly,[27] although, there is no specialised convention on CAH,[28] but the ILC took up the issue of crimes against humanity as part of its work on the Draft Code of Crimes against the Peace and Security of Mankind which was finalised in 1996, but never adopted.[29] The *ad hoc* International Criminal Tribunals in the 1990s re-codified CAH.[30] Subsequently, the Special Court for Sierra Leone,[31] the Special Panels in East Timor and the Khmer Rouge Tribunal contained CAH as a category of offences,[32] and their prosecutors charged it extensively. William Schabas noted that CAH charges became more successful than war crimes and almost always more successful than genocide cases.[33] The jurisdiction of the ICTY includes two Articles on war crimes (Articles 2 on grave breaches and 3 on other violations of the Laws and customs of war), genocide (Article 4), and crimes against humanity (Article 5). The Article 5 contains a provision linking the crime – like it did at Nuremberg – to armed conflict, providing that the

[26] 82 UNTS 279 (1945); 14 State Dept Bull 391 890 TIAS No 1589.

[27] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (United Nations General Assembly Resolution) Dec 11 1946 GA Res 95(l) UN Doc A/64/Add 1 (1946); ILC, Report on the formulation of Nurnberg principles, prepared by the Special Rapporteur, J Spiropoulos A/CN4/22 12 April 1950; Yearbook of the International law commission (1950) II.

[28] Sadat Leila N, 'Crimes against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334; Rome Statute of the International Criminal Court UN Doc A/CONF 183/9, adopted 17 July 1998 entered into force 1 July 2002 Article 22(2).

[29] Report of the International Law Commission on the Work of Its Forty-Eighth Session (1996) 2 *Year Book of International Law Commission;* 45 UN Doc A/CN4/SER A/1996/Add 1 Part 2; Cherif Bassiouni, *Crimes Against Humanity Historical Evolution and Contemporary Application* (Cambridge University Press, US 2011)171-83; Roger S Clark, 'History of Efforts to Codify Crimes Against Humanity from the Charter of Nuremberg to the Statute of Rome in Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press, Cambridge 2014).

[30] UN Doc S/RES/827 (1993) 32 ILM1203 (1993); UN Doc S/RES/955 (1994): 33ILM 1598 (1994).

[31] 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. The Special Court for Sierra Leone shall function in accordance with the provisions of the present Statute; see also the Special Tribunal for Lebanon established 1st March 2009, with the primary mandate to hold trials for the people accused of carrying out the attack of 14 February 2005 killing 22 people, including the former prime minister of Lebanon, Rafiq Hariri, and injured many others.

[32] On the Amendment of UNTAET Regulation No 2000/11 on the Organisation of Courts in East Timor and UNTAET Regulation No2000/30 on the Transitional Rules of Criminal Procedure, s 9 UNTAET/REG/2001/25 (14 September 2001) East Timor Statute GA Res 57/228, 57th Sess, UN Doc A/RES/57/228 at Art 5 (18 December 2002) ECCC Statute.

[33] William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge 2006) 185-86 'war crimes are perhaps more useful than CAH in certain types of atrocity crime situations – but nevertheless contain an important grain of truth at its core'.

Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether of international or national in character, and directed against any civilian population.[34] The text of Article 5 is based upon Article 6(c) of the Nuremberg Charter, but with the important addition of imprisonment, rape and torture to the list of illegal acts.

Part three: The Crime of Genocide

Article 6 of the Statute defines Genocide as: any of the following acts committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group by methods such as: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent birth within the group and forcibly transferring children of the group to another group. Views urging a relaxation of the high standards placed on the definition of Genocide have been mostly rejected by international courts and tribunals,[35] notably by the ICTY, which found most of the ethnic cleansing in the former Yugoslavia to be a case of CAH,[36] notwithstanding that more than 200,000 deaths, 50,000 rapes and 2.2 million displacements resulted from Serbs attacks on Bosnian Muslims.[37] The International Court of Justice (ICJ) aligned itself with this jurisprudence in *Bosnia & Herzegovina v Serbia & Montenegro* declining to interpret the

[34] Nicholas Tsagourias, 'Introduction the Application of Public International Law to the Crisis in Libya' (2012)14 *International Community Law Review* 305-307; Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res 827, UN SCOR, 48th Sess UN Doc S/RES/827 at Article 5 (25 May 2003) ICTY Statute International Criminal Tribunal for Rwanda, SC Res 955, UN SCOR, 49th Sess UN Doc S/RES/955 at Article 3 Nov 6, 1994 ICTR Statute SC Res 1315, UN SCOR 4186 mtg UN Doc S/RES/955 at Article 5 (August 14, 2000) SCSL Statute.

[35] The General Assembly characterised ethnic cleansing in *Bosnia and Herzegovina* as genocide, GA Res 47/121 para 10 UN Doc A/RES/47/121 (Dec 18,1992) in pursuit of the abhorrent policy of 'ethnic cleansing', which is a form of genocide and the European Court of Human Right found in *Jorgic v Germany*, 2007-III ECtHR 263, that 'the applicant's acts, which he committed in the course of the ethnic cleansing…could reasonably be regarded as falling within the ambit of the offence of genocide.' para 297. The ICJ and the ICTY have declined to find that ethnic cleansing is a form of genocide; *Prosecutor v Kristic* Case No IT-98-33-T Judgment para 580 (12 July 2007) The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*, recognising that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group.

[36] The use of persecution as a head of crime was critical to the ICTY to properly capture the Crime of ethnic cleansing.

[37] *Prosecutor v Popović et al*, Case No IT-05-88 Judgment (10 June 2010).

Genocide Convention more liberally in a case involving States as opposed to individual criminal responsibility.[38]

Part four: The Crime of Aggression

During the Plenary sessions of the Rome Statute, the crime of aggression was made a core crime within the subject matter jurisdiction of the Court, but did not enter into force because it was undefined and the jurisdictional conditions not set out.[39] However, in 2010 at Kampala, Uganda, the Rome Statute was amended by consensus. The amendments to the Statute (Article 8*bis* on the Crime of Aggression) will be unenforceable until one year after 30 State Parties have ratified it and a decision taken by two thirds of State Parties to activate the jurisdiction after 1 January 2017.[40] Safeguards presumably are in place to deter politicisation of the Court's prosecution of aggression.[41] The Statute establishes a unique jurisdictional regime in which the Office of the Prosecutor (OTP) would have to obtain a majority vote of six judges of the Court's pre-trial division the restriction is stricter on the OTP's ability to investigate aggression than other core crimes within the Court's jurisdiction.[42]

Chapter 4 examines key prosecutorial challenges of the Court in its legitimating process. The chapter views the Court as a legal entity,[43] and the challenges are considered in two perspectives termed 'intrinsic and 'extrinsic' (internal and external to the Court), primarily the external challenges are more or less a spillover effect of the internal challenges. These prosecutorial challenges affect reasonably the internal and external motivations towards the Court. The external motivation is a reflection of the external rewards (acceptance/rejection) towards the Court, the internal rewards or motivation towards the Court exemplifies the performance or its work force (behaviour is often guided by reason) to accomplish a high level and standards of performance to deliver impeccable results at all times in order to accomplish the overall objectives of the Court. The chapter also discusses the need to

[38] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *Bosn and Herz v Serb and Mont* 2007 ICJ (February 26); Leila N Sadat, 'Crimes against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334.
[39] Coalition for the International Criminal Court, 'The Crime of Aggression' <www.coalitionfortheicc.org> accessed 12 April 2014.
[40] M H Jackson and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[41] Harold Koh, Stephen Rapp, 'US Department of State US Engagement with the ICC' <www.iccnow.org/> Accessed 12 May 2014.
[42] ibid; Coalition for the International Criminal Court, 'The Crime of Aggression' <www.coalitionfortheicc.org> accessed 12 April 2014.
[43] ICCSt (n 1) Article 4.

standardise the threshold of the Gravity regime in order to create transparency, resulting in improved credibility for the Court.

Chapter 5 examines the jurisprudence of the International Criminal Court and also considers the jurisprudence of other *ad hoc* tribunals. The jurisprudence of the ICC over crimes against humanity is specifically highlighted by the Courts decision in the post-election crises in Kenya.[44] The researcher analyses various situations handled by the Court having met the admissibility and gravity threshold requirements. In all, as of the time of concluding the research the Court handled a total of about 23 cases out of the numerous communications to the ICC by the international community. However, recently, prosecution of the Kenyan President collapsed for lack of evidence to prove beyond reasonable doubt the charges against him, and the case against *Al-Bashir* the Sudanese President has also been discontinued for better utilisation of recourses.

Chapter 6 the final chapter, concludes the Study with recommendations and the possible future of the International Criminal Court. It pins together the research findings to establish the thesis and underscores the potentials of the International Criminal Court. While it is enviable to limit political interference in international criminal justice process, seldom is it possible to completely eliminate this interference. However, preventing political interference at the national level is certainly more successful than what can be achieved internationally. International war crime trials are inherently political and this is perhaps not surprising when one considers the parties involved and the issues being litigated. International Criminal Law is woven with a high degree of political involvement in the trial process. At the moment the credibility of the ICC and its ability to fulfill its duty is dwindling within the international community, this thesis has examined the situation and proffers ambitious recommendations.

By and large, the enforcement of criminal law within a society is necessary to protect the fabric of the Society. International Criminal Law should guarantee peace and security and be more concerned protecting humanity from atrocities and impunity.[45] Regardless of the current fate of the Court, the future of international criminal justice globally lies not in the duplicity and or duplication of international judicial institutions but in the ICC prosecutors discharging

[44] The 2007–08 Kenyan crises a political, economic, and humanitarian crisis that erupted in Kenya after former incumbent President Mwai Kibaki was declared, the winner of the presidential election held on December 27, 2007, supporters of Kibaki's opponent, Raila Odinga of the Orange Democratic Movement, alleged electoral manipulation perpetrated by both parties in the election.

[45] Anthony Cassese *et al, International Criminal Law* (3rd edn, Oxford University Press, Oxford 2013)18.

their duties and responsibilities with candour and impartiality.[46] The ICC must be alight with new realities. The aggressive behaviour of Russian in Ukraine, though beyond the Scope of this study calls for the operation of an impeccable international criminal court, even after the enforcement of the crime of aggression in January 2017, can the Court muscle-in on Russia? As it is, the United Nations (Resolution 334 xxix) is ineffective based on the veto power doctrine. Next chapter will examine fundamental theories of international criminal law.

[46] Abass Ademola, 'Prosecuting International Crimes in Africa: Rationale Prospects and Challenges' (2013) 24 *European Journal of International Law* 933.

Chapter Two

Theoretical Approach to Crime and the International Criminal Court

2.1 Introduction

The purpose of this chapter is to examine relevant theoretical elements and terminologies peculiar to prosecutions under the legal framework of the International Criminal Court (the Court)[1] a profound international treaty that establishes a permanent international criminal court to deal with the most serious crimes of concern to humanity such as: genocide, crimes against humanity, war crimes and the crime of aggression,[2] defined in the Statute based on customary international law and in accordance with the United Nations[3] (UN) mandate to ensure international peace, security and the 'rule of law'[4] under chapter VII of the 'UN Charter' (Articles 39-41)[5] in juxtaposition with the functions and powers of the United Nations Security Council (UNSC).[6]

The chapter starts by establishing the concept of crime; differentiating between treaty/transnational crimes[7] and crimes under the jurisdiction of the court, noting key principles most relevant to international criminal law such as complementarity,[8] *ne bis in idem,*[9] prosecutional discretion, triggering of jurisdiction,[10] gravity, and admissibility. It concludes with an insight on the theory organisational behaviour.

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[1] 2187 UNTS 3; 37 ILM 999 (1998) (ICCSt); A conference in Rome called the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, also known as the Rome Conference, was held from June 15 to July 17, 1998. It brought together delegations from 160 nations and numerous interested organisations to establish a permanent international criminal court—the first of its kind. After five weeks, deliberations culminated in the adoption of the Rome Statute. Seven countries (including the United States and China, both permanent members of the UNSC) voted against the Statute, with twenty-one states abstaining, the International Criminal Court (ICC) was established with 120 votes in its favour, after receiving its first 60 ratifications it entered into force on 1 July 2002, to date, there are 123 states parties with 34 African Union state members to the ICC.

[2] ibid ICCSt (n 1) Article 5.

[3] 1 UNTS XVI Charter of the United Nations.

[4] Albert Venn Dicey, *Introduction to the Study of The law of the Constitution* (8th edn, Macmillan, London 1885).

[5] UN Charter (n 3).

[6] ibid.

[7] Transnational crimes will include but not limited to: drug trafficking, trans-border organised criminal activities, counterfeiting, money laundering, financial crimes, terrorism, and wilful damage to the environment and child trafficking.

[8] ICCSt (n 1) Article 17; Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Brill Leiden 2008).

[9] ICCSt (n 1) Article 20.

[10] ibid.

2.2 Conceptualising Criminality

Criminal law entails some basic understanding and workings of the law; one question that readily comes to mind is what constitutes a crime? Over the years the purposes of those who frame or enforced criminal laws have been many. Consequently, it is not easy to state the total aims of criminal law, the authors of a new code of criminal conduct are in a position to state their objectives at the outset. The general purpose however, is that, criminal laws of states limit anti-social behaviour to guarantee a safer community.[11] Crimes (except strict liability crimes) have two basic (objective and subjective) 'elements'.[12] *Actus Reus* (*AR),* guilty act, voluntary act or omission (objective elements) to which criminal responsibility can attach and *Mens Rea* (MR), intent or guilty mind, criminal intent (subjective element) which makes the performance of a particular act a crime.[13] The event or state of affairs is called the *Actus Reus,* whilst the state of mind is known as the *Mens Rea* of the crime.[14] The *AR* amounts to a crime when accompanied by appropriate *MR;*[15] the absence of either element weakens the liability for an offence. However, 'strict liability' offences[16] do not require *mens rea* such as possession of 'hard drugs' is an example of common law strict liability offence.[17]

Elements of crimes are to be proven to convict in a court of law.[18] Murder is an intentional killing of a human being at peace time. The elements are that the defendant must have (1) intention (*malice aforethought*) (2) caused the death[19] (3) of a human being (4) at Queens

[11] Smith and Hogan, J C Smith, *Criminal Law* (10th edn, LexisNexis Butterworths, 2002) 3-5.
[12] 'Intent' the test for intention is subjective, can be classified in three ways: *Dolus Directus, Dolus Indirectus and Dolus Eventualis*. Dolus eventualis is an important form of intention generally in criminal law. Commonly invoked, analysed and established that the perpetrator objectively foresees the possibility of the 'outcome' his Act and persists regardless of the consequences, it suffices to establish guilt. A psychological concept of culpability, whether an accused has acted intentionally depends exclusively on his or her subjective state of mind, dolus eventualis is a cornerstone to criminal liability. Dolus eventualis is often regarded as the criminal law equivalent to the tort concept of Gross negligence. *Dolus directus* is basically intention in its literary sense, where consequences were desired and foreseen by the perpetrator prior to the commission of the act. The aim and objective of the accused brings about an unlawful consequence, even though the chance of the result is small. *Dolus Indirectus, regarded as* indirect intention is where for instance a servant wants to poison his boss but realises that the poisoned food she has cooked for his employer will also be eaten by his employer's child. The servant will have direct intention to kill the employer and indirect intention to kill the child.
[13] Smith and Hogan, J C Smith, *Criminal Law* (10th edn, LexisNexis Butterworths, 2002) 3-5.
[14] David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press, Oxford 2011) 29.
[15] ibid.
[16] *R v Larsonneur* (1933), *Warner v MPC* (1969) 2 AC 256; *Sweet v Parsley* [1970] AC 132 House of Lords.
[17] Catherin Elliot and Frances Quinn, *Criminal Law* (6th edn, Pearson Longman, England 2006) 32-50.
[18] ICCSt (n1); Genocide Article 6 (a-e), Crimes against Humanity Article 7 (1) (a - k), War Crimes Article 8 (2) (a-e) Crime of Aggression Article 8 *bis.*
[19] *R v Blaue* [1976] 61 Cr App R 271.

Peace. To obtain a conviction, the State (prosecutor) must prove all the elements of the crime '*beyond reasonable doubt*'.[20]

Criminality originates from prior legal prohibition and not before such prohibitions. There can be no crime (*Nullum crimen sine lege)* without law.[21] A prohibited act, should be spelt out in advance to constitute a crime, it is a tenet of the 'rule of law' that the law must be accessible and so far as possible intelligible, predictable, be sufficiently clear that a course of action can be based on it.[22] The law is *ex post facto*, if created after behaviour has occurred making such behaviour illegal.[23] It is imperative that criminal laws be written in precise terms so that citizens can foresee what conduct is unlawful. People are punished for what they do (*R v White*) rather than for what they think.[24] A failure to act at common law ordinarily is not a crime, but Statute often make it an offence to omit to do something (an obligation *R v Dytham*)[25] where for instance individuals have predetermined legal/special responsibility or duty: *R v Gibson & Procter,* child-neglect and Tax laws are examples.[26] Threatening to act and attempting a criminal act can both be criminal offenses.[27] Similarly, in most jurisdictions conspiring to commit a crime is an offence. Conspiracy Statutes criminalise taking steps to carry out a plan to commit a crime.[28]

[20] *R v Haigh* (2010) EWCA Crim 90, (2010) All ER (D) 19 (Feb), case of a 'shaken baby', the difficulty for the prosecution was that there was no evidence at all on the basis of which the jury could reasonably have decided whether the defendant had had the intent to kill or to cause really serious harm on the one hand, or the lesser mental intent which would have been sufficient for manslaughter on the other; if the evidence is incapable of proving which of two possibilities is true, a jury must not be allowed to reach a verdict that can only be based on speculation. Accordingly, the conviction for murder was quashed and a conviction for involuntary manslaughter was substituted; *Woolmington v DPP* (1934) AC 462 HL.

[21] A tenet of criminal law; a guiding principle of international criminal justice, the general prohibition against *ex post facto* laws, known as the *Nullum crimen sine lege* principle or retroactive criminality, criminalising conduct that occurred before prohibition. The Nuremberg trials was an exception; *Belgium v Senegal:* The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré under the Convention against Torture. Judgment of 20 July 2012 in spite of Senegal's claims.

[22] Tom Bingham, *The rule of law* (Allan Lane Penguin books 2010) 37.

[23] ICCSt (n 1); The Nuremburg Tribunal regarded an exception to this principle.

[24] *R v White* [1910] 2 KB 124**,** medical reports revealed that a mum died from a heart attack, not the poison placed in her tea. The defendant was not liable for her murder as his act of poisoning the milk was not the cause of death. He was liable for attempt. The case also establishes the *'but for' test*, would the result have occurred but for the actions of the defendant? If the answer is yes the defendant is not liable.

[25] *R v Dytham* (1979) BQ 722 (1979) 3 AII ER 641; Brown (1841) Car & M 314, citizens duty to assist the police (1992) Crim LR 611; Smith and Hogan, J C Smith, *Criminal Law*, 10th edition, LexisNexis Butterworths (2002) 60.

[26] *R v Gibson & Procter* (1918) Family duty, R v Naughton (2001) when there could be said to be a duty to act.

[27] Catherin Elliot and Frances Quinn, *Criminal Law* (6th edn, Pearson Longman, England 2006) 32-50.

[28] The Criminal Law Act 1977 s1, see also Article 25 ICCSt.

Offences under the jurisdiction of the ICC need a mental element.[29] Article 30(1) ICCSt states: 'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'.

2.3 The Genealogy of International Criminal Prosecutions

The 1474 *Breisach* trial set the pace for international criminal justice. The Holy Roman trial with about 28 Judges[30] presiding over the case, in 1474, the Duke of *Burgundy* hired *Peter von Hagenbach* to raise an army to occupy the German city of *Breisach.* The Duke acquired the city in exchange for services rendered to the Holy Roman Empire; uninterested in the fate of the distant German townspeople, the French Duke ordered Peter to collect massive (taxes) exactions. When the townspeople rebelled, the Duke ordered Peter to sack, pillage, rape, and burn the city. Peter obeyed his superior's orders. The attack on *Breisach* was horrendous, the news spread throughout the empire, that the situation was a 'crime against the laws of God and Man'.[31] Leaders of the twenty-six member states of the Holy Roman Empire, fashioned a tribunal of juries from Alsace, Switzerland and elsewhere who acted as international judges to prosecute Peter (a Dutch), for crimes committed on the order of a French head of state (the Duke). The trial is considered the first, ever, international criminal trial.[32]At the trial, Peter sought to exhibit the written (defence) orders of the Duke of Burgundy, but the judges refused him to do so, creating the impression that subordinates in Peter's position should not execute superiors orders when they are so manifestly 'against the laws of God and Man'. Consequently, the court's refusal shielded the Duke from responsibility. Peter was sentenced to be drawn and quartered.[33] The Duke of *Burgundy* benefited from the impunity, thus, political considerations prevailed over justice.[34]

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[29] P Saland, 'International Criminal Law Principles' in S R Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc US 2001).

[30] Gordon Gregory S, 'The Trial of Peter Von Hagenbach: Reconciling History Historiography and International Criminal Law' (*University of North Dakota - School of Law (February 16, 2012*) <http://dx.doi.org/10.2139/ssrn.2006370> accessed 01/05/2014.

[31] Cherif M Bassiouni, 'Perspectives on International Criminal Justice' (2010) 50 *Virginia Journal of International Law* 269, 298.

[32] ibid; Robert B Rosenstock, Essay: Mclean Lecture on Law: 'The Proposal for an International Criminal Court' (1994) 56 *The University of Pittsburgh Law Review* 271; Jordan Paust, 'Selective History Of International Tribunals And Efforts Prior To Nuremberg' (2004)10 *International Law Students Association Journal of International & Comparative* Law 207; Michael Scharf and Schabas, William *Slobodan Milosevic on Trial: A Companion* (Bloomsbury Academic, New York 2002).

[33] A brutal method of causing death.

[34] Cherif M Bassiouni, 'International Criminal Justice in Historical Perspective' in Antonio Cassese (eds) The Oxford Companion to International Criminal Justice (Oxford University Press, New York 2009) 132.

International criminal justice re-emerged in 1918 with the victorious allies of World War 1(WW1). The Treaty of Versailles[35] announced intentions to prosecute the German *Kaiser Wilhelm II of Hohenzollern and* other,[36] for the supreme offence against international morality and sanctity contained in Articles 227, 228, 229 and 230,[37] the Allied States unsuccessfully demanded the extradition of the *Kaiser* from Netherlands, where he had established residency.[38] Politics again prevailed over justice at the cost of a precedent in an international Treaty.[39] The inability to prosecute the German war criminals,[40] led the Allies in 1923 to agree to have Germany take over the task under German laws. The German Supreme Court sitting *Leipzig* to try 45 defendants from the initial 21000 only tried 22 and a maximum of 3 years imprisonment for the crime of sinking a hospital ship with over 600 wounded people.[41] In addition, the Allies decision to forgo the prosecution of Turkish officials for the massacre in 1915 of an estimated 200,000 Armenian civilians, confirms the interests in Turkey to help face-off the expansion agenda of the newly established *Bolshevik* regime in Russia in 1917 that was greater than the need for justice for the Armenians,[42] another political undertone? However, the four major Allies[43] in 1943 at the Moscow declarations affirmed their intention to prosecute the Axis powers for war crimes;[44] by 1945 they drafted the

[35] 225 CTS 188 adopted 26 June 1919; entered into force on 10 January 1920. The treaty is divided into 16 parts. Part VII, entitled penalties consists of four Articles (227-30) that evince an early attempt to establish individual responsibility for war crimes and to create an early attempt to establish individual responsibility for war crimes and to create tribunals for their adjudication. In the event *Kaiser Wilhelm II* successfully escaped prosecution through Dutch sanctuary and only 9 alleged German war criminals were tried before a Leipzig court and not a military tribunal as envisaged by Article 228.

[36] James F Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press, Westport 1982) 177–178.

[37] Treaty of Versailles (n 35)

[38] Quincy Wright, 'The legal Liability of the Kaiser' (1919) 13 *American Political Science Review* 121

[39] Cherif M Bassiouni, 'From Versailles to Rwanda in 75 years the need to establish a Permanent International Criminal Court' (1997) 10 (11) *Harvard Human Rights Journal* 50; UN doc CAN 4/L 532/corr 1 UN doc A/CN 4/L 523/corr 3; Cherif M Bassiouni, 'International Criminal Justice in Historical Perspective' in Antonio Cassese (eds) *The Oxford Companion to International Criminal Justice* (Oxford University Press, New York 2009) 132.

[40] The non-extradition of the *Kaiser*.

[41] Werner Hans Erhard, 'The Nuremberg Trial against Major War Criminals and International Law' (1949) 43 *American Journal of International Law* 223; A Von Knieriem, *The Nuremberg Trials* (Chicago; Regnery, 1959); The Leipzig trials were a series of war crimes trials held by the German Supreme Court *(Reichsgericht)* following the end of World War I; E J Janeczek, *Nuremberg judgment in the light of international law* (Genève, Imprimeries populaires; 1949) 83.

[42] Western Europe Cooperation with Turkey a necessity to prevent Russia from uncontrolled access from the Black Sea to Mediterranean, hence the need for Turkey as a barrier against communist expansionism. Although, the Treaty of Sevres included a provision to prosecution Turk officials but replaced by the Treaty of Lausanne, which did not contain such a clause, Instead a secret protocol which gave Turkish Nationals total amnesty. *Realpolitik* prevailed as Treaty of Serves was replaced with the Treaty of Lausanne, which contained no provisions for Turkish Nationals to be tried in Turkey, (the Treaty of Peace between the Allied Power and Turkey) 10 August 1920.

[43] The United States, Britain, France and Russia.

Charter of the International Military Tribunal (IMT or Nuremberg);[45] signed, 6 August with 19 other States establishing the IMT at Nuremberg which ultimately prosecuted 22 major war criminals. Although, the Nuremberg Charter is not a legislative Act, but included 'Crimes against Peace' 'War Crimes' and Crimes against Humanity.[46] The charge of crimes against peace was a carryover of the failed efforts of the Allies to prosecute the German *Kaiser*[47] under the Treaty of Versailles. Crimes against humanity became a manifestation of the failed attempts of the 1919 prosecution of the Turkish officials for what was then known as 'crimes against the laws of humanity'. The precedent of the post WW1 experience helped shaped international criminal justice in 1945 and onwards, known as victors' justice because it only prosecuted the defeated.[48]

The Allies in 1947[49] proceeded to prosecute the defeated Japanese, unlike the IMT, the IMTFE[50] or The Tokyo tribunal promulgated by an order issued by the Supreme Allied Commander for the Far East, General Douglas MacArthur, the US did not want to give any role to the Union of Soviet Socialist Republics (USSR) in the proceedings, because that the later joined the war against Japan just three weeks before the defeat of Japan; did not want the USSR to have political influence in post war Japan.[51] The IMTFE Charter modeled after the IMT, exemplified more of governing Japan than prosecuting Japanese Emperor *Hirohito* and his associates. Consequently, the Head of State of Japan escaped responsibility despite allowing his country on the side of Germany attacking the US at Pearl Harbour in violation of the law of customs of war.[52] No member of the Allied forces got prosecuted for war crimes.[53]

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[44] Cherif M Bassiouni, *The London International assembly; Crimes Against Humanity in International Criminal Law* (2nd edn, Martinus Nijhoff, 2012) 18- 35.
[45] 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 *American Journal of International Law* 258 (1945) United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), 8 August 1945.
[46] Kai Ambos, 'Crimes against Humanity and the International Criminal Court' in Leila Nadya Sadat (ed), *Forging A Convention for Crimes Against Humanity* (Cambridge University Press, Cambridge 2011) 279-304.
[47] Werner Hans Erhard, 'The Nuremberg trial against major war Criminals and International Law' (1949) 43 *American Journal of International Law* 223; August von Knieriem and Nicholas R Doman, 'The Nuremberg Trials' (1960) 60 *Columbia Law Review* 412-423.
[48] ibid.
[49] Post World War II (WW11) prosecutions.
[50] 14 State Dept Bull 391,890; TIAS No 1589, (IMTFE).
[51] Cherif M Bassiouni, 'International Criminal Justice in Historical Perspective' in Antonio Cassese (eds) *The Oxford Companion to International Criminal Justice* (Oxford University Press, New York 2009) 132.
[52] ibid.
[53] ibid.

The Allied Control Council Law No 10 (CCL No 10)[54] governed the prosecution of war criminals within each of the Allied occupation zones in Germany.[55] The definition of CAH in Article II (1) (c) of CCL No 10 for Germany[56] removed the requirement of a connection between crimes against peace and war crimes.[57] This modification enabled the United States tribunals to delink CAH from armed conflict in *United States v Josef Altstoetter*[58] (Justice Case) and *United States v Otto Ohlendorf* (*Einsatzgrupen* Case)[59] another significant development that emerged from these tribunals relates to the restriction of the definition of CAH to systematic commission of severe State sponsored delicts.[60] While the Nuremberg and Tokyo Charters required that CAH evidence a connection to aggression or war, this supplementary requirement was left out of CCL No 10.

After World War II, the Cold War began; efforts to advance international criminal justice gave way to the political conflict between East and West. The United Nations (UN) efforts to establish an international criminal court and develop a code of offences against peace and security of mankind continued but without a successful outcome. Politics again prevailed over the advancement of international criminal justice.[61] Consequently, advancement in international criminal law prosecution was slow until 1992 when the United Nations Security Council (UNSC) established a commission of experts[62] to investigate violations of

[54] No 3, Official Gazette of the Control Council for Germany 50 – 55, (31st January, 1946); 36 ILR 31. (CCL 10) to try war criminals not deemed to be of dominant character in those parts of Europe occupied by the Allies.
[55] Allied 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, Berlin (January 31, 1946), Cherif M Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd edn, Martinus Nijhoff, 1999) 590 defining crimes against humanity as 'atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated'; Matthew Lippman, 'Crimes Against Humanity' (1997)17 *Boston College Third World Law Journal*171.
[56] Ibid; *Prosecutor v Akayesu* ICTR- 96-4-T Trial Chamber Judgment 565-66 (2 September 1998); *McMullen v Hodge* and Others 5 Tex 34, 23 (1849), this substantially predates similar recognitions in the 1868 Declaration of St Petersburg 'contrary to the laws of humanity'; the 'Martens clause' in the preamble to the Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, TS No 539.
[57] Phylilis Hwang, 'Defining Crimes against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 *Fordham International Law Journal* 457.
[58] *United States v Josef Altstoetter et al* 'Justice Case' (1947).
[59] *United States v Otto Ohlendorf et al*, (1948).
[60] P Hwang, 'Defining Crimes against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 *Fordham International Law Journal*.
[61] Cherif M Bassiouni, 'From Versailles to Rwanda in 75 years the need to establish a Permanent International Criminal Court' (1997) 10 (11) *Harvard Human Rights Journal* 50; UN doc ACN 4/L 532 (1996) 15 July 1996 revised by UN doc CAN 4/L 532/corr 1, UN doc A/CN 4/L 523/corr 3.
[62] United Nations Security Council Resolution 780 (Establishing a Commission of Experts to Examine and Analyse Information Submitted Pursuant to Resolution 771) SC res 780, 47 UN SCOR at 36, UN Doc S/RES/780 (1992), Adopted by the Security Council at its 3119th meeting, on 6 October 1992 Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions, Recalling paragraph 10 of

international humanitarian law (IHL) in former Yugoslavia.[63] The report of the commission led the UNSC to establish in 1993 the International Criminal Tribunal for Yugoslavia (ICTY)[64] after the ICTY, came the International Criminal Tribunal for Rwanda (ICTR),[65] to prosecute persons responsible for serious violations of IHL in the territory of Rwanda and Rwandan citizens responsible for such violations committed in neighbouring States, between 1 January to 31 December 1994, the Tribunal prosecuted a number of persons.[66] The ICTY/ICTR demonstrates the will of the international community to curb impunity within the realm of international legality[67] as against a creation by victorious powers at the end of an armed struggle.[68] The tribunals became land marks in international criminal prosecutions, which helped pave way for the establishment of the ICC.[69] The purpose of the ICC in theory[70] includes retribution, deterrence, expressivism,[71] restorative justice and

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its resolution 764 (1992) of 13 July 1992, in which it reaffirmed that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches, Recalling also its resolution 771 (1992) of 13 August 1992, in which, inter alia, it demanded that all parties and others concerned in the former Yugoslavia, and all military forces in *Bosnia and Herzegovina*, immediately cease and desist from all breaches of international humanitarian law, Expressing once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina, including reports of mass killings and the continuance of the practice of 'ethnic cleansing'.

[63] ibid; S/RES/827 (1993) 25 May 1993; adopted by the Security Council at its 3217th meeting on 25 May 1993The Security Council, Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions. Having considered the report of the Secretary-General (S/25704 and Add l) pursuant to paragraph 2 of resolution 808 (1993), Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organised and systematic detention and rape of women, and the continuance of the practice of 'ethnic cleansing,' including for the acquisition and the holding of territory.

[64] UN Doc S/RES/827 (1993); 32 ILM 1203 (1993); On 25 May 1993, the UN Security Council passed resolution 827 formally establishing the International Criminal Tribunal for the former Yugoslavia (ICTYSt).

[65] UN Doc S/RES/955 (1994); 33 ILM 1598 (1994) (ICTRSt).

[66] The conviction of the Prime Mminister during the genocide, *Jean Kambanda*, to life in prison in 1998 was the first time a head of government was convicted for the Crime of Genocide.

[67] United Nations Document S/PRST/1994/16.

[68] World War II (1939 – 1945).

[69] 2187 UNTS 3; 37 ILM 999 (1998) (last amended 2010) (ICCSt); A conference in Rome called the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, also known as the Rome Conference, was held from June 15 to July 17, 1998. (adopted 17 July 1998) It brought together delegations from 160 nations and numerous interested organisations to establish a permanent international criminal court—the first of its kind. After five weeks the deliberation culminated in the adoption of the "Rome Statute." Seven countries (including the United States and China, both permanent members of the UNSC) voted against the Statute, with twenty-one states abstaining the International Criminal Court (ICC) was established with 120 votes in its favour, after receiving its first 60 ratifications it entered into force on July 1, 2002. To date, there are 123 states parties (African Union State members are about 34) to the ICC.

[70] Linda M Keller, 'The False Dichotomy of Peace versus Justice and the International Criminal Court' (2008) 3 *Hague Justice Journal 1 Journal Judiciaire De La Haye* 12.

[71] ibid.

reconciliation.[72] Theoretical bases for these goals overlap,[73] with the goals of international criminal justice in particular and the theories of punishment,[74] the difficulty to rely solely on national courts to enforce international laws, also aided the establishment of the ICC coupled with coordinating the players in the International sphere being increasingly complicated. Therefore, the ICC provides improved centralised system of laws complete with a set of comprehensive norms.

2.4 The Concept of Jurisdiction

Jurisdiction is the power of a sovereign to regulate or otherwise impact upon people, property and circumstances and reflects basic principles of states sovereignty. Jurisdiction is a central feature of any sovereignty, it is an exercise of authority which may alter, crate or terminate legal relationships and obligations. Jurisdiction although primarily territorial, is not exclusively so tied and may be based on other grounds. The complexity of the concept of jurisdiction often leads to jurisdictional competence questions and conflicts as to the extent of the authority of particular courts. The Rome Statute establishes the jurisdiction of the International Criminal Court in line with international law such that jurisdiction could be established through territorial, nationality of offender (active personality), nationality of victim (passive personality) subject matter jurisdiction and universal jurisdiction (*erga omnes*) of the crimes within the Statute.[75] Territorial jurisdiction is the most favoured[76]

[72] Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, 543 (proposing guidelines to give meaning to phrase interests of justice); Ralph Henham, 'The Philosophical Foundations of International Sentencing' (2003) 64Journal of International Criminal Justice 80 (restorative justice and ICC); Mark A Drumbl, *Atrocity Punishment and International Law* (Cambridge University Press USA 2007) 80 as does, the ICC embraces incarceration and reparations.

[73] ibid Drumbl 149; the civil law system's frequent combination of compensation and criminal prosecution also illustrates the lack of strict separation between the two.

[74] Eric Blumenson, 'The Challenge of a Global Standard of Justice' (2006) 44 *Columbia Journal of Transnational Law* 801; 'Mark S 'Ellis, Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability' (2006) 2 *Journal of National Security Law & Policy* 111 (choice between peace and justice); Anita Frohlich, 'Reconciling Peace with Justice' (2007) 30 *Suffolk Transnational Law Review*271; Lisa J Laplante and Kimberly Theidon, 'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz' (2006) 28 *Michigan Journal of International Law* 49 (peace and justice balance); Dwight G Newman, 'The Rome Statute Some Reservations Concerning Amnesties and a Distributive Problem' (2005) 20 *American University International Law Review* 293 (complementarity, peace and retributive justice); Charles Villa-Vicencio, 'The Reek of Cruelty and the Quest for Healing' (2000) 14 *Journal of Law and Religion* 165.

[75] The International Court of Justice (ICJ) in the Arrest Warrant case of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) held 14 February 2002 that the issue and international circulation by Belgium of the arrest warrant of 11 April 2000 against *Abdulaye Yerodia Ndombasi* failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Congo enjoyed under international law; and that Belgium must cancel the arrest warrant; *United States v Fawaz Yunis* (Crim A No 87-0377) 681 F Supp 896 at 9001-1 (DDC) 1988. The Universal and the Passive Personal principle appear to offer potential bases for asserting jurisdiction over the hostage-taking and aircraft piracy charges against Yunis.

(*forum delicti commissi)*, the place and law where the crime was committed,[77] jurisdiction based on the nationality of victims. Jurisdiction based on the nationality of offender or the right of a state to protect her interests is infrequent.[78] The Nuremberg Tribunal exercised jurisdiction 'to persons acting in the interest of the European Axis countries,[79] who are accused of crimes within the Tribunal's subject-matter jurisdiction,[80] thus its jurisdiction was personal in nature; defendants had to have acted in the interests of the European Axis.[81]

At the ICTY[82] jurisdiction is confined to crimes committed on the territory of the former Yugoslavia, subsequent to 1991, the jurisdiction therefore is territorial.[83] Jurisdiction of the ICTR[84] is over crimes committed in Rwanda from 1993 – 1994; over crimes committed by Rwandan nationals and in neighbouring countries in the same period,[85] accordingly its jurisdiction is both territorial and personal.[86] State Parties that signed up to the Rome Statute did so for the ICC to have jurisdiction over their territory and nationals.[87] The drafters of the Rome Statute sought to limit the ability of the Court so that national courts can exercise the first jurisdiction.[88] Only when domestic justice systems are 'unwilling' or genuinely 'unable'

However, his counsel argues that the Universal principle is not applicable because neither hostage-taking nor aircraft piracy are heinous crimes encompassed by the doctrine. He urges further, that the United States does not recognise Passive Personal as a legitimate source of jurisdiction. The government flatly disagrees and maintains that jurisdiction is appropriate under both. These general principles were developed in 1935 in Harvard, a research project in effort to codify principles of jurisdiction under international law; other treatises have recognised the principles: Louis Henkin, *International Law Cases and Materials* (5th edn, West, USA 2009) 447; Burns H Weston, Richard A Falk, Anthony D'Amato, *International Law and World Order: A Problem-Oriented Course book (American Casebook Series,* 2nd edn, West Group 1990) 564; Cutting case 1866.

[76] *S S Lotus (France v Turkey)* 1927 The Permanent Court of International Justice (ser A) No 10 (Sept 7); The Treaty of International Penal Laws 1889 states: 'Crimes are tried by the Courts and punished by the laws of the nation on whose territory they are committed irrespective of the nationality of the actor or of the injured'; William A. Schabas, *An introduction to the International Criminal Court* (3rd edn, Cambridge University Press, Cambridge 2009) 58.

[77] *Judge Moore, SS Lotus (France v Turkey)* PCIJ, 1927, Series A No 10 P 70.

[78] William A Schabas, An Introduction to the International Criminal Court (4th edn, Cambridge University Press, Cambridge 2011) 63-89; The bombing of Pan Am Flight 103 over Lockerbie in 1988, The Scottish court (Netherlands) a special sitting of the High Court of Justiciary set up under Scots law in the Netherlands, for the trial of two Libyans charged with 270 counts of murder in connection with the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on 21 December 1988.

[79] ibid Schabas.

[80] Subject-matter jurisdiction is the authority of a court to hear cases of a particular type or cases relating to a specific subject matter. Prosecution and Punishment Agreement of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) Annex (1951) 82 UNTS 279 Article 6.

[81] Schabas (n 78).

[82] UN Doc S/RES/827/ (1994) (ICTYSt).

[83] William A Schabas, An Introduction to the International Criminal Court (4th edn, Cambridge University Press, Cambridge 2011) 63-89

[84] 2187 UNTS 3; 37 ILM 999 (1998) (last amended 2010) (ICCSt).

[85] UN Doc S/RES/955 (1994); 33 ILM 1598 (1994) (ICTRSt).

[86] W Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press England 2011) 64-66.

[87] 2187 UNTS 3; 37 ILM 999 (1998) (last amended 2010) (ICCSt).

[88] ibid Article 17 and para 10 of the Preamble.

to prosecute a heinous crime can the ICC prosecute, known as positive complementarity.[89] Under international law, universal jurisdiction *(quasi delicta juris gentium*)[90] applies to some crimes but not limited to piracy,[91] slave trade,[92] hijacking, threats to air-travels,[93] attacks on diplomats,[94] nuclear safety,[95] terrorism,[96] apartheid;[97] torture[98] and trafficking in persons, however, these crimes are outside the scope of this research.

Although, the application of universal jurisdiction is widely recognised for genocide, crimes against humanity and war crimes but universal jurisdiction is not specifically granted to the ICC within the statute.[99] The *travaux préparatoires* highlighted how Article 12[100] became a compromise reached for the Court to have jurisdiction over nationals of State Parties and over crimes committed on their territory.[101] Professor Sharon Williams commented that though the provision is far from perfect but was all that was possible at the time.[102]

[89] ibid; Mohamed El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law* 869.
[90] W Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, England 2011) 64-66.
[91] *United States v Smith* 18 US (5 Wheat) 153 (1820) Piracy Act 1837, Piracy Act 1850.
[92] Slave Trade Act 1807, Slave Trade Act 1824, Slave Trade Act 1843, Slave Trade Act 1873. On 25 March 1807, the Abolition of the Slave Trade Act entered the statute books. Nevertheless, although the Act made it illegal to engage in the slave trade throughout the British colonies, trafficking between the Caribbean islands continued, regardless, until 1811.
[93] Hague Convention for the Suppression of unlawful Seizure of Aircraft (1971) 860 UNTS 105; Montreal Convention for the Suppression of unlawful Acts against the safety of Civil Aviation (1996) 974 UNTS 117.
[94] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents (1977) 1035 UNTS 167.
[95] Convention on the Physical Protection of Nuclear Material of 1980, (1984) 1456 UNTS 101.
[96] European Convention on the Suppression of Terrorism (1978) 1137 UNTS 99; International Convention against Taking Hostages, (1983) 1316 UNTS 205.
[97] International Convention on the Suppression and Punishment of the Crime of Apartheid (1976) 1015 UNTS 234 Art IV (b).
[98] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) 1465 UNTS 85, Article 10.
[99] Daniel D Ntanda Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87 101. During the drafting process of the Statute, some States questioned why what could be done individually in their national justice systems could not be done collectively as an international body? Other States felt the solution too ambitious and likely to discourage ratifications. other States quarrelled with the legality of an international court with universal jurisdiction that there was no rationale in law for such a court, and insisted that the only legal basis should be active personal jurisdiction, that is, to try nationals of a State party.
[100] 2187 UNTS 3; 37 ILM 999 (1998) (last amended 2010) (ICCSt).
[101] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction', in Antonio Cassese and others *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford 2002) 583–616.
[102] Sharon A Williams, 'Article 12 Prosecution to the Exercise of Jurisdiction' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Hart Publishing, Oxford; 2008) 330-75.

Jurisdiction under the Rome Statute - jurisdiction, a measure of the extent of the Courts authority established in Articles 5, 11, 12, 17, 18, 19, 24 and 126 of the Statute,[103] shall be limited to the most serious crimes of concern to the international community.[104] Crimes within the jurisdiction of the Court provide lists of punishable offences.[105] Article 11 deals with jurisdiction *ratione temporis*,[106] Article 12 relates to pre-conditions to the exercise of jurisdiction; sets out territorial jurisdiction and personal jurisdiction.[107] Article 19[108] necessitates that the Court satisfies it has jurisdiction in any case brought before it.[109] This led the Pre-Trial Chamber 1 to authorise the arrest warrant against Thomas Lubanga.[110] The concept of jurisdiction also arises with regard to national justice systems, Article 17[111] on complementarity requires the Court to defer to national prosecutions, unless the state with jurisdiction over the crime is unwilling or unable genuinely to investigate and prosecute the crime.[112] Whilst Article 18 refers to information and the States that would have normally exercised jurisdiction over the crimes concerned.[113] The Court's jurisdiction is established and understood in the following contexts:

- Jurisdiction *ratione materiae* (subject matter jurisdiction) 'crimes to be tried before the ICC?'

- Jurisdiction *ratione personae*, 'who can be tried?'

[103] 2187 UNTS 3; 37 ILM 999 (1998) (last amended 2010) (ICCSt). Article 5; War crimes, Genocide, Crimes against Humanity and the crime of Genocide; Article 17 admissibility/complementarity.
[104] ibid Article 5(1).
[105] The substantive crimes are war crimes, crimes against humanity, the crime of aggression and genocide.
[106] ICCSt (n 1) Article 11 (1)The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute; Jennifer K Elsea, 'International Criminal Court: Overview and Selected Legal Issues' [2002] *Congressional Research Service Report* RL31437.
[107] ibid ICCSt Article 12 (2) (A & B) 'The State of the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft'; 'The State of which the person accused of the crime is a national.'; Schabas (n 78).
[108] ibid ICCSt Article 19 (1) Challenges to the jurisdiction of the Court or the admissibility of a case. 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.
[109] ibid, Subject-matter jurisdiction is the authority of a court to hear cases of a particular type or cases relating to a specific subject matter. Subject-matter jurisdiction, territorial jurisdiction, and adequate notice are the three most fundamental requirements for a valid judgment.
[110] *The Prosecutor v Thomas Lubanga* (ICC-01/04-01/06-8); *The Prosecutor v Katanga and Ngudjolo*, on the Appeal of Mr Germain Katanga against the oral decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Judgment 25 September 2009 (ICC-01/04-01/07-1497) paras 85 and 86.
[111] ICCSt (n 1) Article 17; issues of admissibility.
[112] ibid.
[113] ibid, Article 18, when a situation has been referred to the Court… may limit the scope of the information, with a situation referred to the Court pursuant to Article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to Articles 13 (c) and 15, the Prosecutor shall notify all State Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.

- Jurisdiction *ratione temporis* 'crimes committed after the Statute comes into force'
- Jurisdiction *ratione loci,* territorial jurisdiction.

Subject Matter Jurisdiction (*Ratione Materiae*), jurisdiction *ratione materiae* refers to the four substantive crimes which can be tried before the Court namely: Genocide, Crimes against Humanity, War crimes and the Crime of Aggression.[114] The preamble of the Statute and Article 5 describe these crimes as 'the most serious crimes of concern to the International Community', the crimes are 'unimaginable atrocities that deeply shock the conscience of humanity'[115]

Temporal Jurisdiction (*ratione temporis*), jurisdiction *ratione temporis* refers to crimes committed after the entry into force (1 July 2002) of the Rome Statute. States which become Parties afterwards, the competence of the ICC holds only for the Crimes committed after the Statute comes into force for such States. However, it would suffice that either the State where the Crime was committed or that the Nationality of the author of the Crime be party to the Statute for the competence of the ICC to be exercised. The ICC cannot exercise jurisdiction over crimes committed prior to entry into force of the Statute.[116] As well, Article 24 declares that no person shall be criminally liable for conduct prior to entry into force of the Statute making the Statute prospective.[117] This was elaborated in the Lubanga case, the Pre-Trial Chamber I held: on the issue of temporal application of the Statute ... In conformity with Article 126 (1)...the second condition would be met pursuant to Article 11 of the Statute if the crimes underlying the case against Mr Thomas Lubanga Dyilo were committed after 1 July 2002..., the Chamber considers that the second condition has also been met.[118] Furthermore, regarding international crimes committed in Venezuela and referred to the ICC, the prosecutor stated that: '...The events occurred prior to the *temporal* jurisdiction of the Court and so cannot be considered for investigation under the Statute.'[119] In the case of States that became parties to the Statute subsequent to its entry into force, the Court has jurisdiction only

[114] ibid.
[115] ibid, paragraph 2 of the preamble.
[116] ibid, Article 11(1) declares that: 'the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute' beginning 1 July 2002.
[117] ICCSt (n 1) Article 24, the Statute is not retrospective.
[118] *The Prosecutor v Lubanga* (ICC-01/04-01/06-8) Decision on Prosecutor's Application for a warrant of Arrest 10 February 2006 para 26.
[119] Communication Received by the Office of the Prosecutor of the ICC, Issued in February 2006 para 2 and 16 July 2003.

over crimes committed after the entry into force of the Statute with respect to such States,[120] for example, Colombia ratified the Statute in August 2002, several weeks after the entry into force on 1 July 2002. The Statute entered into force for Colombian on 1 November 2002, in accordance with Article 126,[121] the Court cannot therefore prosecute any case based on the Columbian ratification for the period 1 July – 1 November 2002.[122]

The exception to the general rule concerning *temporal* application of the Statute is the possibility for a State to make *ad hoc* declaration recognising the Court's jurisdiction over specific crimes,[123] even if the State is not a party to the Statute,[124] such declarations, formulated in accordance with Article 12(3) of the statute, would appear to be retroactive by their very nature. Uganda made such a statement, labelled 'Declaration on Temporal Jurisdiction.' Uganda accepted the exercise of the Court's jurisdiction for crimes committed following the entry into force of the Statute on 1 July 2002. The legality of the declaration appears to have been assumed by Pre-Trial Chamber III, which took note of it when it confirmed the Arrest Warrant against Joseph Kony.[125]

Jurisdiction *ratione temporis* is different from retroactive crimes.[126] International human rights law prohibits retroactive (*nullum crimen, nulla poena sine lege)* crimes and punishments.[127] Similar pronouncements can be found in the *Eichmann* case of 1961[128] and in the *Erdemovic* judgment of the ICTY.[129] Significantly, '*nullum crimen sine lege'* is also set out in Articles 22 and *'nulla poena sine lege' in Article* 23 ICCSt.[130] The ICC is different from the Nuremberg, the Tokyo or the *ad hoc* tribunals (ICTY/ICTR) constituted to judge crimes already committed. The standard adopted by the European Court of Human Rights

[120] ICCSt (n 1) Articles 11(2) and 126 (2).
[121] ibid, 126 (2) 'For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession'.
[122] Schabas (n 78)
[123] ibid.
[124] ICCSt (n 1) Article 12 (3).
[125] ICC-02/04-53 Warrant of Arrest for Joseph Kony Issued on 8 July 2005 amended on 27 September 2005 para 32; ICC-02/04-54 Warrant of Arrest for Vincent Otti 8 July 2005 para 32.
[126] William Schabas, *An introduction to the International Criminal Court* (4th edn, CUP England 2011) 64-66.
[127] Aly Mokhtar, '*Nullum Crimen, Nulla Poena Sine Lege* Aspect and Prospects' (2005) 26 Statute Law Review 41; Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 *International Law Quarterly* 153,165.
[128] *Attorney General v Adolf Eichmann* Crim Case No 40/61, in the District Court of Jerusalem.
[129] *Prosecutor* v *Erdemovic* Case No IT-96-22-T Judgment 29 November 1996 (1998) 108 ILR 180 para 35.
[130] ICCSt (n 102) Article 23 "*Nulla poena sine lege"* A person convicted by the Court may be punished only in accordance with this Statute.

with respect to retroactive crimes is that they must be foreseeable by an offender.[131] The issue of 'continuous crimes' remain undecided; it will be for the Court to determine how it will be handled.[132] However, Article 24 (1) reads: no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.'[133] This reflects a compromise to address delegates obsessed with the question of continuous offences, noted by William Schabas.

Jurisdiction Territorial (*Ratione Loci*), the Court's jurisdiction is over serious crimes committed on the territory of State Parties regardless of the Nationality of the offender. Article 12 (2) of the Statute requires that the jurisdiction extends to the territory of States that accepts the Court on an *ad hoc* basis and on a territory so designated by the SC. Territory includes crimes committed on board vessels or aircraft registered in the State party,[134] Some territories are beyond the reach of the Court: the High Seas (common heritage of mankind), Antarctica and Outer-space. If atrocities are committed in these places, jurisdiction will be established on the basis of the Nationality of the offender.[135]

Many National jurisdictions extend the concept of territorial jurisdiction to include crimes that create effects upon their territory such that, it could be argued in case of a conspiracy to commit genocide,[136] the Court might have jurisdiction even if the conspirators hatched their plan outside the territory where the Crime is to take place. Similarly, an order to take no prisoner is a crime even if nobody acts upon the order[137] it could be committed outside the territory of a State but might be deemed to fall within the jurisdiction of the Court, if the effects bear upon the territory in the semblance of incitement and abetting. Although, the silence of the Statute on effects jurisdiction and a strict interpretation of Article 12 might bar such a concept. Approving the Arrest Warrant for the five Lord's Resistance Army (LRA) leaders in Uganda and for Thomas Lubanga in Congo, the Pre-Trial Chamber observed that

[131] *SW v United Kingdom*, Series A No 335-B, 22 November 1995 paras 35–6; *CR v United Kingdom*, Series A No 335-B, 22 November 1995 paras 33–4.
[132] Per Saland, 'International Criminal Law Principles' in Lee S R (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, US; 2001) 196–7; Raul Pangalangan, 'Article 24', in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Hart Publishing, Oxford; 2008) 475–90.
[133] UN Doc A/CONF183/C1/L65/Rev1, no footnote in the final version adopted by the Conference: UN Doc A/CONF183/C1/L76/Add3.
[134] ICCSt (n 1) Art 12(2) (a).
[135] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press England 2011) 64-89.
[136] ICCSt (n 1) Articles 12(2) (a) 6 and 25(d).
[137] ibid Arts 8(2) (b) (xii) and 8(2) (e) (x).

the crimes alleged are committed on the territory of the referring State and SC Resolution 1593 empowers the Court to prosecute crimes committed in Darfur.

During ratification, a few States made declarations that there is no specific provision in the Statute concerning the territorial scope of the Court compared to many other multilateral international (Genocide Convention) instruments.[138] Netherlands, declared that the Statute applies not only to its European territory but also to the Netherlands Antilles and Aruba. Denmark declared it did not intend the Statute to apply to the *Faroe Islands and Greenland*.[139] The effect of excluding the reach of the Court from a territory which, on its own, has no right to correct the situation because neither the *Faroe* Islands nor Greenland are sovereign States and as a result they cannot accede to the Statute. Thus, the Court might take the lead in *Loizidou* v *Turkey case*[140] and rule that the Danish declaration is illegal reservation with no effect in accordance with Article 120 of the Statute on reservations thereby recognising jurisdiction over the disputed territories, this problem is theoretical now since Denmark withdrew the declaration in 2006.[141]

Personal Jurisdiction (*Ratione Personae*), the Statute provides that the ICC's jurisdiction is only over natural persons, Article 25 (1), of at least eighteen years of age (Article 26) at the time the crime was committed.[142] There is no immunity under the Statute due to official rank (Article 27 (1)) of the accused person.[143] Pursuing moral persons developed during the Rome conference. The discussion on this subject raised disagreements amongst many States, that it was decided not to integrate this competence in the Statute, but the Court has jurisdiction under Article12 (2) (b) over nationals of non-party states that accept the Court's jurisdiction on an *ad hoc* basis by virtue of a declaration,[144] or pursuant to a decision of the Security Council,[145] creating jurisdiction, on the Nationality of the offender such an offender will be subject to prosecutions. Territory not Nationality seems to be the order of prosecution to date.

[138] Convention for the Prevention and Punishment of the Crime of Genocide 1948 78 UNTS 277; 45 *American Journal of International Law* (Supp) 7 (1951) (Genocide Convention).
[139] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, England 2011) 64-89.
[140] *Loizidou* v *Turkey* (Preliminary Objections) Series A No 310.
[141] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, England 2011) 64-89.
[142] UN Doc A/CONF183/C1/L76/Add3; UN Doc A/CONF183/C1/WGGP/L1; P Saland, 'International Criminal Law Principles' in S R Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc US 2001) 200–2.
[143] ICCSt (n 1) Article 27 (1).
[144] ibid; Article 12(3); and Rules of Procedure and Evidence, UN Doc PCNICC/ 2000/INF/3/Add1 Rule 44.
[145] Security Council Resolution 955 established an *ad hoc* tribunal with jurisdiction over Rwandan nationals.

In Uganda and the DRC prosecutions, no allegations that accused persons are State Party nationals, nor did the SC give the Court jurisdiction over the Acts of Sudanese nationals committed outside of Sudan, whereas the ICTR had jurisdiction to prosecute crimes on Rwanda territory and crimes committed by Rwandan nationals in neighbouring states.[146]

The Communication received for the Prosecutor to act in accordance with Article 15 ICCSt, noted several allegations of acts perpetrated by the Nationals of coalition forces during the invasion of Iraq in 2003.[147] Upon investigation, he pointed to the fact that inquires have been made concerning nationals of the United Kingdom with respect to acts perpetrated on the territory of Iraq a non-party state,[148] and concluded that it did not meet adequately the admissibility requirements of the Court. An exception to the general principle of jurisdiction over nationals is explicitly set out in the Statute with respect to persons under the age of eighteen at the time of the offence.[149] However, the ICTY noted that its Article 6[150] is purely jurisdictional in nature, rejecting as unfounded, the proposition that there was no criminal responsibility for crimes committed by persons under the age of eighteen under either conventional or customary international law.[151] Despite Articles 27 of the ICC Statute, a look at Article 98 of the Statute tends to grant the bilateral agreement negotiated by the United States and international obligations of States a form of immunity.[152] These agreements do not in reality create immunity for nationals of the USA. They simply purport to relieve a State Party from an obligation to arrest and transfer individuals subject to a request from the Court.[153] A State Party may also invoke Article 98(2), its agreement with the non-party State and decline to comply without necessarily violating its duties under the Rome Statute.

2.5 Immunity under the Rome Statute

The Court has extended the scope of immunity under Article 98 ICCSt, to address the issue of personnel of the UN and non-member States, in spite of the Nuremberg principles and the 1948 Genocide Convention,[154] also rules of national/international laws that create immunities

[146] UN Doc S/RES/955 (1994).
[147] Communication Received by the office of the Prosecutor of the ICC 16 July 2003.
[148] Letters of Prosecution dated 9 February 2006 (Iraq).
[149] ICCSt (n 1) Article 26.
[150] ICTYSt Article 6; jurisdiction over natural persons pursuant to the provisions of the present Statute.
[151] *The Prosecutor v Oric* Case No (IT-03-68-T) Judgment (30 June 2006) para 400.
[152] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press England 2011) 64-89.
[153] ibid.
[154] 78 UNTS 277; 45 *American Journal of International Law* (Supp) 7 (1951) Convention for the Prevention and Punishment of the Crime of Genocide (1948).

or shelter individuals from criminal prosecutions are of no effect before the Court for States Party members.[155] Traditionally, immunities have taken two main forms first, some States, through their constitution, provide that their Head of State and government officials or elected representatives are immune from prosecution. Secondly, under customary international law incumbent Heads of States, foreign ministers and diplomats (immunity *ratione personae*) cannot be prosecuted by the Courts of other States, some States have had to consider constitutional amendments in order to eliminate such special regimes and thereby make their legislation consistent with the Statute. The 2002 ruling in the *Arrest Warrant* case, the ICJ (International Court of Justice) recognised that an incumbent or former minister of foreign affairs may not have immunity before some international tribunals,[156] where it has jurisdiction.[157] The Court also considered Article 27 of the Rome Statute which provided it with a basis for concluding that incumbent Heads of State and similar officials, such as foreign ministers, might not be protected by traditional immunities, as a matter of customary international law.[158]

There is an important practical exception, however, that can serve to shield certain classes of persons from prosecution. The Court is prohibited, pursuant to Article 98(1), from proceeding with a request for surrender or assistance if this would require a requested State to act inconsistently with its obligations under international law as concerns a third State, unless the latter consents if diplomatic immunity falls into such a category. It means that, while a State Party to the Statute may not shelter its own Head of State or Foreign Minister from prosecution by the ICC, the Court cannot request the State to cooperate in surrender or otherwise with respect to a third State. Nothing prevents the State Party from doing this if it so wishes, and once the Head of State was taken into actual custody of the Court, he/she would be treated like any other defendant.

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[155] ICCSt (n 1) Article 27.

[156] The principle of the Head of State responsibility is enshrined in the Genocide Convention; Article 7 of the Nuremberg Charter; Article 6 of the Tokyo Charter; the Statute of the ICTY (Article 7); the ICTR (Article 6) and the ICC (Article 27); The ICJ in *Congo v Belgium (Arrest Warrant)* recognised the accountability of the Head of State for the three crimes but subject to temporal immunity while in office as part of customary international law. Since Nuremberg, individuals became accountable for international crimes irrespective of what domestic law may authorise. A principle from the Nuremberg trials 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'; E J Janeczek, 'Nuremberg Judgment in the light of International Law' (Imprimieres Populaires, Geneva, 1949) 83.

[157] ibid; *Congo v Belgium* para 61.

[158] ibid, para 58 Note that, in this respect, the ICJ overrules the decision of the House of Lords in the *Pinochet* case: *R* v *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, [1998] 4 All ER 897; [1998] 3 WLR 1456.

Furthermore, Article 98(2) was intended to ensure that a rather common class of treaties known as 'Status of Forces Agreements' (SOFAs) would not be undermined or neutralised by the Statute.[159] SOFAs are used to ensure that peacekeeping forces based in a foreign country are not subject to the jurisdiction of that country's courts. The United States have attempted to pervert Article 98(2), drafting treaties that shelter all American nationals from the Court; several States Parties have succumbed to Washington's pressure and agreed to such arrangements.[160] Article 27(2) ICCSt does refer to immunity, the content is of a substantive rather than procedural. Cherif Bassiouni Chair of the Drafting Committee at the Rome Conference noted: there is no conflict between Article 27(2) and Article 98(1) these Articles should have been merged into a single provision in order to avoid confusion.[161] The effect of Article 27(2) is to foreclose State Parties from invoking immunities before the Court and to make a defence of immunity unavailable to an accused national of a State Party. Article 27(2) does not really apply to nationals of non-Party States. Any immunity that they may have as a result of customary or treaty law cannot be removed simply because a group of states have decided, by treaty, that such immunities cannot be invoked before an institution of their own creation.[162]

2.6 Deferral and Acceptance Jurisdiction

The SC may prevent the Court from exercising jurisdiction in accordance with Article 16 of the Statute called 'Deferral' of jurisdiction with a resolution under Chapter VII of the UN Charter[163] asking the Court to suspend prosecution, in such a case, the Court may not proceed. Sequel to this, the UNSC resolution 1422, adopted on 12th July 2002, after the entry into force of the Rome Statute,[164] the SC granted immunity from prosecution by the ICC to the UN peacekeeping personnel from countries not party to the ICC[165] The resolution, passed

[159] Dapo Akande, 'Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 (3) *Journal of International Criminal Justice* 618-650.
[160] ibid.
[161] Cherif M Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Crime Court' (1999) 32 *Cornell International Law Journal* 443.
[162] William Schabas, *An introduction to the International Criminal Court* (4th edn Cambridge University Press, England 2011); the Al-Bashir arrest warrant, and the African Union report.
[163] UN Charter 1 UNTS XVI.
[164] On 1 July 2002 the ICCSt entered into force.
[165] Acting under Chapter VII of the United Nations Charter, the Council unanimously adopted resolution 1422 (2002), by which it also expressed its intent to renew its request for further 12-month periods for as long as might be necessary and decided that Member States should take no action inconsistent with the above-mentioned provision and with their international obligations. The ICC's Statute entered into force on 1 July, and article 16 of the Statute concerns a 12-month deferral option on a case-by-case basis.. United Nations 12 July 2002. Press Release SC/7450 < http://www.un.org/News/Press/docs/2002/sc7450.doc.htm> accessed 18 June 2014.

at the insistence of the United States, which threatened not to renew all UN peacekeeping missions (including UN Missions in Bosnia and Herzegovina, [to be] renewed same day)[166] unless its citizens were protected from trial by the ICC.[167] Resolution 1422 came into effect on 1 July 2002 for a period of 12 months, renewed again for twelve months by Resolution 1487, on 12 June 2003. But, the SC repudiated renewal in 2004 after pictures emerged of US troops abusing Iraqi prisoners in *Abu Ghraib*. The US withdrew its demand[168] the legality of the resolution draws some scrutiny, Article 16 contemplates specific situations or investigation rather than some blanket exclusion of a category of persons. Moreover, Article 16 of the Statute says that the Council must be acting pursuant to Chapter VII[169] UN Charter, applicable only when there is a threat to peace, a breach of peace or an act of aggression. Ironically, some UN authorised missions are not created pursuant to Chapter VII of the Charter and there is a debate whether or not the SC resolutions can have their legality reviewed by courts.

The ICJ is hesitant to pronounce on this, because the ICJ and the Council are principal organs of the UN and the ICJ feels the Charter does not establish a hierarchy where one principal organ of the UN can review the decision of the other, although, this does not apply to the ICC which is not created by the Charter of the UN, so not an organ of the UN. The ICTY considered the review of the legality of Resolution 827, its constitutive act in the *Tadic´s case.*[170] Resolution 1422 is seen as an abuse of powers of by the SC whose legality, theoretically, may well be challenged in later proceedings before the ICC.[171] Peacekeepers have been alleged to have participated in crimes that fall within the jurisdiction of the Court; these matters are to be dealt with by their National courts, although, this has not been the case. Reasonably, Resolution 1422 is generally seen as bullying from the United States. Other

[166] Dispute over war crimes court settled *BBC News* (13 July 2002) <www.bbc.co.uk/news> accessed 20/04/2014.
[167] Human Rights Watch 'The ICC and the Security Council: Resolution 1422'. Human Rights Watch <www.hrw.org> accessed 25/04/2014.
[168] BBC News (n 166) Q&A on the International Criminal Court.
[169] Z S Deen-Racsmany, 'The ICC Peacekeepers and Resolution 1422: Will the Court Defer to the Council?' (2002) 49 *Netherlands International Law Review* 378; Lionel Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', in Lee S R (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, US; 2001)143; A compromise, inspired by a draft submitted by Singapore, was ultimately worked out, allowing for the Council to suspend prosecution but only by positive resolution, subject to annual renewal.
[170] *The Prosecutor v Tadic´* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 105 ILR 453; 35 ILM 32.
[171] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, England; 2011) 157-186.

occasions where the SC excluded individuals from the Court's jurisdiction are: firstly, with Resolution 1497 of August 2003, which declares 'that current or former officials or personnel from a contributing state, which is not a party to the Rome Statute, shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions arising out of or related to the Multinational force or UN stabilisation force in Liberia, save such exclusive jurisdiction has been expressly waived by that contributing state.[172]

Similarly, Resolution 1593, adopted in March 2005, which refers the situation in Darfur to the Court (which has since been challenged by Sudan and the African Union) states that Nationals, current or former officials or personnel from a contributing State outside Sudan not a State Party to the Rome Statute shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorised by the Council or the African Union (AU), unless such exclusive jurisdiction has been expressly waived by that contributing State.[173] Aside the Jurisdiction resulting from ratification of the Statute by a State Party, Article 12(3) of the Statute authorises a non-party state to accept jurisdiction of the Court on an *ad hoc* basis over specific crimes,[174] such accepting State, shall cooperate with the Court in accordance with part 9.

Although, there is no consequence if an accepting state fails to cooperate.[175] *Cote d'Ivoire* and Uganda made declarations in respect of Article 12(2). *Cote d'Ivoire* signed the Rome Statute on 30 November 1998, but did not ratify the instrument until 14 December 2010, Uganda, in support of her application for arrest warrants for the Leaders of the Lord's Resistance Army (LRA), the Prosecutor included a declaration on the temporal jurisdiction, dated 27 February 2004, Uganda accepted the Court's jurisdiction for crimes committed

[172] UN Doc S/RES/1497(2003) par7; Salvatore Zappala, 'Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC' (2003) 1 *Journal of International Criminal Justice* 671
[173] Schabas (n 171).
[174] On 17 April 2014, the Registrar of the International Criminal Court (ICC), *Herman von Hebel*, received a declaration lodged by *Ukraine* accepting the ICC's jurisdiction with respect to alleged crimes committed in its territory from 21 November 2013 to 22 February 2014. The declaration was lodged under Article 12(3) of the Rome Statute, the founding treaty of the ICC, which enables a State not party to the Statute to accept the exercise of jurisdiction of the Court. Ukraine accepts ICC jurisdiction over alleged crimes committed between 21 November 2013 and 22 February <www.bbc.co.uk/news> accessed 2014 (17/04/2014).
[175]On Article 12(3) ICCSt; Carsten Stahn, Mohamed El Zeidy and Hector Olasolo, 'The International Criminal Court's Ad Hoc Jurisdiction Revisited' (2005) 99 *American Journal of International law* 421; Steven Freeland, 'How open Should the Door Be?' – Declarations by non-states Parties under Article 12(3) ICCSt (2006) 75 *Nordic Journal of International Law*, 211; Carsten Stahn, 'Why Some Doors May Be Closed Already: Second Thought on a Case by Case Treatment of Article 12(3) Declarations' (2006) *75 Nordic Journal of International Law* 243.

following the entering into force of the Statute on 1 July 2002. Since, Uganda ratified the Rome Statute on 14 June 2002, it entered into force in Uganda on 1 September 2002, two months after the Statute entered into force. Although no explicit provision allows for a State Party to back date the effect of its ratification, presumably Article 12(3) is the authority for Uganda's declaration of temporal jurisdiction because, a State may also accept the jurisdiction of the Court, by allowing the Office of the Prosecutor (OTP) to begin a preliminary investigation, without having to ratify the Statute.[176]Article 12(3) is the residue of a provision in the 1994 draft statute of the International law Commission (ILC) by which State consent was contemplated on a case by case basis.[177] The wording of Article 12 and 13 suggest that what is envisaged is an investigation that has already been initiated by the Prosecutor that is then followed by a request that the state concerned consent to jurisdiction.[178] The Prosecutor could well make use of Article 12(3) as a way of addressing impunities in territories that may not yet be subject to the jurisdiction of the Court.[179]

2.7 Activating the Exercise of Jurisdiction

The Nuremberg tribunal prosecuted 'major war criminals of the European Axis'. The Prosecutor determines who those individuals might be. Similarly, the Prosecutors of the ICTY/ICTR and the Special Court of Sierra Leone (SCSL) had free reign to identify suspects.[180] The ICTY jurisdiction was limited to crimes committed on the territory of the former Yugoslavia, in effect, the instrument establishing the Tribunal was also its 'trigger'.[181] The situation is different with the ICC.[182] The Court's focus of prosecution is not pre-determined like the earlier tribunals. Also, significant differences exist between the 1994 ILC draft and the final version in the Statute.[183] The Rome Statute establishes that the Court may open a preliminary examination of a situation in a state or region that has been in conflict based on three (triggers) possibilities.[184] First, by referring a situation to the Court by a State

[176] ibid.
[177] Text adopted by the 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. The report, which also contains 'Ccommentaries on the draft articles' (1994) 2 Yearbook of the International Law Commission.
[178] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 81.
[179] ibid.
[180] ibid.
[181] ibid.
[182] H Olasolo, *The Triggering Procedure of the International Criminal Court Legal Aspects of International Organization* (Martinus Nijhoff Leiden and Boston 2005) 35 – 89.
[183] Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May- 22 July 1994, Chapter II UN Doc A/49/10; Articles 23 (1) and 25(1) (2).
[184] ICCSt (n 1) Articles 13 (a-c).

Party, second, by the Security Council (SC) and lastly, by the Prosecutor (*Proprio Motu*) in accordance with Article 13 (c) entitled the 'Exercise of Jurisdiction'.[185]

State Party referral mechanism became the first to be 'triggered' before the Court. Though, States are usually reluctant to complain against one another save for exceptional circumstances.[186] Hence, States referral 'situations' within own borders, known as 'self-referral;'[187] intended to induce the Court to prosecute rebel groups operating within.[188] The Government of Uganda on 16 December 2003 made the first referral.[189] The second referral came from the Democratic Republic of Congo (DRC) in 2004,[190] also by December 2004, the Central African Republic (CAR) made a referral to the Court.[191] Article 14 ICCSt sets out the terms for referral of a 'situation' by a State Party.[192] Referrals must be in writing.[193] The triggering of jurisdiction of the Court by either the SC or a State Party is known as referral.[194] Nothing in the *travaux préparatoires* or in the various commentaries by participants in the drafting process suggests that a State referring a case *against itself* preferred the term referral

[185] The Court may exercise jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

[186] Daniel D Ntanda Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87,109.

[187] Paola Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 949.

[188] Antonio Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4 *Journal of International Criminal Justice* 434,436.

[189] Mohamed El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 *International Criminal Law Review* 83; Situation in Uganda (ICC-02/04–01/05) Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005 paras 3–4.

[190] ICC-01/04–01/06-32-AnxA1 (21 March 2004).

[191] Referrals from the Central African Republic (CAR) an ICC State Party on 21 December 2004 to the ICC Prosecutor, a letter from the Government of CAR, referring to the Court crimes within the jurisdiction committed in the country from 1 July 2002. On May 22, 2007, the Prosecutor accepted the CAR's request to investigate the situation. The Prosecutor explains that sexual violence is the principal focus of the investigation because sexual crimes outnumbered killings. A peculiarity of the conflict is the high reported number of victims about 600 within five months. Other dimensions are rapes by multiple perpetrators, in front of third parties and or with forced participation of relatives. The scale and gravity of the conduct are sufficient to warrant investigation under international criminal law. The individuals who ordered and authorise the acts could face charges of war crimes and crimes against humanity.

[192] Article 14 states (1) A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. (2) As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

[193] Rules of Procedure and Evidence, Doc ICC-ASP/1/3 Rule 45.

[194] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, England 2011) 146-165

to complaints. The drafting history of Article 14 of the Rome Statute leaves little doubt that what was contemplated was a 'complaint' by a State Party against *another* State.[195] 'Self-referral' encourages States to defer to the ICC rather than assume their responsibilities to prosecute, Paragraph 6 of the Preamble to the Rome Statute encourages member States to exercise their criminal jurisdiction over those responsible for international crimes' this is 'positive complementarity'. The Statute does not contemplate the possibility of a State referring a case, then withdrawing it.[196] The term 'trigger' is a helpful metaphor.[197] Once the jurisdiction has been 'triggered' it cannot be 'un-triggered'.[198] The decision not to proceed after a State Party referral rests with the Prosecutor and the Pre-Trial Chambers and in accordance with Article 53 of the Statute or with the SC, pursuant to Article 16 on 'deferral.'[199]

The second triggering Mechanism for jurisdiction of the Court is through the SC referral. There is no detailed provision in the Statute concerning SC referral compared to State Party referrals. The SC referral is governed by Article 13(b), which authorises the Court to exercise jurisdiction over crimes within Article 5, referred to the Prosecutor by the SC acting under Chapter VII of the UN Charter, with 'primary responsibility for the maintenance of international peace and security.'[200] The SC referral of the situation in Darfur, Sudan to the ICC is a recommendation by the International Commission of Inquiry in its January 2005 report.[201] The Commission stated that the Sudanese justice system was unable and unwilling to address the situation in Darfur.[202] In March 2005, the SC referred the 'Situation in Darfur' to the Court under Resolution 1593.[203] Resolution 1593 specifically declares that the Council

[195] ibid.
[196] ibid.
[197] ibid.
[198] ibid.
[199] ICCSt (n 1).
[200] United Nations Charter, Article 23 & 24, Article 23 of the Charter declares that the Security Council consists of five permanent members, China, France, Russia, the United Kingdom and the United States, and ten non-permanent members who are elected by the General Assembly from among the membership of the organisation to a two-year term. Nine votes are required to adopt a resolution, but any permanent member may exercise a veto. Chapter VII of the Charter declares that '[t]he SC 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'; Ruth B Philips, 'The International Criminal Court Statute: Jurisdiction and Admissibility' (1999) 10 Criminal Law Forum 61, 73.
[201] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, paras 571–2.
[202] ibid para 586.
[203] At the Security Council 5158th Meeting SC refers Situation in Darfur, Sudan, to the Prosecutor of International Criminal Court, Resolution 1593 (2005) adopted by vote of 11 in favour to none against, with 4 abstentions (Algeria, Brazil, China, United States)

is acting under Chapter VII.[204] This is consistent with the Statute referring the Darfur/Sudan conflict.

Crimes that go beyond the trivial or *de minimis* range in national jurisdiction are more often than not prosecuted. Giving the Prosecutor the power to initiate prosecution is the mechanism most analogous to domestic justice systems, for an international tribunal based on complementarity, 'the discretion to prosecute will be wider, and the criteria upon which such prosecutorial discretion could be exercised are nebulous and complex, based on the work of the other two tribunals,[205] it is a challenge to the Prosecutor choosing from many meritorious complaints with appropriate situations for international intervention, than to weed out weak or frivolous ones,[206] this favours the argument that the Court would have less work if it relies solely on State Parties and the SC to trigger its jurisdiction.[207] Non-governmental organisations made the *proprio motu* prosecution one of their battle cries,[208] some powerful States vigorously opposed the idea, fearful that the position might be occupied by an NGO-friendly litigator with an attitude.[209]

Article 15 of the statute, alleviates some fear, the Prosecutor's independence is tempered with oversight from the Pre-Trial Chambers.[210] Accompanying the *proprio motu* powers is the concept of complementarity,[211] the Court would not proceed if a national jurisdiction is investigating or prosecuting. However, if the Prosecutor concludes that there is a 'reasonable basis' for proceeding with an investigation, the Prosecutor must submit a request for authorisation of an investigation to a Pre-Trial Chamber.[212] The Pre-Trial Chamber must confirm that a 'reasonable basis' for investigation exists; in addition make a preliminary

[204] UN Charter (n 4) Article 39.
[205] ICTY (n 64); ICTR (n 65).
[206] Justice Louise Arbour, Statement to the Preparatory Committee on the Establishment of an International Criminal Court, 8 December 1997'; see William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, England; 2011) 176.
[207] Leila Nadya Sadat and S Richard Carden, 'The New International Criminal Court: An Uneasy Revolution', (2000) 88 Georgetown Law Journal 381, 400–1.
[208] Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May–22 July 1994; UN Doc A/49/10, para 89–90.
[209] Schabas A W, *An introduction to the International Criminal Court* (4th edn CUP, England; 2011) 178 ; see also the Concerns of the United States Regarding the Proposal for a *Proprio Motu* Prosecutor, 22 June 1998, 'Permanent International Criminal Court Established' (1998) 35:2 *UN Chronicle Online Edition.* 'Views on International Criminal Court Put Forward in Sixth Committee', Press Release GA/L/2879, 2 November 1999.
[210] Silvia A. Fernandez de Gurmendi, 'The Role of the International Prosecutor' in Roy Lee, (ed) *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International 1999) 175,181.
[211] ICCSt (n 1) Article 17.
[212] Rules of Procedure and Evidence, UN Doc PCNICC/2000/INF/3/Add 3, Rule 50.

determination that the case falls within the jurisdiction of the Court.[213] This does not mean that issues of jurisdiction and admissibility are settled or that the Court is prevented from reversing its initial assessment at some later stage. Should the Pre-Trial Chamber reject the Prosecutor's request, subsequent application for authorisation based on new facts or evidence can be made.[214]

The Prosecutor could determine that the information provided does not justify proceeding on the matter, in such a case he is required to inform those who provided the information. An unsatisfied informant is without further recourse and may not challenge or appeal the Prosecutor's decision, although the Statute explicitly contemplates the possibility of new facts being re-submitted.[215] The Prosecutor in determining whether to exercise his *proprio motu* powers is required to consider three factors. First, he must determine whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.[216] Second, he must assess whether the case would be admissible in accordance with Article 17 of the Statute, whether the national courts are unwilling or unable genuinely to proceed, and lastly assessing the notion of 'gravity'. If these conditions are met, the Prosecutor must also give consideration in the 'interests of justice'.[217] The 'gravity' criteria and the 'interests of justice', provide enormous space for highly discretionary determination.

Finally, it is part of the policy to request arrest warrants or summons to appear only when a case is nearly trial-ready in order to facilitate the expeditiousness of the judicial proceedings,[218] in respect to communications or submissions filed pursuant to Article 15, the reliability of the source of information obtained and the information itself shall be preliminarily examined to determine whether the alleged criminal conduct may fall within the jurisdiction of the Court *ratione materiae, personae, loci and temporis*,[219] and whether a case is or would be admissible,[220] in accordance with Article 14?[221] The Prosecutor's *proprio motu* power to initiate an investigation with authorisation from a Pre-Trial Chamber is a very

[213] ICCSt (n 1) Articles 15(4) and 19.
[214] Application for preliminary investigation into the DRC case (ICC-01/05 -01/08).
[215] ICCSt (n 1) Article 15(6).
[216] Ibid; Article 53(1) (a).
[217] ibid Article 53(1) (c).
[218] 'Report on Prosecutorial Strategy'14 September 2006 paras 5–6.
[219] ICCSt (n 1) Article 11 & 12; also the Crime of aggression was defined and adopted by the Review Conference in 2010 and will enter into force in after necessary ratification 2017.
[220] Draft Regulations of the Office of the Prosecutor Part 2, Section 2, Regulation 2.
[221] ICCSt (n 1)

important mechanism under the Statute. This procedure provides the legal basis to carry out investigations where states have failed to refer an objectively serious situation. The Prosecutor should use this power with responsibility and firmness, ensuring strict compliance with the Statute.[222]

2.8 Complementarity under the Statute

The complementarity regime[223] of the ICC overcomes problems associated with the concurrent system of the *ad hoc* tribunals[224] and establishes a better relationship with national justice institutions by providing that the ICC will only prosecute crimes, if national judicial systems are 'legitimately unable or unwilling;' central to the ICC mandate and a means of respecting national sovereignty. The principle defines the legal and functional relationship between National courts and the ICC.[225] Paragraph 10 of the Preamble and Article 17 of the Statute come to bear, on how these pieces fit together.[226] How and which course of action to take? The evolution of the concept could be traced to the 1937 draft treaty on terrorism and the post- World War II tribunals.[227] Complementarity is crucial not only to the ICC, but also an underlying paradigm of international criminal justice.[228] A State is obliged to exercise its criminal jurisdiction over those responsible for international crimes within its territory.[229]

Complementarity fundamentally encourages State Parties to implement provisions of the Statute by strengthening their National jurisdiction over the Crimes listed in the Statute the Sovereignty of such a State will remain unaffected; free of any interference by the ICC. Paragraph 6 of the Preamble of the Statute recalls that 'it is the duty of every State to exercise

[222] ICCSt (n1) Article 53(1) (c); Allison Bray and others, 'The International Criminal Court Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report*; 'Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor' : Referrals and Communications', September 2003.
[223] ibid Article 17.
[224] ICTYSt Article 9(2); ICTRSt Article 8 'International Tribunals have primacy over national courts'.
[225] Lijun Yan 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) 4 *Chinese Journal of International Law* 121,132.
[226] ICCSt Paragraph 10 of the preamble of the Rome Statute emphasises that '. . . the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'; Article 1 of the Rome Statue provides 'An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute'.
[226] Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law* (M N Publishers, 2008) 156.
[227] ibid.
[228] ibid.
[229] ICCSt (n 1) Paragraph 6 of the Preamble.

its criminal jurisdiction over those responsible for international crimes'. The ICC can only deal with limited cases and has to rely on direct enforcement through State Parties.[230]

The ICCSt does not define the term 'complementarity'[231] neither is complementarity an absolute principle, but rather, one subject to variations depending on the circumstance of its application.[232] The provision is far from being perfectly drafted, leaving its full understanding and interpretation to the assessment of the Court.[233] Whilst domestic jurisdictions enjoy primacy to deal with their own alleged human rights violations, only if remedies were deemed 'inadequate or ineffective', could the ICC proceed.[234] The theory of complementarity has been described as essential for acceptance of the Statute by States[235] and often referred to as the underlying principle,[236] the corner stone.[237] Thus Article 17 functions as a barrier to the existence of jurisdiction.[238] The Rules of Procedure and Evidence of the ICC recognises this by providing that the Court shall rule on any challenge to its jurisdiction first before dealing with matters of admissibility.[239]

The complementarity regime, strikes a very delicate balance between judicial independence and the competing interests of State sovereignty.[240] However, there is overwhelming desire by some States to keep own courts from being overshadowed by the ICC, leading to a

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[230] ibid.
[231] Mohamed M, El Zeidy, *The Principle of Complementarity in International Criminal Law* (Brill Nijhoff, Leiden 2008) 157.
[232] ibid.
[233] ibid.
[234] *Akdivar and others v Turkey*, Application No 21893/93, ECHR, (Preliminary objection) of 16/09/1996, para 67-68; *Van Oosterwijck v Belgium*, Application No7654/76, ECHR, (Preliminary Objection) of 06/11/1980, paras 36-40; *Velasquez Rodriguez*, Preliminary Objections, Judgment of 26/06/1987, Inter-American Court of Human Rights (Series C) No1 (1987) paras 87-88; Exceptions to the Exhaustion of Domestic Remedies (Arts 46 (1), 46(2) (a) and 46(2) (b) of the American Convention on Human Rights) Advisory Opinion OC- 11/90 of 10 August 1990 Inter-American Court of Human Rights (Series A) No 11 (1990) paras 40-41.
[235] Report of the Ad Hoc Committee on the establishment of an International Criminal Court, GAOR 50th Sess, Supp l No 22 (Doc A/50/22) para 29; W Bourdon/ E Duverger, La Cour penale international: Le statute de Rome, 2000 94.
[236] J I Charney, 'International Criminal Law and the Role of Domestic Prosecutions' (2001) 95 *American Journal of International* Law 120.
[237] E La Hayes, 'The Jurisdiction of the International Criminal Court: Controversies over the Precondition for Exercising its Jurisdiction' (1999) 46 *Netherlands International Law Review* 1; B Swart and G Sluiter, 'The International Criminal Court and international Criminal Cooperation' in H A M von Hebel, J G Lammers and J Schukking (eds) *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (Asser Press, The Hague, 1999) 91,105.
[238] ibid.
[239] Rules of Procedure and evidence of the International Criminal Court 2002, PCNICC/2000/1/Add 1; Rule 58 (4) 'The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility'.
[240] Mohamed El-Zeidy and Carsten Stahn (ed) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, New York 2011) 89-94.

growing consensus among countries' responses to complementarity.[241] Theoretically, the ICC's presence should incentivise states to investigate and prosecute cases of core international crimes, to avoid any infiltration by the ICC into cases occurring on their territories.[242] Positive complementarity has encouraged genuine national proceedings, reliance on national and international networks and participation in a system of international cooperation. The 2010 Kampala Review Conference, the first conference on the Rome Statute, concluded that States require stronger national frameworks to exercise criminal jurisdiction. The conference asserted that a more systematic approach towards empowering national legal orders was needed.[243] Basically, complementarity functions as a catalyst for National courts, it is likely that significant obstacles to effective domestic prosecution of ICC crimes will persist due to destroyed or seriously weakened legal systems.[244] The systemic nature of these crimes remain unchanged and so do the obstacles to national prosecutions, already apparent in situations that appeared before the Court, like obstacles to the domestic prosecution of crimes committed in Uganda, the DRC and Sudan largely correspond to those that existed in situations prior to coming into force of the Statute.[245] Another reason for the complementarity regime is the fear on the part of prospective State Parties that the ICC would become a Supra-national criminal court and would result in countries losing domestic control of criminal prosecutions.[246]

2.9 Admissibility under the Rome Statute

The Court would admit cases under Article 17(1) of the Rome Statute, where (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, (b) the case has been investigated by a State with jurisdiction and the State decides not to prosecute the person(s) concerned (in the two instances, the Court has to preclude the possibility that the State is unwilling or unable genuinely to carry out such investigation or prosecution before it can admit the case) a case would be admissible if national proceedings were undertaken for

[241] Morten Bergsmo and Asbjørn Eide (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide. Boston* (Brill Academic, Leiden 2003)17, 22.
[242] Mohamed El-Zeidy and Carsten Stahn (ed) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, New York 2011) 89-94.
[243] ibid.
[244] Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, Oxford 2009) 42-67.
[245] Allison Bray and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report University of Washington*.
[246] Hector Olasolo, 'Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity and the Role of Office of the Prosecutor' (2005) 5 *International Criminal Law Review* 121.

the purpose of shielding the person(s) from criminal responsibility, (c) the person(s) concerned have already been tried for conduct which is the subject of the complaint, the principle of *ne bis in idem* sets in and (d) the case is not of sufficient gravity to justify further action by the Court.

2.10 *Ne Bis in Idem* and the International Criminal Court

The double jeopardy '*autrefois acquit* or *ne bis in idem'* concept originates from Roman Civil Law; found in common law jurisdictions, that no legal action can be instituted twice for the same cause of action. The International Covenant on Civil and Political Rights (ICCPR)[247] guarantees the right to be free from double jeopardy[248] however it does not apply to prosecutions by two different sovereigns[249] unless relevant extradition Treaty expresses a prohibition. That a person should not be prosecuted more than once for the same criminal conduct[250] 'the double jeopardy rule,'[251] is found in various legal systems.[252] It is the criminal law version of a broader principle, aimed at protecting the finality of judgments, and reflected in the doctrine *Res Judicata*.[253] Although, differing views can be found among writers, advocates and a substantial body of opinion holds that the principle (*ne bis in idem)* is not recognised as a rule of custom, even though there is somewhat more support from Schabas, Bassiouni *et al*[254] for the rule as a general principle of international law.[255] *Ne bis in idem*

[247] ICCPR 999 UNTS 171 (ICCPR) entered into force Mar 23, 1976.
[248] ibid Article 14 (7).
[249] *A P v Italy* UN HRC CCPR/C/31/D/204/1986.
[250] Gerard Conway '*Ne bis in Idem* in International Law' (2003) 33 *International Criminal Law Review* 217.
[251] Roman law maxim '*nemo bis vexari pro una et eadam causa'* (a person shall not be twice vexed or tried for the same cause). The term ''double jeopardy'' is derived from the wording of the Fifth Amendment to the Constitution of the United States of America, which states, *inter alia*, '[Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb'.
[252]Cherif Mahmoud Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions'(1993) 3 *Duke Journal of Comparative & International Law* 247; a widely accepted national constitutional principle.
[253] Article 38(1) (b) and (c) International Court of Justice Statute (regards international custom and the general principles of law recognised by civilised nations respectively); *Res Judicata* in its application to civil matters appears to have long been accepted as a general principle of international law; See the Chorzo´w Factory Case (Interpretation), (1927) PCIJ Ser A 9 para 27; *Socie´te´ Commerciale de Belgique Case*, (1939) PCIJ Ser A/B 78 para 175 cited in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, Cambridge 2006)337-347; Rosa Theofanis, 'The Doctrine of *Res Judicata* in International Criminal Law' (2003) 3 *International Criminal Law Review* 195.
[254] Cherif Mahmoud Bassiouni, 'Human Rights in Criminal Justice Identifying International Protections in National Constitutions' (1993) 3 *Duke Journal of Comparative & International Law* 247, 289.
[255] In the context of extradition law, *ne bis in idem* is more generally accepted as a rule of public international law, particularly as between the requested and requesting state where a prior prosecution and/or sentence has been imposed in the former (as opposed to where a prior prosecution took place in a third state); Dietrich Oehler, citing Symposium on Extradition and National Reports in Preparation of International Penal Congress of Rome (1969) 39 *Revue International De Droit Penal* 375; Cherif Mahmoud Bassiouni, *International Extradition and World Public Order* (Kluwer Academic Publishers, 1974) 459; Satya Deva Bedi, *Extradition In International Law and Practice* (William S Hein & Co, 1970) 171; Martin Lawrence Friedland, Double

operates at three levels; firstly, it operates in relation to multiple prosecutions within a state (internal application). Secondly, it operates between different sovereigns (first-tier international application). Thirdly, it operates with respect to relations between states and international tribunals (second-tier international application). Furthermore, the nature of transnational crimes and the applicable jurisdictional principles[256] could leave defendants at risk of prosecution for international crimes by a number of sovereigns, as well international criminal tribunals.

The Rome Statute creates a different form of *Ne bis in idem* under Article 20.[257] The jurisdiction of the ICC to try individuals who have been the object of sham proceedings in a national court is technically an exception to the principle. Whereas a person may not be prosecuted twice for the same crime, however, Article 20 enables the Court to prosecute persons for crimes within the jurisdiction of the Court, even after being tried for the same crime in a national court if:

A) The proceedings were aimed at shielding the person from criminal responsibility; or

B) The procedure was not independent or impartial in accordance with the norms of due process[258] recognised by international law, and was conducted in a manner which, in the circumstance, was inconsistent with an intent to bring the person concerned to justice.

Jeopardy (Oxford Clarendon Press, 1969) 391–392; For a contrary view in relation to third states, the view that *Ne bis in idem* is not a rule of international law apart from treaty provisions where the prior trial has occurred in a third state.

[256] A state may assert jurisdiction over: (1) all criminal acts that occur within its territory and over all person responsible for such conduct, regardless of their nationality (the territoriality principle) (2) aliens who commit acts abroad that are considered prejudicial to the safety of the state or it security (3) their own nationals who commit crimes abroad (4) those persons who commit offences abroad which harm the nationals of the state (passive personality) (5) the exercise of universal jurisdiction in respect of crimes under customary international law (such as war crimes, crimes against humanity, genocide and torture); J Dugard *International Law A South African Perspective* (4th edn, Juta 2001).

[257] ICCSt (n 1) Articles 20(3) (a) (b).

[258] All are entitled to equal protection by law without any discrimination (Article 7 UDHR) Universal Declaration of Human Rights; 'All persons shall be equal before the courts and tribunals' (Article 14(1) (ICCPR) International Covenant on Civil and Political Rights; 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him' (Article 10 UDHR); Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (Article 14 (1) ICCPR); 'Any judgment shall be made public,' except in the interest of children (Article 14 (1) ICCPR) A person shall be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (Article 14 (3) (a) ICCPR); A person shall have adequate time and facilities for the preparation of his defence and to communicate with counsel (Article 14 (3) (b) ICCPR); The free assistance of an interpreter should be provided if the person does not speak or understand the language used in court (Article 14 (3) (f) ICCPR).

Criminal justice would have been rendered, only when rendered in accordance with due process and other international standards. In order for the ICC to begin a new trial, the violation of procedural safeguards must have been committed with the aim of preventing the person concerned from being brought to justice. *Ne bis in idem* affects the functioning of the entire legal system,[259] whether national or international, separately or in conjunction with each other. The importance of the principle is evinced by the fact that it is not only built into the criminal procedure acts, but also a basic human right.[260]

Additionally, *Ne bis in idem* can be seen as an aspect of the complementarity approach of the Court to National courts. In contrast the *ad hoc* tribunals had concurrent and primacy of jurisdiction over National courts (Article 10 of ICTY Statute and Article 9 of ICTR Statute state that the *ne bis in idem* principle can be enforced mainly to clarify that the *ad hoc* tribunal's sentences are 'stronger' than those of domestic courts) whereas, the jurisdiction of the ICC is said to be secondary or complementary to National jurisdiction.[261]

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[259] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, Cambridge 2006) 336-339; Mahmoud Cherif Bassiouni 'Human Rights in Criminal Justice Identifying International Protections in National Constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 247, 289.

[260] Article 8(4) the American Convention on Human Rights; Protocol 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedom, Article 4(1).

[261] Articles 13 and 17 of the Rome Statute; Bart S Brown, Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals, (1998) 23; *Yale Journal of International Law* 383; John T Holmes, The Principle of Complementarity, in The International Criminal Court: The Making of The Rome Statute – Issues, Negotiations, Results in Roy S Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, US 2001) ; *Prosecutor v Kanyabashi* (Case no ICTR-96-15-T) Decision of the Trial Chamber, 18 June 1997 para 32: 'It is true that the Tribunal has primacy over domestic criminal courts and may at any stage request national courts to defer to the competence of the Tribunal pursuant to Article 8 of the Statute of the Tribunal … The Tribunal's primacy over national courts is also reflected in the principle of *non bis in idem* laid down in Articles 9 and 28 of the Statute which establishes that States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber. Primacy is thereby entrenched in the Tribunals which exclusively derives from its establishment under Chapter VII of the UN Charter, it enables the Tribunal to issue directly binding international legal orders and requests to States irrespective of their consent' (rejecting an argument that the Tribunal ought to defer to the principle, often found in civil law jurisdictions and reflecting the civil law conception of criminal jurisdiction as relating to nationality (rather than territoriality) of *jus de non evocando* ie that nationals have a right to be tried by a court in their own national jurisdiction. While the Statutes of the ICTY and ICTR respectively, are annexes to Security Council resolutions pursuant to Chapter VII of the United Nations Charter, the Rome Statute, is a multilateral treaty and the Statute of the Special Court for Sierra Leone, is a treaty between an international organisation (the United Nations) and a State (Sierra Leone). The Special Court for Sierra Leone will enjoy primacy over the national courts of Sierra Leone (Article 8(2) of its Statute), although peacekeepers who commit transgressions while on duty in Sierra Leone will be subject to the jurisdiction of the sending state, unless the latter is unwilling or unable to carry out an investigation or prosecution in which case the Special Court may exercise jurisdiction if authorised by the security council to do so Article 1(2) & (3) of the Statute.

However, as a principle in Article 38(c) of the Statute of the International Court of Justice (ICJ)[262] *ne bis in idem* is not a 'general principle of criminal law' as *Kittichaisaree* notes, the placing of *ne bis in idem* provisions in the Statute reflects the fact that *ne bis in idem* is so closely related in the scheme of the Statute to admissibility; it is a procedural bar to the ICC's jurisdiction (rather than a ground for excluding responsibility).[263] It prevents the state from attempts to retry facts underlying an acquittal.[264]

The double jeopardy protection could be limited by the dual sovereignty doctrine. The doctrine, set out in *United States v Lanza*[265] establishes that the double jeopardy clause does not bar prosecutions for the same offence at state and federal level. Although, the so called 'sham exception' limits further prosecutions by different sovereigns if the second prosecution is a cover for a prosecution by the first sovereign, who failed at its first attempt, this is a limited and narrow exception.[266] Additionally, Article 20 does not protect against multiple criminal prosecutions by different contracting parties. This is yet another indication of the limited protection afforded by the *Ne bis in idem* formulation in the Rome Statute. Whilst Article 20 ICCSt does not preclude the ICC from exercising jurisdiction over the conduct of persons who have been granted amnesty via truth commissions[267] and amnesty tribunals[268] Article 53[269] permits the prosecutor to abandon an investigation, if it would not serve the interest of justice. Article 20 (2) ICCSt grants States the opportunity to prosecute defendants for national crimes outside Article 5 ICCSt, a further examination of this article from the perspective of human rights, reveals obvious limitations of the *Ne bis in idem* defence. It is submitted that Article 20(3) of the Rome Statute contains a legitimate limitation of state sovereignty in the two exceptions that have been created. Firstly, the limitations on sovereignty are narrow in scope. Secondly, National legal systems cannot be wholly trusted

[262] ICJ Statute/ the UN Charter 1 UNTS XVI 1945.
[263] K Kittichaisaree K, *International Criminal Law* (Oxford University Press, US 2002)
[264] *Brown v Ohio* 432 US 161.
[265] *US v Lanza* 260 US 377 (1922) 260 US 377.
[266] *Bartkus v Illinois* 359 US 121 (1959).
[267] Such as the South African Truth Commission the Promotion of National Unity and Reconciliation Act 34 of 1995 (the Act), that established the TRC; also the Nigerian Human Rights Violations Investigation Commission (later called The Judicial Commission for the Investigation of Human Rights Violations) The Oputa Panel was formally inaugurated on June 14, 1999 by President Obasanjo. Statutory Instrument No. 8 of 1999 constituted and appointed the Commission. Statutory Instrument No 13 of 4 October 1999 amended the terms of reference and reflected changes in the membership of the commission.
[268] M Arsanjani 'Jurisdiction and Trigger Mechanisms of the ICC' in Hebel, Lammers & Shukking (Eds) *Reflections on the International Criminal Court* (TMC Asser Press, 1999) 73.
[269] ICCSt (n 1).

to genuinely prosecute international criminals.[270] Grave international crimes, such as Genocide, often go hand in hand with insecure or illegitimate domestic legal systems, because international criminals may be able to bring enormous pressure to bear on domestic actors thereby decreasing the prospects of an impartial hearing, as Judge Cassese stated in *Tadić.*[271] 'It would be a travesty of law and betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights.'[272]

2.11 Structures, Situations, Cases and the International Criminal Court

Understanding the Structures and functions of the Court is imperative to appreciate the Challenges the Court faces jurisdictionally.[273] The Jurisdiction of the Court rests on Article 5 of the Statute.[274] Preliminary examinations by the Court to determine whether it has jurisdiction over a situation is based on temporal, territorial, personal and subject matter guidelines set out in the Statute. Appreciating the distinction between situations and cases within the Court's process is necessary. If a preliminary examination establishes that the Court has jurisdiction over a situation, a full investigation into that situation may commence. 'Cases' relate to 'tangible' incidents and 'specific' suspects that emerge from the investigation of a particular situation.[275] The ICC (a court of last resort) is designed to complement existing national judicial systems.[276] Thus, the jurisdictional limits are only applicable if the relevant National court proves either unwilling or genuinely unable to investigate a situation.[277]

Article 34 of the Statute establishes four organs of the Court known as the Court's structure.

I) The Presidency

II) The Chambers (judiciary)

III) The Office of the Prosecutor (OTP) and

[270] William Schabas, *An Introduction to the International Criminal Court* (4th edn CUP Cambridge 2011) 63-89
[271] *The Prosecutor v Tadic* Case No IT-94-1 –T.
[272] J Paust *et al International Criminal Law: Cases and Materials* (2nd ed, Durham, NC Carolina Academic Press 2000) 163.
[273] ICCSt (n 1) Article 5.
[274] War Crimes, Genocide, Crime against Humanity and the Crime of Aggression.
[275] Henry M and others, 'The International Criminal Court, Confronting Challenges on the path to Justice' [2013] *Jackson School of International Studies Task Force Report*.
[276] ICCSt (n 1) Article 17.
[277] Paragraph 10 of the Preamble to the ICCSt (n 1); Henry M, 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report*.

IV) The Registry.

The Presidency is charged with the overall function and administration of the Court (excluding the OTP, which operates independently). It is comprised of three judges who serve three-year terms and selected from within the Court.

The Chamber is made up of three divisions:

Pre-Trial Chamber

Trial Chamber and

Appeals Chamber

Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.[278] The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified above.[279] The OTP handles situations referred to the Court. Lastly, the Registry serves as a non-judicial head of administration for the Court, and run by the Registrar.[280] This office functions under the Authority of the President of the Court.[281]Managerially, this is counter-productive, undermines specialisation and detrimental to the principle of checks and balances which is part of the overall problems of efficiency and effectiveness within the International Criminal Court. Although, not stated as an organ of the Court in the Statute, the Assembly of States Parties[282] (ASP) plays an important role in the Court's performance. It acts as an oversight mechanism to the organs of the Court, especially the OTP, the Presidency and the Registry. The ASP is the only body vested with the right to make amendments to the Rome Statute[283] and it's made up of one representative from each state party; having a vote each. States that have signed the Statute without ratify it, are 'observer states,'[284] they could participate in the proceedings of the ASP without voting. The ASP elects 21 individuals to

[278] ICCSt (n 1) Article 36 (1) qualifications, nomination and election of judges.
[279] Ibid Article 36(2).
[280] Ibid Article 43.
[281] Ibid Article 43 (2).
[282] Ibid Article 112.
[283] The 2010 Kampala Conference Defining Aggression and the amendments to Article 8 and other provisions of the Statute.
[284] ICCSt (n 1) Article 112 (1).

serve a three year term on the executive committee, known as the Bureau.[285] The ASP is also vested with the authority to establish other subsidiary bodies to carry out its functions.[286]

The Court also includes a number of semi-autonomous offices such as the Office of Public Counsel for Victims and the Office of Public Counsel for Defence. These Offices fall under the Registry for administrative purposes but otherwise function as wholly independent offices. The Statute also founded an institution for restorative justice called the Trust Fund for Victims (TFV).[287] The TFV was established specifically for addressing the needs of those who have suffered the most from violence during conflicts involving crimes investigated by the Court.'[288] Furthermore, the TFV is mandated to enforce reparations ordered by the Court, provide physical, psychosocial rehabilitation and support to victims of crimes that falls within the jurisdiction and investigation of the Court.[289] Thus, the TFV exists in order to alleviate the pain and suffering of individuals and communities by providing a means of recovery. This makes the ICC a unique court, not just for holding perpetrators of the worst crimes responsible for their acts, but also for working to restore a positive semblance of normalcy in the lives of victims.[290]

In investigating a situation, the OTP must determine 'admissibility' according to Article 53 ICCSt. It must assess complementarity[291] and the gravity of the situation. This is central to the Courts mandate as a means of respecting national sovereignty.[292] Consequently, the lack of effective national implementation of the ICC legislation leaves the OTP to open investigations in an increasing number of situations. However, there has been no coherent applicable guideline for assessing the gravity threshold by the OTP. Subsequently, it has become excessively reliant on the PTC-I interpretation of the gravity threshold[293] and has

[285] ibid Article (112 (3) (a).
[286] Congressional Research Service – The Library of Congress, 'International Criminal Court: Overview and Selected Legal Issues [2002]; Henry M, 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report*.
[287] ICCSt (n 1) Article 79.
[288] ibid Article 79 (2) 'the Court may order money and other property collected through fines or forfeiture to be transferred by order of the Court to the Trust Fund. Henry M, 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report.*
[289] ibid Article 79 (1).
[290] ibid Article 75.
[291] ibid Article 17.
[292] ibid.
[293] *The Prosecutor v Thomas Lubanga Dyilo,* ICC-PTC-I Situation in the Democratic Republic of the Congo ICC-01/04-01/06 (24 February 2006).

applied it inconsistently, undermining the OTP's ability to remain independent, objective, and impartial.

The Challenge of Preliminary Examination - in order to distinguish situations that warrants investigation from those that do not, and in order to manage the analysis of the factors set out in Article 53(1).[294] Preliminary examination is conducted in all situations brought before the OTP to determine whether the criteria established in Article 53 of the Statute is met.[295] The OTP, on the basis of the facts and information available and in the context of the overarching principles of independence, impartiality, and objectivity, determines whether a situation warrants an investigation.[296] The preliminary examination is initiated by a referral to the Prosecutor by a State Party,[297] the UNSC[298] or by the Prosecutor acting *proprio motu*.[299] While each phase focuses on a distinct statutory factor for analytical purposes, the Office applies a holistic approach throughout the preliminary examination process.[300]The Prosecutor uses a filtering process, in four phases to analyse the seriousness of communications received, using information made available and seeking additional information, the OTP determines whether a situation is of 'reasonable basis to proceed.'[301] The four phases listed in the *ICC-OTP November 2013 Policy Paper on Preliminary Examinations are:* [302]

- **Phase 1** provides an initial assessment of all information on alleged crimes received under Article 15 (communications). The purpose is to analyse and verify the seriousness of information received, filter to identify those that appear to fall within the jurisdiction of the Court. Specifically, initial assessment distinguishes between communications relating to: a) matters which are manifestly outside the jurisdiction of the Court; b) a situation already under preliminary examination; c) a situation already under investigation or forming the basis of a prosecution; or d) matters which are neither manifestly outside the jurisdiction of the Court nor related to situations already under preliminary examination or investigation or forming the basis of a prosecution, and therefore warrant further analysis. Communications deemed to be manifestly outside the Court's jurisdiction may

[294] ICC-OTP November 2013 Policy Paper on Preliminary Examinations.
[295] ICCSt (n 1); UN Doc A/CONF183/9, July 17 1998 Article 53 Initiation of an Investigation.
[296]Allison Bray and others, 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report*; ICC-OTP Policy Paper on Preliminary Examinations Draft. The Hague (4 October 2010).
[297] ICCSt (n 1) Article 13 (a).
[298] ibid Article 13 (b).
[299] ibid Article 13 (c).
[300] ICC-OTP November 2013 Policy Paper on Preliminary Examinations.
[301] ibid ICCSt (n 1) Article 15(3).
[302] Allison Bray and others, 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report*.

be revisited in light of new information or circumstances, such as a change in the jurisdictional situations. Communications deemed to require further analysis will be the subject of a dedicated analytical report which will assess whether the alleged crimes appear to fall within the jurisdiction of the Court and therefore warrant proceeding to the next phase. Such communications shall be analysed in combination with open source information such as reports from the United Nations, non-governmental organisations and other reliable sources for corroboration purposes.[303]

- **Phase 2** represents the formal commencement of a preliminary examination of a given situation, it focuses on whether the preconditions to exercise jurisdiction under Article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. The analysis is conducted in respect of all Article 15 communications that were not rejected in Phase 1, as well as of information arising from referrals by a State Party or the SC, declarations lodged pursuant to Article 12(3), open source information, and testimony received at the seat of the Court. Phase 2 analysis entails a thorough factual and legal assessment of the crimes allegedly committed in the situation at hand with a view to identifying the potential cases falling within the jurisdiction of the Court.[304]
- **Phase 2** (**a**): analyses focus on issues of temporal, territory or personal jurisdiction.
- **Phase 2** (**b**): analyses focus on alleged crimes within the jurisdiction of the Court.[305] The Office considers crimes committed on a large scale, as part of a plan or policy. The Office may gather information on relevant national proceedings if such information is available at this stage. Phase 2 leads to the submission of an 'Article 5 report' to the Prosecutor, in reference to the material jurisdiction of the Court as defined in Article 5 of the Statute.[306]
- **Phase 3** focuses on the admissibility of potential cases in terms of complementarity and gravity pursuant to Articles 17. Phase 3 leads to the submission of an 'Article 17 report' to the Prosecutor, in reference to the admissibility issues as defined in the Statute.[307]

[303] ICC-OTP November 2013 Policy Paper on Preliminary Examinations.
[304] ibid.
[305] ICCSt (n 1) Article 5.
[306] ICC-OTP November 2013 Policy Paper on Preliminary Examinations.
[307] ibid.

- **Phase 4** examines the interests of justice. It results in the production of an 'Article 53(1) report,' which provides the basis for the Prosecutor to determine whether to initiate an investigation in accordance with Article 53(1).[308]

A situation must satisfy all necessary jurisdictional requirements to be admissible, followed by the issues of admissibility of a situation, first, in the context of complementarity and second, in the context of gravity.[309]

The Challenge within the Requirement of Gravity- The gravity threshold is essential in determining whether a situation is or not admissible. The OTP reviews information concerning subject matter jurisdiction.[310] To date, the only judicial interpretation of the gravity threshold was from the PTC-I, when reviewing the Court's first situation in the DRC; emphasised that the 'gravity threshold provided for in Article 17(1) (d) of the Statute must be applied.' 'At the stage of initiation of investigation of a situation, that the relevant situation must meet such gravity threshold' and crimes should be evaluated based on how 'systematically or large-scale' they were conducted. The PTC-I provided a framework for applying the gravity threshold, unlike in the Statute, in determining admissibility.[311] It is arguably important adhering to a more clarified gravity threshold, successful conviction came out of the PTC-I, illustrating the potential that clarifying the gravity threshold for admissibility could result in delivering convictions and meaningful justice to those affected.

Since, the PTC-I provided this description in reference to the DRC's specific situation but unsupported by legal parameters, the gravity threshold for admissibility of a situation must be standardised, making it applicable to all situations.[312] Without explicit definition or set of guidelines for using gravity during admissibility, the Prosecutor is left with too much prosecutorial discretion.[313] This leads to inconsistent implementation of the gravity threshold for admissibility which breads inconsistent and debatable results. The heavy reliance by the OTP results in narrow evaluation of factors in determining situations admissibility because of the synonymous use of 'gravity' with 'systemic' or 'large scale', as implied by the PTC-I.

[308] ibid.
[309] Allison Bray and others, 'The International Criminal Court, Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report*.
[310] ICCSt (n 1) Article 5; Crime of aggression was defined in 2010 currently undergoing ratification and to come into effect by 1st January, 2017.
[311] ICC-01/04-01/07, 10 February 2006 paras30,70;*The Prosecutor v Thomas Lubanga,* Case No ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute; <www.icc-cpi.int/iccdocs/doc/doc530350.pdf> (accessed 6 February 2015).
[312] Allison Bray and others, 'The International Criminal Court, Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* 13.
[313] ibid.

'Systemic' refers to the 'organised nature of acts of violence and the improbability of their random occurrence' while large-scale concerns 'the widespread nature of the attack.'

The Prosecutor, in the 2013 policy paper on preliminary examinations, stated, the gravity for admissibility includes an 'assessment of the scale, nature, manner and impact of the alleged crimes committed in the situation,' emphasising that the OTP must assess 'gravity in relation to the most serious crimes alleged and to those who appear to bear the greatest responsibility for these crimes. The PTC-I required systematicity or scale as a condition of the gravity threshold in Article 17(1) (d) and the OTP has implemented these conditions analogously with gravity for admissibility. Also, the OTP primarily considers quantitative (numerical) factors such as number of victims, when determining admissibility. This narrow evaluation of the factors determining the admissibility of a situation is evident when considering why the OTP dismissed the situation in Iraq.[314] The Court in 2006 received over 240 relevant communications expressing 'the concern of numerous citizens and organisations regarding the launching of military operations and the resulting human loss' by the United Kingdom (UK) soldiers in Iraq. The number of victims of the inhumane treatment allegedly caused by the UK national soldiers in Iraq came to between 4 and 12. The OTP reported that the crimes had been committed within the Court's jurisdiction and thus considered the gravity threshold.[315] The OTP concluded that no more than twelve deaths fell within the jurisdiction of the Court that could be included in a potential investigation.[316] Consequently, the OTP dismissed the situation in Iraq on the basis of gravity, stating further that this dismissal is considered in respect of other situations currently under investigation that features thousands of wilful killings.[317] However, after years of the UK failing to prosecute direct perpetrators among its troops in Iraq, it is time for the Court to step in says *Andreas Schueller,* a legal adviser at the European Center for Constitutional and Human Rights.[318]

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[314] ibid.

[315] Luis Moreno-Ocampo letter to The Hague, 'After analysing all available information, it was concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed'; <http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> (accessed 6 February 2015)

[316] William Schabas *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011); Allison Bray and others, 'The International Criminal Court, Confronting Challenges on The Path to Justice' Jackson [2013] *School of International Studies Task Force Report* 13.

[317] ibid.

[318] German-based European Centre for Constitutional Human Rights has recently submitted to the International Criminal Court a 250-page document entitled 'The Responsibility of UK Officials for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008'; In 2004 there were reports by the International Committee of the Red Cross, by Amnesty International about the abuses and mistreatment of the detainees in Iraq by British forces up till now nothing serious has been a done by the UK.

Also, the Statute does not define the criteria for gravity in determining a situation's admissibility even in the Rule of Procedure (RPE) or other governing documents.[319] It remains a vague expression. It is difficult for the Prosecutor to effectively explain the reasoning behind the gravity threshold when finding a situation admissible.[320] Besides, it is used over a range of situations; the interpretation has led the OTP to become overly reliant on quantitative factors a trade-off on qualitative factors equally important in determining the gravity of a situation. Quantitative factors refer to numerical data, such as the number of victims whilst qualitative factors refer to categorical data, such as target vulnerability. Thus the OTP's commitment to independence, objectivity, and impartiality while conducting preliminary examinations could be undermined. Including a list of qualitative factors for the OTP to consider would lead to a more credible examination and alleviate prosecutorial discretion during prioritisation of admissible situations. Thus the gravity threshold remains ambiguous and ill-defined yet an important determinant for a situation's admissibility.[321] Once guidelines have been established, an increase in transparency will aid the overall advancement of the Court's legitimacy.[322]

2.12 The Court's Intermediaries

The ICC as a global court is required to investigate around the world in countries with very different cultures, histories, languages and conflicts. As a result, the Court depends on partners in its work with advice and background information about the context in which it is operating. The Court needs local partners to help conduct outreach in local languages in the field, liaise with victims and witnesses, or facilitate victims 'participation in legal proceedings. Consequently, the Court relies on a group of people generally referred to as 'intermediaries.'[323] These are people or organisations that help the Court to connect with witnesses and others facilitating activities such as locating or communicating with victims,

[319] Allison Bray and others, 'The International Criminal Court, Confronting Challenges on The Path to Justice' [2013] *Jackson School of International Studies Task Force Report*.
[320] ibid; The PTC is one of the judicial divisions of the Court that acts as a check on the power of the Prosecutor, especially when the Prosecutor initiates a preliminary examination *proprio motu*' Corrie Karen. 'Pre-Trial Division of the International Criminal Court: Purpose, Powers, and First Cases' [2006] American Non-Governmental Organizations Coalition for the International Criminal Court.
[321] Allison Bray and others, 'The International Criminal Court, Confronting Challenges on The Path to Justice' [2013] *Jackson School of International Studies Task Force Report*.
[322] ibid.
[323] The International Criminal Court *Draft Guidelines Governing the relations Between the Court and Intermediaries*, August 2011; See the International Criminal Court, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants [ICC-01/04-545 04-11-2008] <http://www.iccnow.org/documents/ASP-memo-20111212.pdf> accessed 19June 2014

particularly in settings without proper communication (mobile phone) coverage or transportation access.[324] In the *Lubanga's* case, the Court faced issues of how to manage interactions with intermediaries.[325] For security concerns, the Court may provide protection for intermediaries because they may be at risk on account of the activities of the Court.'[326] The Court had found that three intermediaries may have been persuaded, encouraged, or assisted witnesses to give false evidence,[327] which could amount to a crime under Article 70 of the Rome Statute and which the prosecutor can investigate under Rule 165 of the RPE.[328] Although, the Chamber did not direct the Prosecutor to stop working with intermediaries, instead it signified that the Prosecutor could not delegate its investigative work to intermediaries. In 2011 the Court finalised the Draft Guidelines on Intermediaries which was considered at the ASP meeting in November 2012.

2.13 Theory of Organisation Behaviour

The objective of this section is to provide a new approach to understanding the International Criminal Court not just as a court but as an international organisation. The creation of the Court is an important development in international law and international organisations founded upon international cooperation; with a well grounded understanding of the dynamics within an international organisation such as the ICC it is needless to say that its effectiveness will be better accomplished. At the core of this approach is the giving of a much higher profile to the issue of the nature of organisations.[329] The theories of Organisation Behaviour (OB) will be used as a set of conceptual tools that will help in classifying and explaining the phenomena in this area of research.[330] The fundamental assumption of this section is that an understanding of the nature of organisations is an inextricable part of the understanding of the

[324] Kelly Askin, Alison Cole, 'Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court' (2012) *American Society of International Law*; Commentary on the Draft ICC Guidelines on Intermediaries 2011, <http://www.refugee-rights.org/Assets/PDFs/2011/icc-intermediaries-commentary> accessed 19 June 2014.
[325] International Criminal Court, First decision on the Prosecution request for Authorisation to Redact Witness Statements', Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I *Prosecutor v Germain Katanga* , ICC-01-04-01-07-475-ENG (13 May 2008) para 54.
[326] International Criminal Court Rules of Procedure and Evidence Rule 87, Doc No ICC-ASP/1/3 (9 September, 2002).
[327] Wairagala Wakabi, 'Lubanga witness says he was paid $200 to tell lies' February 8, 2010, Lubanga Trial Website at <http://www.lubangatrial.org/2010/02/08/lubanga-witness-says-he-was-paid-us200-to-tell-lies> 18 May 2014.
[328] ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).
[329] Richard W Dunford, *Organisational Behaviour: An Organisational Analysis Perspective* (Addison Wesley Publishing Company 1992) 3.
[330] Robin Fincham, Peter Rhodes, *Principles of Organisational Behaviour*, (4th edn, Oxford University Press, Oxford 2005) 4.

behaviour of the organisation.[331] Consequently, understanding the behaviour of organisations such as the International Criminal Court could also pave way to nip in the bud some of the Courts challenges; thereby induce performance (within and outside the Court) with a better understanding of the Courts stance and the achievement of its objectives.

An organisation exists when two or more persons agree to collaborate over a period of time or in perpetuity in order to achieve certain goals.[332] Organisations can be understood or described in different metaphors[333] such as: a machine (a classical view),[334] Organisms (the organic view), Brains (the cybernetic view), Culture (a product of their dominant values), political systems (concerned with the distribution of power), psychic prisons (sources of stress for individuals), flux and transformation (constantly changing organisms), instruments of dominium (a means of exerting power, however legitimate).[335] For the purpose of this thesis, only a few of the metaphors will further be explained for a broader view. An organisation viewed from the perspective of a machine, is that organisation seen as a purpose-driven device (the machine metaphor)[336] an assumption that a common goal or purpose exists (such as combating impunity and the rendering of not only legal justice but also transitional justice) and there should be a predominant focus on the design and approach as a means to ensure achieving overall intent and purpose of such an organisation like the Court for instance. The machine metaphor approach, underscores the formal design of organisations (the legal framework) and outcomes may be explainable in terms of design flaws (the issue of sovereignty as a design flaw in the Statute) leading to malfunctioning, fundamental upon such design flaws.[337] Furthermore, defining an organisation as an 'Organism' is the intension to treat it as a living thing (a legal entity)[338] with parts as in a human body, to a large extent functionally differentiated and interdependent such that the survival of the whole depends on adequate functioning of all parts. This biological representation continues if we consider organisations as operating in an environment (social,

[331] Richard W Dunford (n 329).
[332] Gerald A Cole, *Organisational Behaviour Theory and Practice* (Continuum Publishers, London 1995) 4.
[333] Gareth Morgan, *Images of Organiasations,* (Sage Publications New York 2006) 3-11.
[334] Henri Fayol, Istanbul, 29 July 1841 – Paris, 19 November 1925, a French mining engineer who developed a general theory of business administration. The father of Strategic management, based largely on his own management experience, he developed his concept of administration. In 1916 he published these experience in the book "Administration Industrielle et Générale,' at about the same time as Frederick Winslow Taylor published his Principles of Scientific Management.
[335] Gerald A Cole, *Organisational Behaviour Theory and Practice* (Continuum Publishers London 1995) 4.
[336] Richard W Dunford, *Organisational Behaviour: An Organisational Analysis Perspective* (Addison Wesley Publishing Company 1992) 3.
[337] Gareth Morgan, *Images of Organisations,* (Sage Publications New York 2006) 3-11.
[338] ICCSt (n 1) Article 4.

economic) to which they must adapt if they are to survive.[339]Additionally, defining organisation as a 'political system' is the notion and privilege that an organisation is a forum where participants interact in pursuit of a range of interests, some interests will be common, others will differ; some will be complimentary and some will conflict. This does not mean that the legitimate organisational goals are subverted but that organisations by their nature and creation are political.[340] Lastly, from the cultural perspectives, the essence of organisations stems not in the complex of tasks and structures, rules and procedures as assumed by models such as the machine approach but rather in the realm of shared systems of beliefs and values,[341] such as the dictates of the Nuremberg principles, to hold individuals accountable for their misdeed.

Organisational behaviour is the field of study that investigates organisations from multiple viewpoints, methods and levels of analyses[342] to determine how organisational structures affect behaviour within, outside and in relation to other organisations. There are three main theories within this study, namely, Micro, Meso and Macro studies. Micro organisational behaviour studies focus on individual and group dynamics in an organisational setting. Team studies are popular parts of organisational behavioural studies, it examine the best ways to form, use and lead teams in a variety of situations to accomplish utmost performance. 'Meso' scale structures, involves the study of power, culture, and the networks of individuals in organisations. 'Macro' organisational analysis/theory studies whole organisation and conflict zones, including how they adapt. What strategies, structures and contingencies guide them as organisations? In addition, macro-organisational behavioural research looks at an organisation as a whole. It studies how organisations progress and how their strategies regarding employees and leadership affect the performance of the entire organisation.[343] This is the part of the field that may recommend a flat organisation with few levels of management over a complex bureaucracy or a model using inspirational leadership instead of more aggressive programs. Organisational Behaviour therefore, encompasses what might be called management theory. This is a loosely knit body of knowledge about the behaviour of people in organisations, which aims to explain behaviour in terms of achievement of work goals,

[339] Ian Brooks, *Organisational Behaviour: Individuals, Groups and Organiasation,* (financial Times Prentice, Hall Publishers 2009) 24 – 30.
[340] Richard W Dunford, *Organisational Behaviour: An Organisational Analysis Perspective* (Addison Wesley Publishing Company, 1992) 5.
[341] ibid.
[342] Laurie J Mullins, *Management and Organisational Behaviour* (10th edn, FT Publishing International 2013) 4, 12.
[343] Gerald A Cole, *Organisational Behaviour Theory and Practice* (Continuum Publishers London 1995) 3.

especially concerned with issues of goal setting, resource deployment, employee motivation, team-work, leadership, control, co-ordination and performance measurement.[344]

In addition, Organisational behaviour studies the impact individuals, groups, and structures have on behaviour within organisations, it is an interdisciplinary field that includes sociology, psychology, communication and management.[345] Organisational behaviour focuses on organisational and intra-organisational issues and relates to everyday practices of organisations leading over a long period to the culture of the organisations. Many factors come into play whenever people interact in organisations. Modern organisational studies attempt to understand and model these factors. Organisational studies seek to control, predict and explain that Organisational Behaviour can play a major role in organisational development, enhancing overall organisational performance, as well as enhancing individual and group performance, satisfaction, and commitment.

A reward, real or elusive, presented after the occurrence of an action, is intended to trigger the behaviour to occur again. This is enabled by associating positive meaning to the behaviour. Studies show that if the person receives the reward immediately, the effect is greater, and decreases as delay lengthens. Repetitive action-reward combination can cause the action to become habit.[346] Motivation is the driving force that causes the flux from desire to will,[347] for instance, hunger is a motivation that elicits a desire to eat. Motivation is an inner drive to behave or act in a certain manner. Motivation can be looked at as a cycle where thoughts influence behaviours and behaviours thus drive performance. Performance will impact thoughts and the cycle becomes cyclical. Each facet is comprised of many multi-faceted dimensions where attitudes, beliefs, intentions, effort, and withdrawal all affect the amount of motivation one has. Rational motivation refers to the idea that entities are rational and that behaviour is guided by reasons. However, recent research (on Satisficing) has significantly undermined the idea of homo economicus[348] or of perfect rationality in favour of a more 'bounded rationality theory.' The field of behavioural economics is particularly concerned with the limits of rationality in economic agents.

[344] ibid.
[345] ibid.
[346] ibid.
[347] Vroom V H, *Work and Motivation* (Wiley, New York 1954).
[348] Rittenberg and Trigarthen, *Principles of Microeconomics* (flat world Knowledge, 2006) 221.

Motivation is derivable from two sources: oneself and other people. The two sources are called intrinsic motivation and extrinsic motivation respectively. An in-depth analysis of the theory of motivation would be unnecessary for the purpose of this dissertation. It is however mentioned here for two main reasons. Firstly, to establish the basis for analysing the challenges of the Court as internally and externally related. Secondly, to establish that internal and external motivation towards the Court can elicit performance and minimise some of the Court challenges.

2.14 Conclusion

In this chapter we examined the theoretical concepts of implementing the current regime of international criminal law as established within the Rome Statute, elaborating on key operational principles of the Statute which set the stage for further complex analysis of the Court's operations, prosecutions and challenges. Additionally, we examined the limits and jurisdictional basis of the Court such as complementarity, *ne bis in idem*, admissibility and gravity, in determining whether a situation under preliminary examination provides a reasonable basis to proceed, without undermining relevant sections within the legal framework of the Court. Since, complementarity and gravity play a vital role in determining a situation's admissibility, the ICC must work to improve the ability of national jurisdictions to try cases domestically and also create adaptable guidelines for applying the gravity threshold in order to ensure that the OTP remains impartial when determining which situations to investigate. In addition, the chapter briefly examines alleviating the sufferings of victims through restorative justice with the Trust Fund for Victims, and reviews the Courts jurisdiction (*ratione materiae, personae, loci and temporis*), and other related provisions within the Statute to enable proper focused investigations on the most serious crimes of international concern these crimes will be examined in-depth in the next chapter, and concludes by examining some theories of organisations that could if adequately implemented challenge some of the prosecutional challenges the Court faces.

Chapter 3

Article 5 of the Rome Statute

All men are equal before the law. [Nobody should be above the law]. More men and women in this world are united by the conviction that genocide, crimes against humanity, war crimes and the crime of aggression cannot go unpunished – regardless of the nationality and the rank of the perpetrators.

Hans-Peter Kaul

Introduction

This chapter examines the *Suī generis* of crimes in Article 5 of the Rome Statute (the statute)[1] and their development over time, the purpose of the chapter is also to help us appreciate the *travaux préparatoires* at the Rome Conference in 1998.[2] Understanding these enable understanding and analysing the prosecutorial challenges established in chapter four and the jurisprudence of the Court considered in chapter five. The substantive crimes: war crimes, crimes against humanity, genocide and the crime aggression are the subject matter (*ratione materiae*) jurisdiction of the Court. Thus, the chapter is divided into four parts; each part examines a substantive crime.

Part one

3.1.1 War Crimes

'...it is especially forbidden . . . to kill or wound treacherously…'[3]

War crimes are serious violations of treaty rules and or of customary laws of war. The dictates of war crimes established within recent developments in international law and international criminal law particularly the Rome Statue of the International Criminal Court[4] and relevant cases will be examined in this section of the Chapter. The Appeals chamber of the International Criminal Tribunal for Yugoslavia (ICTY) stated in *Tadic Interlocutory Appeal* that: 'war crimes must consist of a serious infringement of an international rule. That

[1] 2187 UNTS 3; 37 ILM 999 (July 17, 1998), entered into force 1 July 2002 (ICCSt).

[2] ibid; a conference in Rome called the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, also known as the Rome Conference, was held from June 15 to July 17, 1998. It brought together delegations from 160 nations and numerous interested organisations to establish a permanent international criminal court—the first of its kind. After five weeks, deliberations culminated in the adoption of the Rome Statute. Seven countries (including the United States and China, both permanent members of the UNSC) voted against the Statute, with twenty-one states abstaining, the International Criminal Court (ICC) was established with 120 votes in its favour, after receiving its first 60 ratifications it entered into force on 1 July 2002, to date, there are 123 states parties with 34 African Union state members to the ICC.

[3] The Hague Convention IV Article 23(b) (emphasis added).

[4] ICCSt (n 1).

the rule violated must either belong to the corpus of customary law or be part of an applicable treaty, and entail criminal responsibility of the person(s) breaching the rule.'[5] Consequently, war crimes may be perpetrated in the course of either international or non-international armed conflicts. It is a violation of the rules regulating wars.[6] Since *Tadic*, it has been widely accepted that serious violations of laws on internal armed conflict can no longer be over looked.[7] This is further supported by Article 8^2 (2) ICCSt.[8]

3.1.2 War Crimes under the Rome Statute

Under the Rome Statute war crimes could be committed by: (A) Grave breaches of the Geneva Conventions (GC) such as: Article 50 GC I,[9] Article 51 GC II,[10] Article 30 GC III[11] and Article 147 GC IV.[12] The four Geneva Conventions include prohibited conducts such as willful killing, torture, inhuman treatment, hostage taking, extensive destruction and appropriation of property. Grave breaches must be committed in the context of an international armed conflict and against persons or property protected under the GC.[13] The GC requires States to legislate effective penal sanctions for persons committing, or ordering the commission of, any of these gave breaches and bring them to justice irrespective of their nationality. A vast body of substantive rules exists comprising what are traditionally called 'the law of The Hague' and 'the law of Geneva'. The former includes the Hague conventions of 1899 and 1907 on international warfare. These rules provide for various categories of lawful combatants and regulate combat actions and treatment of persons who do not or no longer take part in conflict (civilians, prisoners of war, wounded and the sick).[14] The later,

[5] SC Res 827, UN SCOR 48th Sess 3217th mtg at 1-2 (1993); 32 ILM 1159 (1993); *The Prosecutor v Dusko Tadic*, IT-94-1 101 ILR 1; 105 ILR 419; 105 ILR 479.
[6] Antonio Cassese and Paola Gaeta, *International Criminal Law* (3rd edn, Oxford University Press, Oxford 2013) 80, 85.
[7] *The Prosecutor v Dusko Tadic*, IT-94-1 101 *ILR* 1; 105 *ILR* 419; 105 *ILR* 479.
[8] ICCSt (n 1) Article 8^2 (2); Elements of crime; PCNICC/2000/1/Add 1.
[9] Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949.
[10] Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 12 August 1949.
[11] Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva 12 August 1949.
[12] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva 12 August 1949.
[13] Knut Dörmann, *War Crimes under the Rome Statute of the International Criminal Court, with a Special focus on the Negotiations on the Elements of Crimes* in Armin von Bogdandy and Rüdiger Wolfrum (ed) Max Plank *Yearbook of United Nations Law,* volume 7, 2003 (Koninklijke Brill, NV Netherlands, Volumes 1-17 2013) 341, 467
[14] Anthony Cassese, Acquaviva G, Fan M, Whiting A, *International Criminal Law: Cases and Commentary* (Oxford University Press, England 2011).

comprises various GC (the four Conventions of 1949 and the two additional Protocols of 1977), However, the Third Geneva convention of 1949 regulates various classes of lawful combatants, thereby updating the Hague rules; in addition the first Additional Protocol of 1977 to some extent updates those rules of the Hague law which deals with means and methods of combat.[15] (B) A category of war crimes, cover serious violations of the laws and customs applicable in international armed conflicts from other sources such as: I) The 1899 Hague Declaration (IV, 3) concerning expanding bullets The Hague, 29 July, II) the 1925 Geneva Gas Protocol.[16] (C) Lastly, are the categories of serious violations of the law and customs applicable in armed conflicts not of international character such as common Article 3 to the GC. Common Article 3 includes a prohibition of acts such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. Not all serious violations of international humanitarian law have been included within the definition of war crimes in the Rome Statute,[17] for instance no provisions dealing with unjustifiable delay in the reparations of prisoners of war or civilians or on the launching of an indiscriminate attack affecting the civilian population or civilian objects unless one equates such an attack with an attack against the civilian population which is a war crime under the Statute.[18] Given that several delegations contested the customary law status of some provisions of Additional Protocol I, certain serious violations were omitted and other prohibitions such as: the prohibition on disproportionate attacks and attacks against the natural environment Article 8 (2) (a) (b) (iv) ICCSt included only, after a modification of the treaty language.

Articles 6, 7, 8^2 and 15*bis* set out the list of crimes over which the court will have jurisdiction i.e. Genocide, crime against humanity, war crimes and the crime of aggression, to provide greater certainty and clarity concerning the content of each crime, some states felt it necessary to develop specific texts on elements of crimes (EOC).[19] This consequently led to the creation of Article 9 of the ICCSt. It states that the elements of crime shall assist the Court in the interpretation and application of Article 6, 7, and 8^2 ... Also Article 21 states that the Court shall apply the Elements of crime on the basis of these rules; the EOC will guide

[15] ibid.
[16] Protocol for the prohibition of the Use of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, Geneva 17 1925.
[17] Knut Dormann (n 13) 341, 407; H von Hebel and D Robinson, 'Crimes within the Jurisdiction of the Court' in: R S Lee (ed), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers Inc, US 2001)104.
[18] ibid.
[19] ibid; ICC ASP/1/3 at 108 UN Doc PCNICC/2000/1/Add.2 (2000).

future Judges through the interpretation of provisions on crimes contained within this statute...

3.1.3 The Use of Specific Weapons under the Rome Statute

The Statute covers few war crimes relating to the use of specific weapons, a consequence of the difficulty encountered in reaching a consensus at the Rome Conference. Excluding nuclear weapons whilst listing other weapons of mass destruction, namely chemical and biological weapons, was unacceptable to a number of states. They feared that prohibiting some weapons of mass destruction while remaining silent on nuclear weapons would give tacit approval to the legality of nuclear weapons,[20] thus, it was necessary to exclude all weapons of mass destruction from the Statute for the time being. The weapons provisions in the Statute are therefore restricted to those weapons that are prohibited under IHL.[21] These restrictions appear in paragraphs (b) xvii, xix and (e) xiv of Article 8^2,[22] bearing in mind that the chemical and biological restrictions emanated from the 1925 Geneva gas protocol often interpreted as including the proscription of the use of chemical weaponry. However, Article 8^2 (2) (b) (xx) ICCSt allows for future expansion of the list of prohibited weapons through an amendment procedure.[23]

Under the Statute deliberate attacks against civilian population, individual civilians or undefended non-military objectives[24] stated in Articles 8^2 (2) (b) (i) or Article 8^2 (2) (e) (i) is a war crime. In spite of the ICTY's decision in *Tadic*[25] that customary law rules prohibiting the use of specific weapons are also relevant to non-international armed conflict. A reasonable amount of the provisions in Article 8^2 applicable to international armed conflicts are not in the section on non-international armed conflict. Other gaps seen, in the war crimes applicable to internal conflict is the no provision on prohibition of intentionally starving the civil population.[26]

[20] Knut Dormann (n 13).
[21] H von Hebel and D Robinson (n 17)116.
[22] ICCSt (n 1) Article 8^2.
[23] Knut Dormann (n 13).
[24] ICCSt (n 1) Article 8^2 (2) (b) (v).
[25] *Dusko Tadic* (n 7) (As stated: What is inhumane and consequently proscribed in International wars cannot but be inhumane and inadmissible in civil strife).
[26] Knut Dormann (n 13).

The failure to include all serious violations of IHL in the Rome Statute means that states are obliged to repress such violations.[27] A) State Parties to Additional Protocols I&II must provide for the repression of those grave breaches in Articles 11 and 85 of that Protocol, which are not included in the Rome Statute. B) State Parties to the Amended Mines Protocol,[28] the Ottawa Treaty and the adopted second protocol, to the 1954 Hague Convention on Cultural Property[29] must implement the provisions relating to the penal repression.

Paragraph 6 in the General introduction (EOC)[30] refers to the term 'unlawfulness' which could act as a place marker that refers to relevant provisions of IHL, such as the war crime of deportation Article 8^2 (2) (a) (vii) ICCSt can only occur in situations where Article 49 (2) and (3) of the Geneva Convention (GC) IV, which describe lawful evacuations, are not applicable. The war crime of destruction and appropriation in the sense of Article 8^2 (2) (a) (iv) ICCSt must be read in conjunction with the provisions dealing with different kinds of protected property in the GC.[31]

3.1.4 The Overlap of Crimes

Paragraph 9 of the general introduction to the EOC deals in general terms with problems of overlap of crimes.[32] It indicates that a particular conduct may constitute several crimes. This statement is a lot relevant to sexual crimes which are not only specific crimes under Article 7 (1) (g), Article 8^2 (2) (b) (xxii) and Article 8^2 (2) (e) (vi) ICCSt , but may also fulfill the conditions of torture, inhuman treatment or other general crimes, such as willfully causing great suffering, or serious injury to body or health.[33] War crimes defined in Article 8^2 (2) (a) (i) – (iii) and (v) – (viii) ICCSt must be committed against persons protected under the GC.[34]

[27] ibid.
[28] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II to the 1980 Convention as amended 3 May 1996).
[29] Second Protocol to the Hague Convention of 1954 for the protection of Cultural Property in the event of Armed Conflict, The Hague 26 March 1999.
[30] International Criminal Court (ICC), Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, finalised draft text of the Elements of Crimes, 2 November 2000, PCNICC/2000/1/Add 2.
[31] Second Protocol to the Hague Convention of 1954 for the protection of Cultural Property in the event of Armed Conflict, The Hague 26 March 1999.
[32] ICC (n 30)
[33] Geneva Convention relative (IV) to the Protection of Civilian Persons in Time of War; Second Protocol to the Hague Convention of 1954 for the protection of Cultural Property in the event of Armed Conflict, the Hague 26th March 1999.
[34] ibid.

In the case of Article 8^2 (2) (a) (iv) of the Statute, acts or omissions must be committed against property regarded as protected under the GC. 'Protected property' is not generally defined in the GC. Instead, the Conventions contain a description of property that cannot be attacked, destroyed or appropriated. In particular the following provisions throughout the GC have to be mentioned. Articles 19, 33- 35 GC I; Articles 22, 24, 25, GC II and Articles 18, 19, 21, 22, 23, 33, 53, 57 GC IV.[35]

3.1.5 International and Non-International Armed Conflicts

A fundamental requirement for a charge under Articles 8^2 (2) (A-F) of the Statute,[36] is the existence of an armed conflict be it international or non-international in character. It follows then that if the Prosecutor fails to prove the existence of a relevant armed conflict it will be impossible to establish charges against the accused.[37] Relying on jurisprudence from the PTC and the 'ICTY', an international armed conflict exists 'whenever there is resort to armed conflict between States.'[38] Whilst a non-international armed conflict is established when States have not resorted to armed force but:

i) the violence is sustained and has reached a certain degree of intensity, and
ii) Armed groups with some degree of organisation, including the capability of imposing discipline and the ability to plan and carry out sustained military operations. Additionally, Article 8^2 (2) (f) of the Statute stipulates that the conflict must be 'protracted' for these purposes.[39]

It is suggested that armed groups with the ability to undertake sustained operations, as revealed by their ability to train troops and participate in numerous battles[40] will fall under a non-international armed conflict in character. Although, there might be some evidence of assistance provided by some states, applying the overall control tests, as adopted by the ICC and ICTY it might fall short of the threshold for direct intervention.[41] Neither the presence of multi-national forces nor the direct intervention by state military force is sufficient to

[35] *The Prosecutor v Dusko Tadic* 1T- 94- 1- AR72, para 81, ICTY Appeals Chamber, Decision on the Defense Motion for interlocutory Appeal on Jurisdiction.
[36] ICCSt (n 1); ICC-01/04-01/06 pare 504.
[37] ibid.
[38] ICC-01/04-01/06-2748-Red para 21.
[39] ibid; the ICTY jurisprudence relied upon is: *Prosecutor v Tadić, Case No. IT-94-1-T; Prosecutor v* dornević *Case No IT-05-87/1-T* ; *Prosecutor v Limaj et al Case No IT-03-66-T Prosecutor v Haradinaj et al Case No IT-04-84-T* (trial judgment) and *Prosecutor v Mrkšić et al Case No. IT-95-13/1-T*
[40] ICC-01/04-01/06-2748-Red paras 22 – 24.
[41] ibid paras 38 – 43.

constitute an armed conflict of international character, as the part played by these forces may not result in two states opposing one another.[42]

During the Lubanga trial, in determining whether the relevant conflict was international between September 2002 and 2 June 2003 and non-international between 2 June 2003 and 13 August 2003, the PTC confirmed the charges against the accused on the basis of Articles 8^{2} (2)(b)(xxvi) and 8^{2} (2)(e)(vii) of the Statute, although the Prosecutor had only charged the accused with the conscription and enlistment of children under the age of fifteen years to have participated actively in hostilities, within the context of a non-international armed conflict under Article 8^{2} (2) (e) (vii) of the Statute.

Although, there is no definition of armed conflict in the Statute or in the EOC document,[43] the introduction to the EOC sets out that: The elements for war crimes under Article 8^{2} paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflicts[44] as with the Rome Statute,[45] neither the Geneva Conventions nor their Additional Protocols (I &II) explicitly defined 'armed conflict.[46] The definition of this concept has been considered by other international tribunals and the Chamber has derived assistance from the jurisprudence of the ICTY[47] which defines it as:

> 'An armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organised armed groups or between such groups within a State'. IHL applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached or in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or

[42] ibid paras 36 – 37, ICC-01/04-01/06 234/ 593.
[43] PCNICC/2000/1/Add 1 (element of Crime 2002). According to Article 9^{2} of the Statute of the International Criminal Court, the elements of crime are to assist the Court in the interpretation of Articles 6, 7, 8^{2} and 8 *bis* of the Statute. Resolution F of the final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court established by preparatory commission for the International Criminal Court (PCNICC) to prepare proposal for the practical arrangements for the establishment and coming into operation of the Court including draft texts of inter alia, Rules of procedure and Evidence and the Elements of Crime. The final text was adopted on 30 June 2000. The rules entered into force upon adoption at the first session of the Assembly of State Parties in New York from 3 – 10 September 2002.
[44]ICC-01/04-01/06 para 531.
[45] ibid para 532.
[46] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Hart Publishing, Oxford; 2008) 291; ICC-01/04-01/06 242/ 593 para 531.
[47] ICC-01/04-01/06 para 533.

> in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.[48]

International armed conflicts relate 'to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.'[49]

The notion of 'armed conflict' has, from 1949, replaced the traditional notion of 'war.'[50] According to the Commentary of the first Geneva Convention,'[51] the substitution of 'armed conflict' for 'war' is deliberate. One may argue almost endlessly about the legal definition of 'war'. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence.[52] The expression 'armed conflict' makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict even if one of the Parties denies the existence of a state of war.' The ICTY confirmed in *Tadic* that 'an armed conflict exists whenever there is a resort to armed force between States.'[53] This definition has since been used by other international bodies.[54] These provisions also apply 'to cases of partial or total occupation of the territory of a high contracting party, even if the said occupation meets with no resistance.'[55] Under States responsibility in unlawful acts, a conflict between government and rebel forces within a country becomes of international character where rebel forces are *de facto* agents of a third State. Thus, the conduct is attributable to the third State.[56] The EOC require that the alleged criminal conduct (war crime) 'took place in the context of and was associated with an armed conflict.'[57]
Therefore, the law of armed conflicts applies in two situations:

I) Non-international armed conflicts and
II) International armed conflicts,

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[48] *Prosecutor v Tadić*, Case No IT-94-1-AR72, Appeals Chamber, decision on the defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*Tadić* Interlocutory Appeal Decision).
[49] GC I-IV, Article 2(1).
[50] Marco Sassòli and others, *How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law* (Volume I, 3rd edn, ICRC, Geneva, 2011) 22.
[51] Pictet Jean S, *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, International Committee of the Red Cross 1952) 32.
[52] 1 UNTS XVI Charter of the United Nations 24 October 1945 Article 51; ICC (n 36).
[53] *Tadic* (n 7) para 70.
[54] ibid para 37; *The Prosecutor v Boskoski and Tarculovski (Trial Judgment), IT-04-82-T,* para 175.
[55] GC I-IV Article 2(2).
[56] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No 10 (A/56/10) chpIVE1 <http://www.refworld.org/docid/3ddb8f804.html> accessed 21 June 2014
[57] ICCSt (n 1) Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii)

Technically, 'armed conflicts not of international character,' are conflict which 'does not involve a clash between nations' the phrase bears its literal meaning[58] and determined by party rather than by territory.[59] Article 8^2 (2) (f) of the Statute, Paragraph 2 (e) applies but does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.[60] Relying on AP II to the Geneva Conventions and the *Tadić* case, PTC I determined that 'the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow the conflict to be characterised as an armed conflict not of international character.'[61]

The Trial Chamber in the Lubanga case agrees with this approach and notes that Article 8^2 (2) (f) of the Statute only requires the existence of a 'protracted' conflict between 'organised armed groups.' It does not include the requirement in AP II that the armed groups need to 'exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations.'[62] It was therefore, unnecessary for the Prosecution to establish that the relevant armed groups exercised control over part of the territory of the State.[63] Furthermore, Article 8^2 (2) (f) does not incorporate the requirement of an organised

[58] *Hamdan v Rumsfeld*, Case No126 S Ct 2749 (2006)
[59] ICC-01/04-01/06 para 534.
[60] Common Article 3 to the Geneva Conventions of 12 August 1949 provides: 'In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting parties, …; Article 1(1) of Additional Protocol II reads: This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. Article1(2) of Additional Protocol II provides as follows: 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.' Whereas Common Article 2 is limited to international armed conflicts between signatories, Common Article 3 affords minimal protection to organised armed groups involved in any conflict not of an international character; Gerhard Werle, *Principles of International Criminal Law* (3rd, US, CUP, Asser Press; 2009) 366,981; Andrew J Carswell, 'Classifying the conflict: a soldier's dilemma.' (2009) 91 International Review of the Red Cross 150; Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP, Cambridge; 2010)157.
[61] ICC-01/04-01/06-803-tEN para 233 the extract of the Pre-Trial Chamber's reasoning relied upon by the defence in its submissions para 515 does not appear to reflect the ultimate conclusion of the Pre-Trial Chamber, set out in para 233 of the Decision on the confirmation of charges.
[62] GC Additional Protocol II, Article 1(1).
[63] Pre-Trial Chamber II came to the same conclusion in ICC-01/05-01/08-424 para 236.

armed groups 'under responsible command', as set out in Article 1(1) of AP II of the GC.[64] Instead, the 'organised armed groups' must have a sufficient degree of organisation in order to enable them to carry out protracted armed violence.[65]

When deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of international character), the following non-exhaustive list is potentially relevant, the group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the group's ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.[66] None of these factors are individually determinative. The criteria should be applied flexibly when deciding whether a body was an organised armed group or not, given the limited requirement in Article 8^2 (2) (f) of the Statute that the armed group be 'organised.'

The intensity of the conflict is also relevant for in determining whether an armed conflict is not of international character,[67] because under Article 8^2 (2) (f), the violence must be more than sporadic or isolated. The ICTY held that the intensity of the conflict should be 'used solely as a way to distinguish an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to IHL.'[68] The ICTY added what should be taken into account, 'the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to

[64] The approach adopted by Pre-Trial Chamber I, ICC-01/04-01/06-803-tEN, paras 232 - 233; Pre Trial Chamber II adopted a different interpretation, ICC-01/05-01/08-424, para 234.

[65] ICC-01/04-01/06-803-tEN, para 234 The inclusion of the additional requirements set out in Additional Protocol II that the armed groups are under responsible command and exercise control over a part of the territory appears to have been deliberately rejected by the drafters of the Rome Statute. See Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes* (2nd edn, Hart Publishing 2008)502 at marginal note 351; William A Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (2010) 204,205; Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Brill,1999) 120,121; International Committee of the Red Cross ICRC, Concerns on Threshold for War Crimes Committed in Non-international Armed Conflicts Contained in the Bureau Proposal in Document A/CONF183/C1/L59 and Corr 1, UN Doc A/CONF183/INF/11.

[66] *Prosecutor v Limaj et al,* Case No IT-03-66-T Judgment (30 November 2005) para 90; *Prosecutor v Haradinaj et al,* Case No IT-04-84-T Judgment (3 April 2008) para 60; *Prosecutor v Boškoski* Case No IT-04-82-T Judgment (10 July 2008) paras 199 – 203.

[67] The requirement set out in Article 8(2) (f) is also a jurisdictional requirement because if the necessary level of intensity is not reached, the alleged crimes do not fall within the jurisdiction of the Court; ICC-01/05-01/08-424 para 225, ICC-01/04-01/06 244/ 593.

[68] *Prosecutor v* d*ornević*, Case No IT-05-87/1-T Trial Chamber, Public Judgment with Confidential Annex – Volume I of II (23 February 2011) para 1522.

the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council (UNSC) and if so, whether any resolution on the matter has been passed?'[69]

Traditionally, non-international armed conflicts 'civil wars' were considered purely internal matters of States, in which no international law provisions applied.[70] This became modified with the adoption of Article 3 common to the four Geneva Conventions (1949), States agreed on minimal guarantees to be respected during non-international armed conflicts.[71] Unlike violence between the armed forces of States, not every act of violence within a State constitutes an armed conflict. The threshold of violence needed for the IHL to apply for non-international armed conflict is therefore higher than for international armed conflicts. In spite of the extreme importance of defining the lower threshold below which IHL does not apply at all, Article 3 does not offer a clear definition of the notion of non-international armed conflict.[72] Accordingly, it was agreed that Protocol II '[s]hall apply to all armed conflicts not covered by Article 1 of Protocol I and which takes place in the territory of a High Contracting Party between its armed forces and dissident or other organised armed groups under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'

It should be noted that this fairly restrictive definition applies only to Protocol II. It does not apply to Article 3 common to the four Geneva Conventions.[73] Practically, there are thus situations of non-international armed conflict in which only common Article 3 will apply, because the level of organisation of the dissident group is insufficient for Protocol II to apply, or the fighting is between non-State armed groups. Conversely, common Article 3 will apply to all situations where Protocol II is applicable. Moreover, the ICC Statute provides an intermediary threshold of application. It does not require the conflict to be between governmental forces and rebel forces alone; that the latter control part of the territory, or that

[69] *Prosecutor v Mrkšić et al*, Case No IT-95-13/1-T, Judgment (27 September 2007) para 407.
[70] The concept of state sovereignty is often traced back to the Peace of Westphalia (1648) which in relation to states codified some basic principles such as: Border inviolability, state's supremacy and territorial integrity. A sovereign is a supreme lawmaking authority within its jurisdiction; See also Article 2 (7) UN Charter.
[71] Marco Sassòli, Antoine A. Bouvier, Anne Quintin, *How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law* (Volume I, 3rd edn ICRC, Geneva 2011)23.
[72] Article 3 states that it is applicable '[i]n the case of armed conflict not of an international character occurring on the territory of one of the High Contracting Parties.'
[73] P II Article 1 'This Protocol which develops and supplements Article 3 common to the Geneva Conventions [...] without modifying its existing conditions of application.'

there be a responsible command.[74] The conflict must, however, be protracted and the armed groups must be organised.[75]

Today, there is a general tendency to reduce the difference between IHL applicable in international and non-international armed conflict, due to the Jurisprudence of the international criminal tribunals, the influence of human rights and some treaty rules adopted by States have moved the law of non-international armed conflicts closer to the law of international armed conflicts, it has often been suggested by some to eliminate the difference altogether. In many fields where treaty rules still differ, the convergence has been rationalised by claiming that under customary international law the differences between the two categories of conflict have gradually disappeared. The International Committee of the Red Cross (ICRC) study on customary IHL,[76] reached the conclusion that 136 (and arguably even 141) out of 161 rules of customary humanitarian law, many of which are based on rules of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts.

At the outset some academics,[77] practitioners[78] and the Jurisprudence of the *ad hoc* tribunals[79] have questioned the usefulness of the distinction between international and non-international

[74] ICCSt (n 1) Article 8(2) (f) [Parts B, C and D].
[75] Realistic threshold in *the Prosecutor v Tadic* paras 49 and 60; detailed analysis, based on reviews of the jurisprudence of the ICTY and of national courts; *see The Prosecutor v Boškoski* paras 177-206.
[76] Case No 43, ICRC, Customary International Humanitarian Law.
[77] James Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalised Armed Conflict' (2003)85 International Review of the Red Cross; Dietrich Schindler, 'The Different Types of Armed conflicts according to the Geneva Conventions and Protocols' (1979)163 Collected Courses of the Hague Academy of International Law; W Michael Reisman and James Silk, 'Which Law Applies to the Afghan Conflict?' (1988)82 *American Journal of International Law*; Hans Pieter Gasser, 'Internationalised Non-international armed conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon,' (1983) 33 *Auckland University Law Review* 479; W Michael Reisman, 'Application of Humanitarian Law in non-international armed conflicts: Remarks by W Michael Reisman,' (1991) 85 Proceedings of the Annual Meeting *American Society of International Law*; Robert Cryer, *An Introduction to International Criminal Law and Procedure: Principles, Procedures, Institutions* (Cambridge University Press, Cambridge 2007) 221,241.
[78] In 1947, the ICRC proposed a paragraph to be added to Article 2 of the draft Geneva Conventions. paragraph stating that 'in all cases of armed conflict which are not of international character, such as a civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, implementing the principles of the Convention shall be obligatory on each of the adversaries.' Although this provision was not adopted, it demonstrates concerns about the distinction between international and non-international armed conflicts existed early enough,' Jean Pictet (ed), The Geneva Conventions of 12 August 1949: Commentary - Volume III: Geneva Convention relative to the Treatment of Prisoners of War (2002) 31. More recently, a study undertaken under the auspices of the ICRC makes reference to a large body of customary rules, the majority of which are equally applicable regardless of the classification of the relevant armed conflict: Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict,' (2005) 87 *International Review of the Red Cross* 198,212.

armed conflicts, chiefly in light of their changing nature. The Chamber, for the purposes of the Lubanga's trial reiterated that the international and non-international distinction is not only an established part of the international law of armed conflict, but more importantly is enshrined in the relevant statutory provisions of the Statute, under Article 21 and must be applied. The Chamber does not have the power to reformulate the Court's statutory framework.[80] The ICTY recognised that, depending on the actors involved, conflicts taking place on a territory at the same time may be of a different nature.[81] The Chamber endorses this view and accepts that international and non-international conflicts may coexist.[82]

The Statute does not define 'international armed conflict.'[83] But relying on Common Article 2 of the Geneva Conventions, ICRC Commentary thereto, and the ICTY *Tadić* Appeal judgment, the PTC I determined that an armed conflict is international: if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition an internal armed conflict that breaks out in the territory of a State may become international – depending on the circumstances and character – if (i) another State intervenes in that conflict through its troops (direct intervention) or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).[84] It is widely accepted that when a State enters into conflict with a non-governmental armed group located in the territory of a neighbouring State and the armed group is acting under the control of its own State, 'the fighting falls within the definition of an international armed conflict between the

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[79] *The Prosecutor v Tadić* Interlocutory Appeal Decision paras 96, 98 and 119; The Chamber addressed the emerging issue of a blurred legal differentiation between international and non-international armed conflicts. The Chamber indicated that 'it is only natural that the aforementioned dichotomy should gradually lose its weight.'

[80] ICC-01/04-01/06 para 539.

[81] *Tadić* Interlocutory Appeal Decision, paras 72-77; Gerhard Werle, *Principles of International Criminal Law* (Oxford University Press, Oxford 2009) 372 at marginal note 997.

[82] *Prosecutor v Tadić*, Case No IT-94-1-A, Judgment 15 July 1999 Judgment para 84; ICJ also acknowledged the principle of coexistence in the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* Judgment of 27 June 1986 para 219: 'The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of international character.' The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict.'

[83] ICC-01/04-01/06 para 542.

[84] ICC-01/04-01/06-803-tEN para 209; ICC-01/05-01/08-424 paras 220-223; *Prosecutor v Tadić* Interlocutory Appeal Decision para 70; *Prosecutor v Delalić et al*, Case No IT-96-21-T Judgment (16 November 1998) para 183 and *Prosecutor v Brnanin*, Case No IT-99-36-T Judgment (1 September 2004) para 122.

two States.'[85] However, if the armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no international armed conflict.[86]

The PTC II in the Lubanga case, on this issue, concluded that 'an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State.'[87] As regards the degree of control of another State over armed group acting on its behalf, the Trial Chamber concluded that the 'overall control' test is the right approach. This will determine whether an armed conflict not of international character may have become internationalised due to the involvement of armed forces acting on behalf of another State. A State may exercise the required degree of control when it 'has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training, equipping and or providing operational support to that group.'[88] The PTC I adopted this approach.[89] Moreover, footnote 34 of the EOC stipulates that the term 'international armed conflict' includes a 'military occupation,' for all the crimes coming within Article 8^{2} (2) (a) of the Statute. PTC I held that a 'territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.'[90]

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[85] Sylvain Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', (2009) 91 *International Review of the Red Cross* 70, 90; *Prosecutor* v *Tadić* Judgment paras 84, 90, 131,137,145; Gary D Solis, *The Law of Armed Conflict* (Cambridge University Press, Cambridge 2010)154,155; Jelena Pejić, 'Status of Armed Conflicts' in Elizabeth Wilmshurst (ed) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, Cambridge 2007) 92, 93.

[86] Jean Pictet (ed), The Geneva Conventions of 12 August 1949: Commentary – Volume I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (2002) 32; Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 …; Sylvain Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' (2009) 91 International Review of the Red Cross pages 70 ; Jelena Pejić, 'Status of Armed Conflicts', in Elizabeth Wilmshurst (ed) Perspectives on the ICRC Study on Customary International Humanitarian Law (Cambridge University Press, Cambridge 2007) 92, 93.

[87] ICC-01/05-01/08-424, para 223.

[88] *Prosecutor* v *Tadić* Appeal Judgment para 137 (emphasis in the original); 'Control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training); ibid, para 137 *Prosecutor v Aleksovski,* Case No. IT-95- 14/1-A Judgment (24 March 2000); *Prosecutor v Delalić et al.,* Case No IT-96-21A, Appeals Judgment, (20 February 2001) para 26; *Prosecutor v Kordić and Čerkez, Case No* IT-95-14/2-A, Appeals Judgment (17 December 2004) paras 306 – 307.

[89] ICC-01/04-01/06-803-tEN para 211.

[90] ICC-01/04-01/06-803-tEN, para 212, relying on ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgement of 19 December 2005, ICJ Reports 2005 and Articles 42 and 43 of Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on land, 18 October 1907. Article 42 reads: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' Article 43 reads: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his

The Chamber notes the reference in Article 8^2 (2) (b) to 'the established framework of international law' and applies equally to the crimes set out in the Article.[91] The crime of 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities' as set out in Article 8^2 (2) (b) (xxvi) of the Statute falls within 'the established framework of international law' as one of the 'serious violations of the laws and customs applicable in international armed conflict.' The prohibition is based on Article 77(2) of AP I to the GC.[92] This Protocol applies to armed conflicts between States, as indicated by Common Article 2 of the GC.[93] It follows that for the purposes of Article 8^2 (2) (b) (xxvi) of the Statute, 'international armed conflict' includes a military occupation.

In accordance with the test set out, to determine whether the Union of Congolese Patriots/ Forces *Patriotiques pour la libération du Congo* (UPC/FPLC) was a party to an international armed conflict in Ituri, the relevant inquiry is whether between September 2002 and 13 August 2003, the UPC/FPLC, the *Armée Patriotic Congolaise* (APC) and the Forces de Resistance Patriotiques en Ituri (FRPI) were used as agents or 'proxies' for fighting between two or more States (namely Uganda, Rwanda, or the DRC) for these reasons and applying regulation 55 of the Regulations of the Court, the Chamber changes the legal characterisation of the facts to the extent that the armed conflict relevant to the charges are non-international in character.[94] The Trial Chamber therefore finds that the armed conflict between the UPC/FPLC and other armed groups between September 2002 and 13 August 2003 are non-international in nature.[95]

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power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'; ICC-01/04-01/06-803-tEN para 205.

[91] ICCSt (n 1) Article 8^2 (2) (b).

[92] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977 Additional Protocol I; Articles 38(2) and (3) of the UN Convention on the Rights of the Child; Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, Cambridge, Cambridge, 2003) 376-377; Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), page 205; William A Schabas, The *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, Cambridge, Cambridge, 2003) 252; Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes (2008)* 467,468.

[93] Article 1(3) of Additional Protocol I reads: 'This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.'

[94] ICC-01/04-01/06 256/ 593 para 566.

[95] ibid para 567.

Although, according to the traditional doctrine, the notion of international armed conflict was limited to armed contests between States. However, during the Diplomatic Conference of 1974-1977, which lead to the adoption of the two Additional Protocols of 1977, this conception was challenged and it was finally recognised that 'wars of national liberation'[96] should also be considered as international armed conflicts.

3.1.6 Other Situations, the Civilian Population and Combatants

Situations of internal violence and tension which do not meet the threshold of non-international armed conflicts, do not warrant the application of IHL as established in Article 1(2) of AP II, which states: 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'[97] The non-applicability of IHL does not necessarily mean lesser protection for the persons concerned. In such cases, human rights rules (better administered by the Court of human rights)[98] and peacetime domestic (criminal) law would apply; they are more restrictive, for instance, regarding the use of force and detention of enemies, while IHL gives States greater latitude on these two aspects.

In the conduct of hostilities, Article 50(1) of Protocol I[99] defines civilians as: 1) A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2) The

[96] Situations defined, in Article 1(4) of Protocol I, as 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."

[97] The notions of internal disturbances and tensions have not been the object of precise definitions during the 1974-1977 Diplomatic Conference. These notions have been defined by the ICRC as follows: Internal disturbances this involve[s] situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or armed forces to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules. Internal tensions could be said to include in particular situations of serious tension (political, religious, racial, social, economic, etc.) but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time: - large scale arrests; a large number of 'political' prisoners; the probable existence of ill-treatment or inhumane conditions of detention; the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact; allegations of disappearances. *See Commentary* to Article 1(2) of Additional Protocol II, paras 4475-4476.

[98] The African Court of Human Rights; The European Court of Human Rights; the Inter-American Court of Human Rights and others.

[99] 1125 UNTS 3; 16 ILM 1391 (1977) Protocol 1 Additional to the Geneva Convention.

civilian population comprises all persons who are civilians. 3) The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.[100] If they have fallen into enemy hands, Article 4 of Convention IV defines as protected civilians all those who fulfil the nationality requirements and are not protected by Convention III. This would mean that any enemy who is not protected by Convention III falls under Convention IV.

Combatants are members of armed forces. The main feature of their status in international armed conflicts is that they have the right to directly participate in hostilities. If they fall into enemy hands, they become *prisoners of war* who may not be punished for having directly participated in hostilities. It is often considered that customary law allows a detaining power to deny its own nationals prisoner-of-war status, even if they fall into its hands as members of enemy armed forces, such persons may be punished under domestic law for their participation in hostilities against their country.

The prohibition against attacking civilians stems from a fundamental principle of IHL, the principle of distinction, which obliges warring parties to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives.[101] In its advisory opinion on the legality of nuclear weapons, the International Court of Justice (ICJ) described the principle of distinction, along with the principle of protection of the civilian population, as 'the cardinal principle contained in the texts constituting the fabric of Humanitarian Law' and stated that 'states must never make civilians the object of an attack.'[102]

The Crimes defined in Article 8^2 (2) (c) ICCSt cover serious violations of Article 3 Common to the four Geneva Convention of 12 August 1949. It must be noted in accordance with the principle of distinction and protection of the civilian population, only military objectives may be lawfully attacked. A widely accepted definition of military objectives is given by Article 52 (2) (3) of Additional Protocol 1 as: 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction,

[100] ibid Article 52.
[101] Protocol 1 (n 99) Article 48 of additional Protocol 1; this Article enunciates the principle of distinction as a basic rule.
[102] ICJ advisory opinion on the legality of the Threat or use of nuclear Weapons, ICJ report 1996 para 78.

capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.[103] In the case of doubt, it shall be presumed not to be used.[104]

The *Galic* judgment - and to a certain extent, the *Shimoda* case – explored one of the most important facets of the contemporary law of armed conflict: the need to distinguish between combatants (who may be targeted, as long as the weapons used are not meant to cause unnecessary suffering and destruction) and persons who are not or who no longer actively participating in hostilities should be spared and never to be targeted. Attacks on legitimate target are to limit incidental (collateral) damage and keep suffering to a minimum, disproportionate damage and unnecessary sufferings are unlawful.[105]

3.1.7 Conscription, Enlistment and Use of Children as a War Crime

During the Lubanga trials, the jurisprudence of the Special Court for Sierra Leone (SCSL)[106] had been considered by the Trial Chamber. Although, decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute,[107] but the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the SCSL Statute [108] is identical to Article 8*2* (e) (vii) of the Rome Statute. Therefore, the SCSL's case law assisted in interpreting relevant provisions of the Rome Statute.[109] Article 4(3) (c) of AP II to the 1949 GC includes an absolute prohibition against the recruitment and use of children under the age of 15 in hostilities (in the context of armed conflicts not of international character)[110] children who have not attained the age of

[103] 1125 UNTS 3; 16 ILM 1391 (1977) Protocol 1 Additional to the Geneva Convention Article 52 (2); Antony Cassese, Cassese A, Acquaviva G, Fan M, Whiting A, *International Criminal Law: Cases and Commentary* (Oxford University Press, England 2011)144.

[104] 1125 UNTS 3; 16 ILM 1391 (1977) Protocol 1 Additional to the Geneva Convention Article 52 (3).

[105] Cassese A, Acquaviva G, Fan M, Whiting A, *International Criminal Law: Cases and Commentary* (Oxford University Press, England 2011) 153.

[106] UN Doc S/2002/246 Statute of the Special Court for Sierra Leone (2002).

[107] ICCSt (n 1).

[108] UN Doc S/2002/246 (2002) Article 4(c) of the SCSL Statute: Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

[109] ICC-01/04-01/06 para 603.

[110] The drafters of Additional Protocol II made provision for the consequences of any possible violation by including a provision Article 4(3) (d) requiring special protection for children under 15 if they take a direct part in hostilities and are captured ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987) 1380. Article 77(2) of Additional Protocol I provides: 'The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.'; ICC-01/04-01/06-803-tEN, paras 242 – 243; see also Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes* (2nd edn, Hart Publishing, 2008) 467 at marginal

fifteen shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.[111]

Additionally, the Convention on the Rights of the Child,[112] a widely ratified human rights treaty, requires State Parties to 'take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take part directly in hostilities,' and to 'refrain from recruiting persons under that age into armed forces' for all types of armed conflicts.[113] The provisions recognise that 'children are particularly vulnerable and require privileged treatment in comparison with the rest of the civilian population.'[114] Other objectives underlying these prohibitions are securing their physical and psychological well-being, this includes not only protection from violence, fatal and non-fatal injuries during fighting, but also, serious trauma that can accompany recruitment including separating children from their families, interrupting/disrupting their education and exposing them to an environment of violence and fear.[115] The SCSL opined that where a child under 15 is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence.[116] Additionally, the SCSL's Trial Chamber in the case of *Prosecutor v Fofana* and *Kondewa* 'CDF case'[117] concluded that:

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note 227; Knut Dörmann, *Elements of War crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (Cambridge University Press, Cambridge 2003) 376,470.

[111] ICC-01/04-01/06 para 604.

[112] GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989) Convention on the Rights of the Child (UNCRC), ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49 of the Convention.

[113] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p3, adopted an opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entered into force on 2 September 1990: Article 38, paras 2 and 3; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UNDOC A/54/RES/263 (2000) Articles 1 to 3, and African Charter On the Rights and Welfare of the Child, OAU Doc CAB/LEG/24 9/49 (1990), adopted on 11 July 1990 and entered into force on 29 November 1999, Article 22(2): [Armed Conflicts] 'State Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.'

[114] ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987) 1377, 1379.

[115] Report of Ms Schauer (CHM-0001), The Psychological Impact of Child Soldiering, ICC-01/04- 01/06-1729-Anx1 (EVD-CHM-00001); Graca Machel, Impact of Armed Conflict on Children, 26 August 1996, UN Doc A/51/306 para 30; GA Res 44/25 annex 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989) Convention on the Rights of the Child (UNCRC), ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49 of the Convention.

[116] SCSL, *CDF Appeal Judgment* para 139.

[117] *The Prosecutor v Moinina Fofana, Allieu Kondewa* (the CDF Accused) Judgment SCSL-04-14-T (9 October 2007).

'The distinction between voluntary enlistment and forced enlistment is somewhat contrived. Attributing voluntary enlistment in the armed forces to a child under the age of 15 years, particularly in a conflict setting where human rights abuses are rife, is of questionable merit.' Therefore, the PTC underscores that the offence of conscripting and enlisting is committed at the moment a child under age 15 is enrolled into or joins an armed force or group, with or without compulsion. In the circumstance, conscription and enlistment are dealt with together, notwithstanding the Chamber's earlier conclusion that they constitute separate offences. These offences are continuous in nature;[118] they end only when the child reaches 15 years of age or leaves the force or group.[119] The EOC[120] require that 'the conduct took place in the context of and was associated with an armed conflict.' The *travaux préparatoires* of the Statute suggests that although direct participation is not necessary, a link with combat is nonetheless required.[121] The Preparatory Committee's draft Statute had postulated a broader interpretation in one of the footnotes:

The words 'using' and 'participate' have been adopted in order to cover both direct and active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints.[122] It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or their use as domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.[123]

[118] *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439, [1968] 3 All ER 442, [1968] 3 WLR 1120, 52 Cr App R 700.The concept of a continuing act was used in this case to allow what seemed to be an omission, to be treated as a positive act.
[119]ICC-01/04-01/06-803-tEN, para 248; see also ICTR, *Prosecutor v Nahimana et al., Case No ICTR-99-52-A*, Judgement (28 November 2007) para 721.
[120] PCNICC/2000/1/Add 1.
[121] Draft Statute for the ICC UN Doc A/CONF183/2/Add 1 (14 April 1998)21 and footnote 12.
[122] SCSL, *AFRC Trial Judgment*, para 737, The first sentence of the relevant footnote of the Preparatory Committee's draft quoted in para 736 of the Trial Judgment. The joint trial of the AFRC leaders Alex Tamba Brima, Santigie Borbor Kanu and Brima Bazzy Kamara began on 7 March 2005. On 20 June 2007, all three co-defendants were found guilty of war crimes and crimes against humanity by the Special Court for Sierra Leone. Brima and Kanu sentenced to 50 years' imprisonment while Kamara was sentenced to 45 years' imprisonment. upheld by the Appeals Chamber on 22 February 2008; ICC-01/04-01/06 para 624.
[123] ibid; Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes* (2nd edn, Hart Publishing, 2008) 471 at marginal note 229; Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Brill, 1999) 206.

It is noted that Article 4(3) (c) of AP II does not include the word 'direct.'[124] Addressing the three relevant acts, namely conscripting, enlisting and participating actively (children under the age of 15 or using them to participate actively in hostilities), in each instance the conduct is not defined in the Statute,[125] the Rules of Procedure and Evidence (RPE)[126] or in the EOC.

3.1.8 The Democratic Republic of Congo War Crime Trials

After the determination of admissibility by the ICC, Thomas Dyilo Lubanga was transferred to ICC custody in March 2006. The ICC Prosecutor charged Lubanga with three counts of war crimes for the recruitment and use of child soldiers.[127] The trial commenced on 18 November 2008, against him as the founder of the Union of Congolese Patriots (UPC) rebel forces in Congo's eastern Ituri district. Lubanga pleaded not guilty, his defence team maintains that he is being used as a scapegoat for other more senior militant leaders.[128] The situation in the Democratic Republic of Congo (DRC) had been referred to the ICC by the DRC itself in 2004 after Lubanga had been charged in the domestic justice system.[129] The referral was with regard to all possible crimes committed during the second Congo war and afterwards the *ratione temporis* was limited due to the entry into force of the Rome Statute with regard to Congo on 1 July 2002. During this conflict, Lubanga was a military commander in the *Mouvement de Libération* and later the founder of the Union of Congolese Patriots (UPC). The UPC was involved in large-scale murder, torture, rape of civilians and forced conscription of child soldiers.

After murdering nine members of the UN peacekeeping mission in the DRC, Lubanga and other militia leaders were captured by Congolese authorities; after the ICC issued a warrant of arrest, their transfer was effected to the ICC, charged with war crimes of enlisting and

[124] Additional Protocol I (n 99) Article 77(2) provides that: children under 15 shall not be allowed to 'take a direct part in hostilities' (Article 38(2) of the Convention on the Rights of the Child contains identical wording); Article 4(3)(c) of Additional Protocol II provides that children under 15 shall not be allowed to 'take part in hostilities', which is broader; see Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes* (2nd edn, Hart Publishing, 2008) 470.
[125] ICC-01/04-01/06 273/ 593 para 600.
[126] ICC-ASP/1/3 at 10 and Corr 1 (2002); UN Doc PCNICC/2000/1/Add1 (2000).
[127] *The Prosecutor V Thomas Lubanga Dyilo*, Document Containing the Charges, Article 61(3) (a) 28 August 2006.
[128] Marlise Simons, 'For International Court, Frustration and Missteps in Its First Trial' *The New York Times*, (21 November 2010).
[129] Lubanga arrested by Congolese authorities after the killing of nine UN peacekeepers in Ituri in February 2005. He and other Ituri militia members have been charged with genocide, war crimes, and crimes against humanity, but not been brought to trial when the ICC warrant was issued. Human Rights Watch, 'DR Congo: ICC Arrest First Step to Justice' [2006].

conscripting children under the age of fifteen to participate actively in hostilities a crime under the Statute.[130]

The PTC 1 granted status of participants to victims in the case,[131] the first time in international criminal law, for victims to participate in criminal proceedings before an international court (though common within the civil law system). The charges were confirmed by the PTC in early 2007. However, the Trial Chamber later imposed a stay of proceedings because the Prosecutor could not disclose a large number of documents due to 'source' confidentiality containing potentially exculpatory information relevant to the preparation of the defence, making a fair trial impossible.[132] The Trial Chamber ordered the release of Mr. Lubanga due to the impossibility to guarantee a fair trial.[133] The Prosecutor appealed these two decisions, which led to the Appeals Chamber upholding the decision to stay proceedings and that Lubanga nonetheless would stay in custody pending a new determination. On 18 November 2008 the Trial Chamber lifted the stay of proceedings because the reasons for the suspension had 'fallen away.' The Trial Chamber I of the ICC later convicted Thomas Lubanga Dyilo on 14 March 2012, for conscripting, enlisting and using child soldiers,[134] a war crime under the Statute,[135] for a non-international armed conflict in the Ituri region of north eastern DRC between September 2002 and August 2003.[136]

The *Lubanga* judgment, the first of its kind by the Court, brings to a close six years of proceedings on the Thomas Lubanga case since February 2006. Though the trial was suspended twice for due process,[137] first before the trial began, when the prosecutor failed to disclose information to the defence counsel (due to source confidentiality), and second, when the prosecutor refused to disclose the identity of an intermediary, the ICC judges thus

[130]ICCSt (n 1) Article 8^2 (2) (b) xxvi and Article 8^2 (2) (e) vii.
[131] ibid Article 68(3).
[132] Rule 55 of the court's Rules of Procedure, ICC-ASP/1/3 (Part II-A) Rules of Procedure and Evidence adopted and entry into force 09 September 2002.
[133] Article 10 of the Universal Declaration of Human Rights, the fair trial guarantees, 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'; Articles 54(1), Article 55(self incrimination) Article 66(1-3) Article 67(2) (3) (i-g) Article 69(7) of the ICCSt (n 1).
[134] ICC-01/04-01/06-803-tEN, 'for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b) (xxvi), Art. 8(2) (e)vii and 25(3)(a) of the Statue from early September 2002 to 2 June 2003'.
[135] ibid.
[136] Kelly Askin, Alison Cole, Thomas Lubanga War Crimes Conviction in the First Case at the International Criminal Court [2012] *American Society of International Law publication*.
[137] *Fiehe v R E Householder Co,* 125 So 2, 7 (Fla 1929), an orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case *Kazubowski v Kazubowski,* 45 Ill 2d 405, 259, N E 2d 282, 290; 6 edn, Black's Law Dictionary.

reversed the procedural approach of other international tribunals by prohibiting witness proofing,[138] a move which may have contributed to the first witness in the case to initially seek to retract his testimony on the stand.[139]

A maximum sentence according to Article 77(1) (a) of the Rome Statute cannot be more than thirty years (life sentences are possible on extreme gravity of the crime and individual circumstances of the convicted person)[140] this, the Prosecutor had prayed for, but in 10 July 2012, Thomas Lubanga was handed a 14-year jail sentence by the ICC over the use of child soldiers. The six years already spent in custody (from 16 March 2006) is deducted from the sentence, noted by the presiding Judge Adrian Fulford. The 30-year prison sentence recommended by the Prosecutor for Mr Lubanga was rejected by the Judges who stated that such a sentence 'would be inappropriate in the case' as it can only be justified by extreme gravity of crimes and the individual circumstances of the convicted person. However, the Trial Chamber unanimously convicted Thomas Lubanga and found that 'conscription' and 'enlistment' are forms of recruitment that refer to 'coercive' or 'voluntary' incorporation, respectively, into an armed group,[141] distinguishing it from the offense of using children to participate actively in hostilities.[142] It therefore concluded that consent of the child did not constitute a valid defence.[143] With respect to children who may have indirect roles in a conflict, the Chamber ruled that it is necessary to determine if 'the support provided by the child to the combatants exposed him or her to real danger as a potential target.'[144] The majority found that it could not consider whether sexual violence would be incorporated within this definition since the Prosecutor did not plead these facts; however, the majority indicated it could consider whether this should be considered in sentencing and reparations.[145] Presiding Judge Fulford issued a separate opinion and Judge Odio Benito wrote a separate and dissenting opinion. Judge Odio Benito stated that sexual violence could be considered 'using' children in armed conflict.[146] Additionally, she found that the reference

[138] Kelly Askin, Alison Cole: 'Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court' (2012) 16 *American Society of International Law*.
[139] ibid.
[140] ICCSt (n 1) Article 77(1) (a).
[141] Kelly Askin, Alison Cole: 'Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court' [2012] *American Society of International Law publication*.
[142] ICC-01/04-01/06 para 609.
[143] ibid para 617.
[144] ibid para 628.
[145] ibid paras 630 & 631.
[146] ibid para17; Judge Odio Benito, dissenting

to 'National armed forces' under Article 8[2] (2) (b) (xxvi) of the Rome Statute should not be construed narrowly to exclude militia groups.[147]

Thomas Lubanga was charged with committing the crimes through coordination with other senior leaders within the UPC, particularly others in charge of military operations.[148] The Trial Chamber found that co-perpetration involves two objective elements, namely: (I) the existence of an agreement or common plan between two or more persons embodying a sufficient risk that, if events follow the ordinary course, would result in the commission of a crime; and (ii) essential contribution to the common plan by the accused that resulted in the commission of the relevant crime.[149] The majority also found that co-perpetration was based upon the theory of collective control over the crime.[150] Judge Fulford's separate opinion disputed that there was no basis for this theory under the Rome Statute, and he rejected the argument that there was a hierarchy of liability within the Rome Statute.[151] Instead, he preferred elements that complied better with a plain reading of the Rome Statute.[152] Regarding the mental element, the Chamber found it necessary to prove that (I) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of fifteen to participate actively in hostilities or that they were aware that in implementing their common plan this consequence 'will occur in the ordinary course of events;' and (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan.[153]

The Trial Chamber concluded that a non-international armed conflict took place in the DRC at the time of the charges and relying on Regulation 55,[154] the Chamber amended the legal characterisation of the charges, which the PTC initially found pertain to armed conflict of international character.[155]

[147] ibid; ICC-01/04-01/06 paras 12 – 14.
[148] ibid, Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) of the Statute from 2 June to 13 August 2003.
[149] ICC-01/04-01/06 paras 980, 981, 985, 999-1006.
[150] ibid, para 994.
[151] ibid, Judge Fulford Judgment paras 6-12.
[152] ibid, paras 16.
[153] ICC-01/04-01/06 para1013; *para*1016 (*mens rea* for the contextual elements).
[154] ibid, Regulation 55(1) of the Regulations of the Court 'Regulations', the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, however, it shall not exceed the facts and circumstances described in the charges and any amendments to the charges.
[155] ICC-01/04-01/06 para 523-67.

3.1.9 Reparations

Trial Chamber I of the ICC in the *Thomas Lubanga Dyilo* case, established the principles and procedures to be applied to reparations on 7 August 2012. The decision is to be notified in accordance with regulation 31[156] of the Regulations of the Court to the office of the Prosecutor and others.[157] On 14 March 2012, the Chamber issued its judgment pursuant to Article 74 of the Statute.[158] On the same day it issued a scheduling order establishing the timetable for sentencing and reparations.[159] Reparation is not new to the Congolese, because the principle exists in Congolese criminal law. Article 258 of the Congolese civil code provides 'that any act whatsoever of a man that causes damage to another obliges him who bears responsibility for the damage to repair it.'[160]

Judges *Adrian Fulford, Elisabeth Odio Benito, and René Blattmann* stated the importance of reparations in international criminal law that reparations go 'beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims.' Reparations are specifically mentioned in Article 75 of the Rome Statute, which lists restitution, compensation, and rehabilitation as forms of reparations. The judges also noted that reparations with symbolic, preventative, or transformative value may be appropriate. The Registry submits that although Article 75(1) of the Statute does not give victims a right to reparations, the Chamber is entitled to establish this general principle, and the Registry invites the Chamber to take this step.[161] In this context, it is argued that the Chamber is able to rely on the existing principles and rules of international law, including those relating to the international law of armed conflict, and it is

[156] ICC-BD/01-01-04, Regulations of the Court, adopted by the judges of the Court on 26 May 2004 Fifth Plenary Session. The Hague, 17- 28 May 2004.
[157] ICC-01/04-01/06 5/94 Judgment (7 August 2012).
[158] ICC-01/04-01/06 Judgment pursuant to Article 74 of the Statute, (14 March 2012).
[159] ICC-01/04-01/06-2844 Scheduling order concerning timetable for sentencing and reparations (14 March 2012)
[160] The conditions of civil liability established by Article 258 of the Congolese Civil Code, book II, which provides: ' that any act whatsoever which causes damage to another, obligates the person by whose fault that damage has occurred to repair it.' Whereas it follows from that legal provision that three conditions must be fulfilled for that liability to be established, namely: 1) The existence of a damage or injury which can be material, physical, or immaterial; 2) The fault; 3) The causal link between the damage suffered and the fault committed. Also, the Democratic Republic of the Congo's Military Judiciary Code (2002) provides: Article 77: Action for reparation of damage caused by an offence falling under the competence of the military jurisdiction can be undertaken by the injured party by becoming a civil party at the same time and before the same judge as the public prosecution action. Article 226: When the military jurisdiction is seized, the party injured by the incriminated act can, by becoming civil party, seize it with the action for reparation.
[161] ICC-01/04-01/06-2865 para12.

submitted that the Court can derive assistance from the national laws of various legal systems of the world, in accordance with Articles 21(b) and (c) of the Statute.[162]

Rule 97(1) of the RPE states: 'the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both,' and the judges emphasised that the Court adopts a collective approach which ensures reparations reach those victims who are currently unidentified. It was held that individual and collective reparations are not mutually exclusive and may be awarded concurrently. Lubanga may not be prevented from participating in symbolic reparations, such as tendering public apologies, since the Court has declared him penniless. The Court stated that reparations for victims will primarily be handled by the Trust Fund for Victims (TFV)[163] and reporting to a different Trial chamber of the ICC.[164] The TFV created by the Assembly of States Parties of the ICC,[165] has a mandate to implement Court-ordered reparations and provide physical and psycho-social support to victims of crimes within the Rome Statute. Its funds are usually through contributions from states and private donors. Furthermore, the Chamber recommended that an interdisciplinary team of experts be retained to provide assistance to the Court[166] in five areas: (1) assessing the harm suffered by victims; (2) looking at the effect that the crime of using children in armed conflict had on their families and communities; (3) identifying the most appropriate types of reparations; (4) establishing those individuals or communities that should receive reparations; and (5) accessing funds for reparations purposes.

3.1.10 Conclusion

In conclusion, this segment has examined war crimes in totality, as currently considered under international criminal law and the International Criminal Court. The chapter investigates the concept of conduct of war under international humanitarian law, customary law, the Geneva Convections and its Additional Protocols. Further examinations include the conviction for war crimes by the ICC of the 'DRC' War lord. It also considered relevant jurisprudence of some *ad hoc* tribunals that have helped formulate to date laws regulating prohibitions and conduct during war. The next segment analyses crimes against humanity under the International Criminal Court.

[162] ICC-01/04-01/06-2865 paras 7, 8.
[163] ICCSt (n 1) Article 79.
[164] ICC-01/04-01/06 7.
[165] ICCSt (n 1) Article 79 (1).
[166] ICC-01/04-01/06 92/947 para 258.

Part Two

Crimes Against Humanity

3.2.1 Introduction

This part of the chapter examines crimes against humanity (CAH) under customary international and treaty law within the jurisdiction of the International Criminal Court (Articles 5 and 7) of the Rome Statute (the Statute).[167] The roles of the ICC in prosecution and prevention of the crime as predicted in its normative framework.[168] Critical analysis in respect of the ICC's capacity to prevent and prosecute perpetrators of the Crime, drawing upon the *travaux préparatoires* of the Rome Diplomatic Conference and interpreting the Statute in light of its object and purpose. CAH as intended by the framers of the Statute is a response to widespread or systematic human rights violations against civilian populations.[169] Understanding the theoretical basis and application of the elements of CAH has been rendered difficult by the absence of a consistent definition and uniform interpretation of the crime.[170] The scope of CAH is also difficult to determine precisely at any given point because of the absence of a specialised convention on the crime.[171]

The theory of CAH under the Statute seeks to respect States sovereignty and also faithful to the purpose for which the Court was created to prevent and punish unimaginable atrocities that deeply shock the conscience of humanity. The ICC is a permanent court with capacity to intervene in on-going conflict situations or prior to the outbreak of war in some cases as compared to the *ad hoc* tribunals, such as the intervention in the Libyan situation before the atrocities mature completely. This chapter further examines the complexity of CAH and the provisions in the Statute that only CAH of the highest threshold will be dealt with and concludes that the Statute does not cover CAH under customary law.

[167] 2187 UNTS 3; 37 ILM 999 (1998) ICCSt (n 1).
[168] ibid, Article 7, Kai Ambos 'Crimes against Humanity and the International Criminal Court' in Leila Nadya Sadat (ed), *Forging A Convention for Crimes against Humanity* (Cambridge University Press, Cambridge 2011) 279,304.
[169] Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 108 *American Journal of international Law* 334.
[170] ibid.
[171] Cherif M Bassiouni, 'Crimes Against Humanity The Need for a Specialised Convention' (1994) 31 *Columbia Journal of Transnational Law* 457.

3.2.2 Crimes Against Humanity *(Crimen Contra Omnes)* Under Customary Law

The customary definition of CAH can be found in charters and laws used for prosecution of the Crime. After World War II, in 1947 United Nations General Assembly Resolution (UNGAR) 177 (11) of 21 November 1947 authorised the International Law Commission (ILC) to document the (seven) Nuremberg Principles which have become customary international law principles.[172] Article 6 (c) of the International Military Tribunal (IMT) Charter,[173] the International Military Tribunal for the far East (IMTF/Tokyo Charter)[174] and the Control Council Law 10[175] all have similar definitions of CAH which states that:

> 'CAH...murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population...Or persecutions on political, racial or religious grounds...Whether or not in violation of the domestic laws of the country where perpetrated.'[176]

Meaning, under customary international law, CAH does not require a state or organisational (*Krstic)* policy,[177] the customary law concept of CAH is broader than the concept under ICC

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[172] 1950 *International Law Commission Year book Vol* 374;UN Doc A/CN 4/SERA.A/1950/Add 1; 44 *American Journal of International Law* (Supp) 15 (1950).

[173] 82 UNTS 279 (1945), Charter of the International Military Tribunal or Charter of the Nuremberg Tribunal or London Charter or the Constitution of the International Military Tribunal (Nuremburg), Art 6(c) annexed to the London Agreement; Private actors not excluded, since they could be acting alone 'as individuals' but 'in the interests' of countries, it is clear that those acting as individuals or members of organisations need not be acting 'as' state actors. In the *chapeaus* of the next three international instruments it is noticed that there is a limit to the jurisdiction of the IMT for the Far East but it contains no reference to states or "countries" and covers crimes committed by persons "as individuals or as members of organizations," and that Control Council Law No 10 contains no reference to a state or country, Similarly, the 1950 General Assembly Declaration on the Principles of the Nuremberg Charter and Judgment contains no limiting reference to a state or country and it even mirrors the principle of inclusivity.

[174] 14State Dept Bull 391, 890; TIAS No 1589, Art 5(c) 'Tokyo Tribunal', as amended by General Orders No 20, (1946).

[175] CCL No 10 1945, Punishment of persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity. 3 official Gazette: Control Council for Germany 50 – 55 (1946); 36 ILR 31.

[176] 3 Official Gazette Control Council for Germany 50-55 (1946) the Control Council enacted this law "[i]n order to give effect to the terms of the . . . London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." (Control Council Law No 10, preamble) The law provided specific definitions for three criminal offenses: Crimes Against Peace, War Crimes, and Crimes Against Humanity); 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJILs 258 (1945) Article 6 (c).

[177] *The Prosecutor v Krstic,* paras 707,727 (stating that customary crimes against humanity do not require a plan or policy); (*Prosecutor v Rutaganda,* para 753,769; John Cerone, *The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes Against Humanity—The Evolution of the Nexus Requirement*, (2008) 14 *European Journal of International Law & COMP L* 191, 197-99 citing *Prosecutor v Semanza,* ICTR 97,20-A para 269 (stating that a plan is not necessary); *Prosecutor v Kunarac* 89- 98 (stating that attacks need not be supported by a policy or a plan) other cases; John H Knox, 'Horizontal Human Rights Law' (2008) 102

jurisdiction.[178] It is also unnecessary that perpetrators of the Crime must be of a particular status, such as state actors, belligerent, or member of an organisation. There is no requirement that an inhumane act must be widespread or systematic or be part of some widespread or systematic conduct, cause great or serious injury, or be in furtherance of some state or organisational policy. Hence, attacks on civilians can constitute CAH under customary international law.[179]

In 1993 the United Nations Secretary General (UNSG) issued a report with respect to the Statute of International Criminal Tribunal for Yugoslavia (ICTY)[180] enumerating additional

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American Journal of International Law 1, 19 (declaring that private actors have duties . . . not to commit . . . crimes against humanity, or genocide); Naomi Roht-Arriaza, 'The Complex Architecture of International Justice' 10 *Gonzaga Journal of International Law* 38 (2007) (that private actors can be liable for aiding and abetting 'genocide or crimes against humanity . . . .); Jennifer M. Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes against Humanity' (2009) 97 *Gonzaga Journal of International Law* 1111, 1126,28 (finding that national courts and the ICTY have 'recognised that private actors could commit crimes against humanity' and state policy is not required; since the Appeals Chamber decision in *Prosecutor v Kunarac* 'explicitly held that a policy or plan is not even an element of crimes against humanity under customary international law . . . other ICTY and ICTR judgments have consistently reaffirmed that a plan or policy is not a requisite legal element . . . For example, the ICTR Appeals Chamber in *Prosecutor v Laurent Semanza ICTR-97-20-T* reaffirmed that the existence of a plan or policy is not' required and rejected the defendant's contention that crimes against humanity require 'the existence of a political objective' and 'the implication of high level political and/or military authorities in the definition and establishment of [a] methodical plan' . . . .); Beth Stephens, *Sosa v Alvarez-Machain: '*The Door is Still Ajar for Human Rights Litigation in US Courts' (2005) 70 *Brook Law Review* 533,538 (noting the holding that private corporations can be responsible for violations that do not require state action, such as crimes against humanity . . . .); Leila Sadat Wexler, 'Prosecutions for Crimes against Humanity in French Municipal Law: International Implications' 91 PROC, *American Society of International Law* 270, 273 (French case addition of requirements of 'systematic,' 'state policy,' and a 'common plan' (a misreading of the conspiracy charge at Nuremberg), were so distant from its international meaning and distorted, and the courts misinterpreted international norms); *Kadic v Karadzic*, 70 F 3d 232, 236 (2d Cir 1995) (stating We hold . . . that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity . . . .); *Prosecutor v Sesay, Kallon, and Gbao*, Case No SCSL-04-15-t (Special Court for Sierra Leone) Judgment (2009) 78-79 (stating that 'existence of a policy or plan, or that the crimes were supported by a policy or plan to carry them out, . . . is not a separate legal requirement . . . .); affirming that no plan is necessary, showing none of the customary instruments require a plan or policy); (giving examples of crimes against humanity which do not involve a plan); M Cherif Bassiouni, Crimes against Humanity in International Criminal (1992) 244,247, Virginia Morris & Michael P Scharf, 'An Insider's Guide to The International Criminal Tribunal For The Former Yugoslavia' [1995]79-80; Schabas, (claiming that Professor Bassiouni's admittedly rare minority viewpoint that crimes against humanity can only be committed by state actors pursuant to a state plan or policy is somehow customary); William Schabas, *State Policy as an Element of International Crimes*, (2008) 98 *Journal of Criminal Law & Criminology* 953-974 (a State plan or policy as an element of a crime against humanity would have many advantages in terms of coherence and judicial policy.) Moreover, human rights are violated when crimes against humanity are committed and it is informing that human rights violations can occur at the hands of private perpetrators, with or without any plan or policy and regardless of the fact that violations are not widespread or systematic. Jordan J Paust, 'The Other Side of Right: Private Duties under Human Rights Law' (1992) 5 *Harvard Human rights Journal 51*; (stating the many crimes against humanity and other international crimes committed by private actors) from a human rights perspective.

[178] Paust Jordan, 'The International Criminal Court Does Not Have Complete Jurisdiction over Customary CAH and War Crimes' (2010) 43 *John Marshall Law Review* University of Houston Law Centre.

[179] ibid.

[180] SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993) (ICTYSt).

limiting elements not in any traditional international legal instruments.[181] The Secretary General's (SG) report did not adopt the approach regarding '*inhumane*' acts found in the customary definitions but used a new limitation set forth in the phrase '*of a very serious nature*.' Though, the ICTY Statute did not adopt the SG's definition, instead, it used the phrase '*the following crimes . . . directed against any civilian population*' then lists several types of acts that constitute such crimes, including 'murder' and 'inhumane acts.'[182] It does not contain any limitation that would require either a widespread or systematic act. Moreover, as in the case of customary CAH, no plan or policy (*Prosecutor* v *Krsti'c)* is required[183] and the acts against civilians need not be engaged in 'on national, political, ethnical, racial or religious grounds.'[184] Despite the definition in the ICTY's Statute, the ICTY proffered startling new limitations seen as judicial activism or attempts at judicial legislation,[185] such as, the opinion that acts against civilians must be 'organised and systematic' despite the fact that these two limiting words do not appear in the Statute of the ICTY or in any of the traditional international legal instruments.[186]

3.2.3 Codification of Crimes Against Humanity In The Rome Statute

The Rome Statute codified CAH bearing that no post-Nuremberg multilateral treaty defined the Crime,[187] unlike genocide[188] and war crimes.[189] Though, skirmishes and inconsistent elaborations of the Crime exist in various texts adopted by the Security Council (SC),[190]

[181] Paust Jordan, 'The International Criminal Court Does Not Have Complete Jurisdiction over Customary CAH and War Crimes' (2010) 43 *John Marshall Law Review* University of Houston Law Centre.
[182] SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993) (ICTYSt) Article 5.
[183] Prosecutor v *Krstic* (IT-98-33-A) Judgement (2 August 2001).
[184] Under customary international law, only persecution-type crimes against humanity need be engaged in on discriminatory grounds; *Prosecutor v Tadic*; IT-94-I-A, Judgment, 283-85, 288-95 (1999).
[185] Paust, Jordan, 'The International Criminal Court Does Not Have Complete Jurisdiction Over Customary CAH and War Crimes' (2010) 43 *John Marshall Law Review*, University of Houston Law Centre.
[186] *Prosecutor* v *Nikolic*, IT-94-2-R61, Trial Chamber, (1995) (stating that acts must be organised and systematic and that the crimes considered as a whole must be of a certain gravity).
[187] Cherif M Bassiouni, 'Crimes Against Humanity: The Need for a Specialised Convention' (1994) 31 *Columbia Journal of Transnational Law* 457.
[188] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, (vol 78) 277, entered into force 12 January 1951.
[189] The four Geneva Conventions and the Additional Protocols; M Cherif Bassiouni, 'Crimes Against Humanity. The Need for a Specialised Convention' (1994) 31 *Columbia Journal of Transnational Law* 457; M Cherif Bassiouni (ed) *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimisation and Post-conflict Justice 2010*); Javier Solana, *A Secure Europe in a Better World: European Security Strategy* 5 (2003) <http://www.iss.europa.eu/uploads/media/solanae.pdf > (European Council report stating 'since 1990, almost 4 million people have died in wars, 90% of them civilians) accessed 06/04/2014.
[190] SC Res 827, UN SCOR 48th Sess; 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993) (ICTYSt/ICTR Statutes).

States and the International Law Commission (ILC).[191] In 1996 the Preparatory Committee report that took up the ILC's 1994 Draft Statute for the ICC, expressed the view that the definition of CAH could await completion of work on the draft Code of Crimes.[192] The framers of the Rome Statute not only codified the jurisdictional and procedural rules for the Court, but also sought to define the crime as well.[193] During the negotiation process in 1998 and prior, little precedent existed emerging from the *ad hoc* tribunals since they decided on few cases and the Special Court for Sierra Leone (SCSL) had not been established.[194] Thus the pull of relevant knowledge and experience necessary to shape the ICC's approach to cases and develop as an outgrowth and or of contribution to customary international law became unavailable to the framers.

Lessons from the International Criminal Tribunal for Rwanda ICTR[195] and the ICTY about the importance of prosecuting sex and gender crimes,[196] coupled with decisions from the Tadić case[197] and the trial (not the decision) in *Akayesu,*[198] led States to propose changes and amendments to the definition of CAH as against that of the Tribunal Statutes.[199] The possibility also that the Rome Statute could be relevant to non-State Parties and their

[191] References to CAH are present in 19th Century French writings, suggesting slavery violated the 'laws of humanity'; see Paust Jordan, '*The International Criminal Court Does Not Have Complete Jurisdiction Over Customary CAH and War Crimes'* (2010) 43 *John Marshall Law Review*; University of Houston Law Centre No; also in the 20th Century condemnation of the massacres of the Armenians in 1919; Cherif M Bassiouni, *Crimes Against Humanity Historical Evolution and Contemporary Application* (Cambridge University Press, Cambridge 2011) 86,111; At Nuremberg they were defined in article 6(c) of the London Charter; The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Article 6(c), August 8, 1945, 82 UNTS 279. Cherif M Bassiouni, 'Crimes Against Humanity': The Need for a Specialised Convention, (1994) 31 *Columbia Journal of Transnational Law* 457.

[192] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee during March-April and August 1996 para 83, reprinted in Cherif M Bassiouni, *The Statute of The International Criminal Court: A Documentary History* (Transnational Publishers, 1998) 398.

[193] See Leila Nadya Sadat, Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute, (2000) 49 *DePaul Law Review* 909, 913; Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess, Supp No 22, para 57, UN Doc A/50 22 (1995) (a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality *nullum crimen sine lege and nulla poena sine lege*) and that the constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused).

[194] UN Doc S/2002/246 Statute of the Special Court for Sierra Leone (2002) (SCSL).

[195] SC Res 955, UN SCOR 49th Sess, 3453rd mtg, U.N Doc S/Res/955 (1994); 33 ILM 1598 (1994) (ICTRSt).

[196] Kelly Dawn Askin, 'War Crimes against Women: Prosecution in International War Crimes Tribunals' (1999) 93 *The American Journal of International Law* 740,744.

[197] *Prosecutor v Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1 (October 2, 2995); *Prosecutor v Tadić*, Case No IT-94-1-T, Judgment (May 7, 1997).

[198] *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Judgment, para 599–644 (Sept. 2, 1998) (holding that it was not proven beyond a reasonable doubt that the acts perpetrated by *Akayesu* were committed in conjunction with an armed conflict, nor that he was a member of the armed forces).

[199] Leila Nadya Sadat and Richard S Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 391.

Nationals through referral of a situation by the SC, made it significant that the Rome Statute represents a codification of customary international law, uniformly applicable.[200] The chapeau elements contained armed conflict nexus found in the ICTY Statute following the Nuremberg and Tokyo Tribunals. Discriminatory intent requirement present in the ICTR and later in the Extraordinary Chambers in the Courts of Cambodia (ECCC)[201] Statute became discarded.[202]

The Statute employs the rubric 'widespread or systematic' (as opposed to 'and systematic'), which follows the provisions of the SCSL,[203] ECCC[204] and ICTR Statute.[205] Other Acts added include provisions on crimes of sexual violence as in SCSL and ICTR but that they must be of 'comparable gravity' to the other crimes involving sexual violence set forth in Article 7(1) (g) which expands considerably the ambit of persecution in Article 7(1) (h) beyond the narrow grounds of ethnic, racial, religious, political and national found in the ICTR and the ECCC Statute,[206] it also includes enforced disappearance of persons and the

[200] ibid; Mahnoush H Arsanjani, 'The Rome Statute of the International Criminal Court, (1999) 93 *American Journal of International Law* 43, 47.

[201] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, Amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), The 2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as amended in 2004 (ECCC Law), and the 2004 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ("UN/Cambodia Agreement") together established the ECCC as a special court in Cambodia requiring the participation of international judges, prosecutors, and administrators in the ECCC alongside their Cambodian counterparts. The creation of the ECCC took longer—from 1997 to 2007—than was the experience for any other international or hybrid criminal tribunal in the post-Cold War era.

[202] *Prosecutor v Tadić*, Case No. IT-94-1-T, Judgment, paras 650-52 (May 7, 1997), the Appeals Chamber reversed this holding, *Prosecutor v Tadić,* Case No IT-94-1-A, para 305 (July 15, 1999); The French delegation had advocated for this position, perhaps relying on France's own, jurisprudence after World War II Darryl Robinson, 'The Elements of Crimes Against Humanity, in the International Criminal Court' in Roy S Lee (ed) *Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, US 2001) 63 This linkage is reinserted, however, in the definition of persecution under article 7(1) (h).

[203] UN Doc S/2002/246 Statute of the Special Court for Sierra Leone (2002) (SCSL).

[204] Laws on the Establishment of the Extraordinary Chambers (n 201).

[205] Rodney Dixon, 'Article 7: Crimes Against Humanity' in Otto Triffterer (ed) Commentary on the Rome Statute of the International Criminal Court (.München/Oxford/Baden-Baden, 2nd ed, Hart Publishing, 2008) 123; ICCSt (n 1) Article 21 of the Rome Statute.

[206] The Statute prohibits persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognised as impermissible under international law. . . . This expansive language is followed by a proviso that the persecution must be in connection with any referred to in this paragraph or any crime within the jurisdiction of the Court, meaning that persecution is only prosecutable when accompanied by war or other acts of violence. Antonio Cassese argues that this limitation is not required by customary international law; Antonio Cassese P. Gaeta, J. Jones eds, *Crimes Against Humanity, in the Rome Statute of The International Criminal Court* (Oxford University Press, oxford 2011)376 yet it follows the practice of the *ad hoc* tribunals; Ken Roberts, 'The Law of Persecution before the International Criminal Tribunal for the Former Yugoslavia' (2002) 15 *Leiden Journal of International Law* 623, 632; *Prosecutor v Kupreškić,* Case No IT-95-16-T, (Judgment) (14 January 2000) para 573-581.

Crime of apartheid as new specific acts constituting CAH. The framers rejected appeals from some governments to add economic and environmental crimes, preferring the list to include only crimes already found in other international instruments, or clearly understood to be predicate acts of CAH under customary international law.[207]

Article 7 of the Rome Statute contains four separate preconditions that must be satisfied before jurisdiction attaches in a particular case in which CAH are charged. The Elements of Crimes,[208] adopted after the Rome Statute pursuant to Article 9 of the ICC Statute, refer to these as 'contextual' elements.[209] (1) the commission of the crime as part of a 'widespread or systematic attack;'[210] (2) against a civilian population;[211] (3) with knowledge of the attack;[212] (4) and involving 'a course of conduct involving the multiple commissions of acts against any civilian population pursuant to or in furtherance of a State or Organisational policy to commit such attack.'[213]

3.2.4 The Policy Element Challenge

The addition of a 'policy' requirement, which many commentators and jurisprudence of the Court suggest systematicity is required even if crimes are 'widespread',[214] as well as the 'multiple acts' element, the 'attack' element, and various limiting provisos in the Statute's elements of crimes suggest that at least some State Parties during negotiations successfully limit the potential scope of application of CAH by cumulating elements that had been found in earlier instruments or writings of scholars on the question,[215] particularly true of the 'planning' or 'policy' element, which had appeared as only one of many possible criteria to be used to distinguish CAH from 'ordinary crimes.' During the meetings of the ICC preparatory committee in 1996,[216] policy element was not included in the *Zutphen*

[207] Leila N Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 108 *American Journal of international Law.*
[208] PCNICC/2000/1/Add 2 Elements of Crimes, 2 November 2000.
[209] ibid; Leila N Sadat (n 207); Leila N Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers Inc, US 2002) 146,48.
[210] ICCSt (n 1) Article 7(1).
[211] ibid; some delegations supported deletion of the words 'civilian population' during the Rome Conference as too limiting, but this traditional limit on the ambit of CAH remained.
[212] ICCSt (n 1) Article 7(1).
[213] Ibid, Article 7(2) (a).
[214] Darryl Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (1991) 93 *American Journal of international Law* 43.
[215] Ibid; noting that many of the detailed provisions of article 7 were adopted out of a concern to avoid vagueness and to underscore the operation of the legality principle in the Statute.
[216] Leila N Sadat, 'Crimes Against Humanity in the Modern Age' (2013)108 *American Journal of international Law*. As late as 1997, France submitted a proposed definition that did not contain a policy element but instead

Intercessional Draft of 1998,[217] nor was it included in the penultimate draft Statute adopted by the Preparatory Committee in April of 1998 that was sent to the Diplomatic Conference in Rome,[218] but appeared in the Bureau Discussion Paper released on July 6, 1998, in the final weeks of the Diplomatic Conference.[219] According to participants in the negotiations, proponents argued that the existence of a policy . . . unites otherwise unrelated inhumane acts, so that in the aggregate they collectively form an 'attack'. [220]

Additionally, the policy element was conceived as a flexible test, of a lower threshold than the term 'systematic,' which was understood as a much more rigorous test.[221] It was added to break a deadlock between members of the likeminded group who preferred the rubric widespread or systematic, and states wishing to use the formula 'widespread and systematic'.[222] A commentary on the Statute notes: 'the anxiety had been to exclude isolated and random acts and ordinary crimes under national law, from the scope of CAH.'[223] At the same time, the addition of the policy element was controversial, attracting 'sustained criticism from non-governmental organisations'[224] although not novel, it was not well-understood to be an element of CAH in customary international law. The French Courts had required evidence of a 'common plan' in their jurisprudence on CAH interpreting Article 6(c) of the Nuremberg Charter[225] and some have suggested the same for certain decisions

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focused on the systematic/widespread nature of CAH, saying 'The term "crimes against humanity" means any of the acts/crimes listed below, committed systematically and/or on a broad scale in the context of a systematic and or widespread attack on a large scale against any a civilian population group, and inspired by political, philosophical, racial, ethnic or religious motives or any other arbitrarily defined motive.' Proposal for a definition of crimes against humanity submitted by the delegation of France UN Doc A/AC 249/1997/WG 1/DP 4 (19 February 1997).

[217] Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc A/AC249/1998/L13 (1998).

[218] Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF 183/2/Add.1 (April 14, 1998).

[219] UN Doc A/CONF183/C1/L53.

[220] Herman von Hebel & Darryl Robinson, 'Crimes within the jurisdiction of the Court', *in Roy S. K. Lee, The International Criminal Court: the making of the Rome Statute: Issues, Negotiations and Results* (Martinus Nijhoff Publishers, Kluwer Law Intl, The Hague 1999).

[221] ibid.

[222] ibid; Darryl Robinson, 'Developments in International Criminal Law: Defining Crimes against Humanity' at the Rome Conference, (1999) 93 *American Journal of International Law* 43.

[223] Machteld Boot, Rodney Dixon & Christopher K. Hall, 'Article 7: Crimes Against Humanity in Commentary on the Rome Statute of the International Criminal Court' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Hart Publishing, Oxford; 2008) 123, 127, 'State or organizational policy is a necessary component of the widespread or systematic attack on the civilian population. It constitutes a basis for ensuring that random or isolated acts are excluded from the scope of crimes against humanity."

[224] Hermen von Hebel (n 220); Darryl Robinson, 'Developments in International Criminal Law: Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 *American Journal of International Law* 43.

[225] Leila N Sadat, Crimes Against Humanity in the Modern Age (2013) *108 American Journal of International Law;* an articulated requirement in the Barbie case and followed in subsequent decisions. *Prosecutor v Klaus*

rendered under Control Council Law No 10.[226] However, no *ad hoc* tribunal statute included a similar element, the ICTY/ICTR had rejected it,[227] and the French position is questionable as a matter of textual interpretation.[228] Most observers conclude its addition in the Rome Statute was to ensure that isolated, uncoordinated and haphazard acts of individuals are excluded.[229]

3.2.5 The Challenge of the Term 'Organisation'

The term 'Organisational' in Article 7(2) (a) ICCSt, although, not defined in the Statute, but the intention is to address actions taken by non-state entities in cases involving States disintegration such as the former Yugoslavia, this include attacks on civilians by well organised hierarchical non-state actors. While, Cherif Bassiouni insists that 'the policy' must be one generated by a State, some observers and participants at the Rome Conference disagree, and claim that the policy need not be one of a State. It can be an organisational policy from non-state actors or private individuals, who exercise *de facto* power behind the policy, the provision in the Article reflects the contemporary position on this issue.[230] On this matter the researcher tends to favour the approach of the school of thought of Cherif Bassiouni *et al*.[231]

Barbie (Fr), Judgment of (3 June 1988); Richard May and Marieke Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha' (1999) 37 *Columbia Journal of Transnational Law* 725.

[226] Guénaël Mettraux, 'Crimes Against Humanity and the Question of a "Policy" Element*' in* L N Sadat (ed) *Forging a Convention for Crimes against Humanity* (Cambridge University Press, Cambridge 2011).

[227] ibid; Sadat (n 225); Guénaël Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, (2002) 43 *Harvard International Law Journal* 237, 270; Steinberg H R (ed), Assessing The Legacy of The ICTY (Martinus Nijhoff, The Hague; 2011). *Prosecutor v Bagilishema*, Case No ICTR-95-1A-T, Judgment, para 78 (June 7, 2001).

[228] ibid; Cherif M Bassiouni , 'Negotiating the Treaty of Rome on the Establishment of an International Crime Court' (1999) 32 *Cornell International Law Journal* 443 noting that State policy is an 'essential characteristic' of CAH; other arguments proposing the amendment of the Rome Statute to delete the 'policy' requirement, see Matt Halling, 'Push the Envelope – Watch it Bend: Removing the Policy Requirement and Extending Crimes Against Humanity' (2010) 23 *Leiden Journal of International Law* 827.

[229] Machteld Boot, Rodney Dixon & Christopher K. Hall, 'Article 7: Crimes Against Humanity' in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Hart Publishing, Oxford; 2008); State or organisational policy is a necessary component of the widespread or systematic attack on the civilian population. It constitutes a basis for ensuring that random or isolated acts are excluded from the scope of crimes against humanity, 159.

[230] ibid.

[231] This is so, given recent happenings such as the Southern Sudan crises of late 2013, the Violence in Mali in early 2014 with reported deaths of over 1000 people which even forced the government of Mali to step down. And of all, the Boko Haram crises in Nigeria. All these do not and will not constitute an intervention by the Court. The crises in Sothern Sudan in late 2013 to January 2014 does not warrant the Court to establish investigation despite the large number of victims caused by an attack or rebellion against the government, in spite of the fact that it could have been motivated by an individual(s).

Additional jurisprudence from the ICTY and ICTR is available to the Preparatory Commission during the Rome Conference although it is unclear how much those jurisprudence influenced the drafters, particularly the contextual or 'chapeau' elements which emerged as some of the controversial elements of the Preparatory Commission's work.[232] The elements supply subsidiary means of interpretation to the Court as regards the interpretation and application of Article 7[233] and other relevant Articles of the Statute. The application of Article 7 by the ICC and a reliance on Article 22 strict rules of construction to keep the ICC faithful to the text of the Statute. Yet neither the Statute nor the EOC offer much assistance in the interpretation of Article 7, for there is no definition of 'civilian population' 'widespread; 'systematic' attacks, or 'organisation' and virtually no guidance as to the meaning of 'policy to commit an attack.' Thus, the job of definition, interpretation and application of Article 7 falls by default to ICC Prosecutor in the first instance, and the Court's judiciary upon review.

The ICTY and ICTR dealt with the aftermath of the Yugoslavian and Rwandan crises, whilst the ICC pursuant to Article 7 of the Rome Statute has more specific definition that goes beyond that of the ICTY and ICTR.[234] Given the overlap between contents of CAH in the Rome Statute and that of the earlier Statutes (ICTY/ICTR) the decisions of the latter will plausibly be compelling on the decisions of the ICC.[235]

[232]Sadat (n 225); *Prosecutor v Tadić*, Case No IT-94-1-T, Judgment, para 650-52 (May 7, 1997), the Appeals Chamber reversed the holding, *Prosecutor v Tadić*, Case No. IT-94-1-A para 305 (July 15, 1999); The French delegation had advocated for this position, perhaps relying on France's own jurisprudence after World War II. Darryl Robinson, "The Elements of Crimes Against Humanity, in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence' in Roy S Lee (ed) Lee S R (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, US 2001); But reinserted, in the definition of persecution under Article 7(1)(h) ICCSt.

[233] ICCSt (n 1).

[234] Peter Burns, 'Aspects of Crimes against Humanity and the International Criminal Court', paper produced as part of the Department of Foreign Affairs and Trade Canada funded Promotion of the International Criminal Court in China Project, Intl Centre for Crim L Reform and Criminal Justice Policy Vancouver, BC, Canada February 2007 <https://www.library.yorku.ca/find/Record/2037803> accessed 22 June 2014.

[235] ibid; The ICTY/ICTR and the ICC Statutes have reaffirmed the customary law character of CAH. Additionally, the prohibition of CAH has the status of *jus cogens* and operates *obligatio erga omnes;* Cherif M Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 *Law and Contemporary Problems* 63; *that* International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including heads of state, the non-applicability of the defence of 'obedience to superior orders' (save as mitigation of sentence) the universal application of these obligations whether in time of peace or war, their non-derogation under 'states of emergency,' and universal jurisdiction over perpetrators of such crimes.

The elimination of the connection of CAH with armed conflict in the Rome Statute reflects the current state of international law,[236] which rejects the need for such a nexus. Although, the ICTY Statute does require a link with armed conflict, this requirement has often been interpreted in decisions emerging from the ICTY as a restriction on ICTY's jurisdiction rather than a restriction in the definition of CAH. Although, in *Tadic´* the ICTY held that, at customary law, CAH could be committed 'on behalf of entities exercising *de facto* control over a particular territory but without international recognition or formal status of a '*de jure*' state or by a terrorist group or organisation.'[237]

However, Professor Cherif Bassiouni, who chaired the drafting committee at the Rome Conference, disagrees that Article 7 ICCSt enlarges the concept of CAH so as to cover non-state actors. In his three-volume work, The Legislative History of the International Criminal Court,[238] he argues: Article 7 does not bring a new development to CAH, namely, its applicability to non-state actors. If that were the case, the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7 of the Statute. A question had arisen after 9/11 as to whether a group such as *al-Qaeda*, which operates on a worldwide basis and capable of inflicting significant harm in more than one state, falls within this category... such a group does not qualify for inclusion within the meaning of CAH as defined in Article 7 ICCSt, and for that matter, under any definition of that crime up to Article 6(c) of the IMT, notwithstanding the international dangers that it poses . . . The text of Article 7(2) clearly refers to State policy, and the words 'organisational policy' do not refer to the policy of an organisation, but the policy of a state. It does not refer to non-state actors.[239]

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[236] After the Nuremberg, Tokyo and CCL No 10 tribunal judgments subsequent international instruments affirmed and expanded upon the definition of CAH such instruments included the Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal the Report of the Sixth Committee, UN GAOR, 1st Sess, pt 2, 55th plen Mtg at 1144, UN Doc A/236 (1946) (also appears as GA Res 95, UN Doc A/64/Add1, at 188 (1946)); the Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948, 78 UNTS 277 the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968; GA Res 2391 UN GAOR 23rd Sess, Supp No 18 at 40; UN Doc A/7218 (1968) the International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov 30 (1973); GA Res 3068 (XXVIII) UN GA OR 28th Sess Supp No 30, 75 UN Doc A/ 9030 (1973); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec 10 (1984) GA Res 39/46; UN GAOR, 39th Sess Supp No 51, at 197; UN Doc A/39/51 (1984). CAH do not require a nexus with armed conflict.

[237] *Prosecutor v Dusko Tadic´* para 654

[238] Cherif M Bassiouni (ed), *Legislative History of the Statute of the International Criminal Volume 1* (Transnational Publishers Inc US 1990- 2005) 3 vol set.

[239] ibid; Cherif M Bassiouni, *Crimes against Humanity*, (2nd edn, Brill The Hague 1999) 243–81.

The most authoritative statement against Professor Bassiouni's position is that of the Appeals Chamber of ICTY, buried in a footnote[240] in its judgment in *Kunarac.*[241] The Appeals Chamber was addressing the issue from the standpoint of customary international law, by which its provisions are deemed to be consistent with custom.[242] The Appeals Chamber said that practice 'overwhelmingly supports the contention that no such requirement exists under customary international law,'[243] and cited a number of authorities in support,[244] such as: Article 6(c) of the Nuremberg Charter, the Nuremberg judgment, national cases from Australia, Israel, Canada and the Secretary General's report on the draft Statute of the Tribunal, various materials of the ILC, without detailed explanation and unclear how and why these references buttress the Appeals Chamber's position.[245]

Moreover, the Appeals Chamber did not mention the text of Article 7(2) of the Statute what influence it may have on the determination of customary international law, echoing earlier pronouncements of the ILC, the Appeals Chamber set the low-end threshold of CAH as being more than merely 'isolated or random acts.'[246] The case law of the ICTY makes it impossible to exclude serial killers and acts of organised crime syndicates from the ambit of CAH. Thus, judges at the ICC will have plenty of encouragement from the *ad hoc* tribunals should they wish to stretch the ambit of CAH.[247] But they will have to reckon with the plain words of the Statute,[248] which indicate a more restrictive view, should they attempt to do so.[249] The gravity threshold on admissibility is another factor that may restrain judicial attempts to expand CAH beyond recognition. The perpetrators of CAH must have 'knowledge of the attack'. Although, the mental element, which is in addition to the general knowledge and intent to commit the underlying crime, is less demanding than the 'specific intent' required for

[240] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 102,112.
[241] *Prosecutor v Dragoljub Kunarac, Radomir and Zoran Vukovic* (Kunarac) IT-96-23-T & IT-96-23/1-T.
[242] ibid; *Prosecutor v Dusko Tadic*, IT-94-1-T (1997) para 287, 296.
[243] ibid; William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011)100-150.
[244] ibid.
[245] ibid.
[246] ibid; *Prosecutor v Dragoljub Kunarac, Radomir and Zoran Vukovic* (Kunarac) IT-96-23-T 96.
[247] William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011); relevant also is the dissent judgment of Peter Hans Kaul in the Kenya election crises authorising the prosecutor to investigate.
[248] ibid.
[249]Antonio Cassese, Albin Eser, Giorgio Gaja, Philip Kirsch, Alain Pellet, and Bert Swart (eds) *The Rome Statute for an International Criminal Court A Commentary;* commenting on areas where Article 7 Is Narrower than Customary International Law'(Oxford University Press, Oxford 2002) 375,376.

genocide.[250] The 'contextual elements' for CAH, connects specific act with the broader context of the particular crimes, according to *Maria Kelt* and *Herman von Hebel*.[251]

Policy issue raises some difficulties about the demarcation line between CAH and 'ordinary' crimes and consequently, the role and scope of international criminal law. Could organisations such as political parties, terrorist or similar others orchestrate CAH under Article 7 ICCSt such as in Kenya?[252] Four theories relate to the 'policy element.'

(1) That there should be no policy element advanced by *Guénaël Mettraux and Jordan J Paust et al* and adopted in tribunal (ICTY) jurisprudence.[253]

(2) That there must be a State policy advanced by Cherif Bassiouni's, William Schabas *et al.*[254]

(3) The theory requiring 'state-like' organisations and

(4) The broader theories encompassing organisations with 'any capacity' to direct CAH by Laila W Sadat *et al.*

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[250] William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011)114,135.

[251] ibid, 114,124; *Maria Kelt* and *Herman von Hebel*, General Principles of Criminal Law and Elements of Crimes (Transnational Publishers, 2001)19, 40; Herman A M von Hebel, Johan G. Lammers and Jolien Schukking, An International Criminal Court - A Historical Perspective *Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos* (TMC Asser Press, 1999) 13,38; *Maria Kelt* and *Herman von Hebel, The International Criminal Court (2001)19,40.* Peter J Van Krieken, Crimes against humanity under the Rome Statute *Refugee Law in Context. The Exclusion Clause* (TMC Asser, Press, 1999) 105,118. Herman von Hebel and Darryl Robinson (ed) 'Elements of Crimes' *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*; (Transnational Publishers, 2001)3,234.

[252] Thomas Escritt (ed) (Reuters) Post election violence in Kenya (2007 – 2008) - The ICC dropped charges against Francis *Muthaura*, who was accused alongside newly elected Kenyan President *Uhuru Kenyatta* of sponsoring election violence. ICC Prosecutor *Fatou Bensouda* said the decision would not affect similar cases against Kenyatta, or his running mate William *Ruto*. Presiding Judge *Kuniko Ozaki* however said the collapse of the prosecution did have implications for the Kenyatta case... Charges withdrawn against *Muthaura*, former head of Kenya's civil service, after a prosecution witness recanted. 'We no longer believe there is sufficient evidence to prove the charges against *Muthaura* beyond reasonable doubt' she said. 'The Prosecution had in its possession prior to the Confirmation Hearing, exculpatory evidence, which completely undermined the credibility of one of its three core witnesses. 'This development is obviously not a bad news for Kenyatta,' said William Schabas; Decision Pursuant to Article 15 of the Rome statute on the authorisation of investigation into the situation in the Republic of Kenya ICC 79-83, ICC-01/09-19 (31-03-2010) 2007-2008 post election violence. The Kenyan crises followed the Presidential election held on 27th December 2007. The Electoral Commission of Kenya declared the incumbent President *Mwai Kibaki* re-elected; supporters of the opposition candidate *Raila Odinga* accused the government of electoral fraud and rejected the results. A series of protests and demonstrations followed, and tribal fighting led to deaths, injuries and displacements.

[253] *Prosecutor v Kunarac* IT-96-23-T 96.

[254] William Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *Journal of Criminal Law & Criminology* 953,982; Gerhard Werle, *Principles of International Criminal Law* (2005); *Guénaël Mettraux, International Crimes and the* ad hoc *Tribunals* (Oxford University Press, Oxford 2006) 155-170,301, William Schabas, 'Crimes Against Humanity: The State Plan or Policy Element' in L N Sadat & M P Scharf (ed) '*The Theory and Practice of Intl Criminal Law', Essays in Honour of Cherif Bassiouni* (The Hague: Martinus Nijhoff Publishers, 2008) 347; Claus Kreb, 'On the Outer Limits of Crimes Against Humanity: The Concept or Organisation Within the Policy Requirement'. Reflections on the March 2010 Kenya Decision' (2010) *23 Leiden Journal of International Law* 855.

The last two theories are those reflected in the Pre-Trial Chamber decisions of the ICC.[255] However, advocates of theory 3 (state-like) and theory 4 (any capacity) seem to agree that CAH do not and should not include random crime waves, that a policy element is necessary to sustain the coherence of CAH, and that CAH may be initiated or endorsed by non-state organisations. The question therefore is: what standard is required to constitute an organisation? The debate spreads across the academia and judiciary as to the necessity of incorporating policy requirement in the chapeau of CAH in the Statute and of what scope is such a requirement? Whilst some scholars qualify the policy requirement as a necessary element on the one hand on the other hand others see it as relevant up to establishing other elements such as the widespread or systemic attack.[256] In the jurisprudence of the ICTY[257] and the ICC, the former held that: the existence of a policy underlying the crimes committed is not an autonomous element of CAH, but may be a relevant evidence in establishing the systemic character of an attack against the civilian population, whilst the later in Article 7(2)(a)[258] clearly incorporates a state or organisational policy as an autonomous element of the crime, though the use of policy as an element of crime does not inevitably breed a different CAH concept than the recognition of the policy as a relevant evidence to establish the other elements.[259]

It is generally agreed that isolated, individual and randomly committed acts of violence are excluded from the scope of CAH within the ICC jurisdiction.[260] The *Tadic* judgment excluded isolated and random acts of individuals from the concept; restricts it to crimes committed in the context of only widespread or systematic attack directed against a civilian population and implies that there must be some form of governmental or organisational policy to commit these acts. However, recognising 'policy' in subsequent jurisprudence as a

[255] Darryl Robinson, '*Essence of Crimes against Humanity Raised by Challenges at ICC'* EJIL Talk Sept 2011 <www.ejiltalk.org> accessed 23 July 2013.
[256] *Prosecutor v Dusko Tadic*, IT-94-1-T.
[257] ibid; SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).
[258] ICCSt (n 1).
[259] Darryl Robinson (n 255).
[260] *G. Mettraux*, '*Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda'* (2002) 43 *Harvard International Law Journal* 237, 314–315; M *McAuliffe deGuzman*, '*The Road from Rome: The Developing Law of Crimes Against Humanity'* (2000) 22 *Human Rights Quarterly* 335, 375–376; K. Ambos & S 'Wirth, *The Current Law of Crimes against Humanity'* (2002) 13 *Criminal Law Forum*, 30; R Dixon (revised by C. Hall), Article 7 CAH, in O *Triffterer* (ed.), '*Commentary on the Rome Statute of the ICC, Observers' Notes',* Article by Article (Baden–Baden: C H Beck/Hart/Nomos, 2nd edn, 2008) 168, 169; W A Schabas, '*State Policy as an Element of International Crimes'* (2008) 98 *Journal of Criminal Law & Criminology* 953, 954; G Werle, '*Principles of International Criminal Law'* (The Hague, TMC Asser Press, 2nd edn, 2009) 288
Phylilis Hwang, 'Defining Crimes against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 *Fordham Internationall Law Journal* 489.

necessary and implicit requirement of this concept became increasingly questionable resulting in the rejection of the approach at the *Kunarac* Appeals Chamber judgment, which held that: ... *Neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan'* there was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. (…) proof that an attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime to prove, it is not necessary to show the result of the existence of a plan or policy.[261] Thus the existence of a plan or policy may be evidentially relevant, but it is not a legal element of the crime.[262] That 'policy' is a relevant factor is affirmed in the *Krstic* judgment.[263] The policy element thus ascertains a certain level of organisation in the case of a mere widespread attack and assures that random acts committed pursuant to an individual plan cannot qualify as CAH.[264] The Pre-Trial Chamber I has interpreted the policy element as being synonymous with the systematic attack-requirement,[265] thereby effectively replacing the alternative widespread or systematic attack requirement with a cumulative widespread and systematic attack requirement.

Though, Pre-Trial Chamber II held that the formal nature of a group and its level of organisation should not be the defining criterion. Instead, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values.[266] On the other hand the policy element is expressly recognised in the Statute as an element of CAH; hence ICC must give effect to the element. The judiciary must justify their decisions based on reasons[267] and the reasoning must be rule based[268] particularly under international criminal law as laid out in Statutes and or judicial decisions.[269]

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[261] *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeal Judgment), IT-96-23 & IT-96-23/1-A, ICTY, 12 June 2002.
[262] *Prosecutor v Kunarac et al* IT-96-23-T, and IT-96-23/1-T 'an attack would include, but is not limited to acts of violence' para 98.
[263] *Prosecutor v Krstic* (IT-98-33-A) para 225; *Prosecutor v Blaskić* IT-95-14-T (2000) 122 ILR1'Lašva Valley'
[264] Elewa M Badar, '*From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity'* (2004) 5 *San Diego International Law Journal* 112, 116; Gerhard Werle, *Principles of International Criminal Law*, 2005; *Guénaël Mettraux, International Crimes and the* ad hoc *Tribunals* (Oxford University Press, Oxford 2006) 155-170.
[265] Matt Halling, 'Push the Envelope, Watch it Bend: Removing the Policy Requirement and Extending Crimes against Humanity' (2010) 23 *Leiden Journal of International Law* 827, 836– 837.
[266] Kenya Authorisation Decision on the investigation into the situation of the Republic (ICC-01/09-19 31-03-2010) para 90.
[267] Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice, Towards a European Jurisprudence* (Oxford University Press, Oxford 1993) 116– 117, Herbert L Packer, *The Limits of Criminal Sanction* (Stanford University Press, US 2012) 88; Leonor Moral Soriano, 'The Use of Precedents as Arguments of Authority and Arguments of Reason in Civil Law Systems*'* (1998) 11 *Ratio Juris* 90, 91–92; A Cassese, The ICTY: 'A Living and Vital Reality' (2004) 2 *Journal of International Criminal Justice* 585, 589;

The 'State-like' Theory: - The approach by Judge Hans-Peter Kaul (late) in his dissent (Kenya's post election investigation authorisation) has much to commend, there is a tendency for Judges to take the 'easier' route of adopting expansive and popular approaches without sufficient rigorous analysis. Judge *Kaul's* reasoning in purposefully resisting such temptation and adhering to a principled analysis and methodology, including his inquiry into drafter's intent and assessment of the purpose of the policy element. While agreeing with this methodology, the doubt that these considerations may not have compelled quite so stringent a standard is unresolved.[270] Scholarly literature including articles by *Cherif M Bassiouni*, *Claus Kress* and *William Schabas* advance some meticulously-reasoned and compelling arguments as to the justification for the policy element and in support of a comparatively demanding requirement of a 'state-like' organisation. Significant considerations include the need: (1) to focus on crimes that affect peace, security and well-being, (2) to focus on crimes less likely to be addressed and prosecuted by states (whether because the state is behind the crimes or because they are committed by a powerful group that the state cannot stop), (3) to focus on harms by entities who have a 'responsibility to protect'; and (4) to ensure an appropriate jurisdictional/resource allocation so that the ICC focuses on the worst cases, each of the arguments seems plausible and sustainable. Scholarly attention to date favours the dissent approach the 'majority approach' also offers a plausible and sustainable account, which warrants greater reflection, to explain why the more flexible majority approach is sound.

Waves of crimes where individuals act on their own initiatives and are unconnected would not constitute CAH. But under customary international law could we say the same to be true? An aggregate of crimes by individuals acting on their own initiative do not amount to an 'attack'. Logically, accepted proposition are (A) an 'attack' cannot be the random acts of individuals acting on their own initiative. (B) The acts must be directed, instigated, actively or passively encouraged by some source other than the individuals.[271] Thus, the policy element is the proposition agreed upon and expressed not in the negative but as a positive requirement. The policy element provides the thread of connection between otherwise disparate acts, so that they may be described collectively as an attack directed against a

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William Twining, David Miers, *How to do Things with Rules* (5th edn, Cambridge University Press, Cambridge 2010) 268,270.

[268] Frederic René Coudert, '*Certainty and Justice, Studies of the Conflict Between Precedent and Progress in the Development of Law'* (New York: D Appleton and Company, 1914) 1, G *Lamond*, '*Do Precedents Create Rules*?' (2005) 11 *Legal Theory Cambridge Journals* 1, 5–6.

[269] ibid.

[270] Darryl Robinson, '*Essence of Crimes against Humanity Raised by Challenges at ICC'* EJIL Talk Sept 2011.

[271] ibid.

civilian population. CAH focus on the collective character of the perpetrators; thus require state or organisational policy according to *David Luban* in the 'Theory of crime against humanity'.[272]

Additionally, Article VI of IMT defines the *subject-matter* jurisdiction of the Court.[273] In three distinct paragraphs, it listed the core offenses, namely crimes against peace, war crimes, and crimes against humanity.[274] An important element is often overlooked; Article VI begins with a preambular paragraph stating that the offenders must have been 'acting in the interests of the European axis countries.'[275] This is a gloss on the statement that 'crimes against international law are committed by men,' to the extent that the 'men' must be acting in the interest of a State. Critical perusal of the Nuremberg judgment issued in 1946 makes it clear that the central nature of the prosecution was to the policy of the Nazi state.[276] In practice, however, there has been few if any before the international tribunals involving entrepreneurial villains who have exploited a situation of conflict in order to advance their own perverse personal agendas. Essentially, all prosecutions have involved offenders acting on behalf of a State and in accordance with a State policy, or those acting on behalf of an organisation that was State-like in attempts to exercise control over territory and seize political power, such as the *Republika Srpska.*[277]

Additionally, in 2005 an expert commission of inquiry mandated by the UNSC to investigate whether Genocide was being committed in Darfur answered the question 'whether or not acts of Genocide have occurred?[278] Not by examining the acts of individual offenders, but by concluding 'that the Government of Sudan has not pursued a policy of genocide.'[279] Besides, with the growing focus on 'gravity' as a test to distinguish cases that deserve the attention of

[272] David Luban, 'A Theory of Crimes against Humanity' 29 (2004) *Yale Journal of International Law* 85-167.
[273] 82 UNTS 279 (1945) Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, the Establishing the Charter of the International Military Tribunal Article 6(Nuremberg Charter).
[274] ibid.
[275] ibid.
[276] William A Schabas, 'State Policy As An Element Of International Crimes' (2008) 98 *The Journal of Criminal Law & Criminology.*
[277] A *de facto* independent country and after 1995 became one of the two political entities that compose Bosnia and Herzegovina.
[278] SC Res 1564, 12, UN Doc S/RES/1564 (Sept 18, 2004).
[279] Report of the International Commission of Inquiry on violations of International Humanitarian Law and Human Rights in Darfur para 518, UN DOC S/2005/60 (25 Jan 2005); a contrary opinion is Ademola Abass, 'Proving State Responsibility for Genocide: *The ICJ in Bosnia v Serbia* and the International Commission of Inquiry for Darfur' *Fordham International Law Journal* (2007) 31.

international tribunals, a State policy requirement may prove useful.[280] Crime waves of unconnected individuals or from numerous spontaneous groups are 'normal' crimes, and should not engage international jurisdiction.[281] Consequently, where a minor organisation commits crimes on a small scale (non-widespread) then the mere fact of being meticulously planned does not convert those crimes (heists, assassinations) into CAH; they are still common crimes.

3.2.6 Gender Crime a Crime Against Humanity

'Forced pregnancy' as a crime became problematic to accept when the Statute was being drafted, some believed it might be construed as creating an obligation upon States to provide women who had been forcibly impregnated with access to abortion.[282] A definition of the term was finally agreed to mean: 'the unlawful confinement of a woman; forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.' The definition shall not in any way affect national laws relating to pregnancy.[283]

The definition reassures States that the Statute would not conflict with their anti-abortion laws;[284] also making it possible to prosecute sexual violence as an act of torture. In *Kunarac*, the Appeals Chamber of the ICTY held that sexual violence gives rise to severe pain or suffering, whether physical or mental, adding that it was not necessary to provide visual evidence of suffering by the victims, as this could be assumed.[285] Rape is not defined in the Statute but left to the judges to determine however a few months after the adoption of the Statute, the *ad hoc* tribunals had developed two different definitions of the crime of rape. The first proposed by the Rwanda Tribunal in *Akayesu*, noted that 'the central elements of the

[280] William A Schabas, 'State Policy As An Element Of International Crimes' (2008) 98 *The Journal of Criminal Law & Criminology*.
[281] Darryl Robinson, '*Essence of Crimes against Humanity Raised by Challenges at ICC'* EJIL Talk Sept 2011.
[282] UN Doc A/CONF 183/C 1/SR 3, para 32; UN Doc A/CONF183/C1/SR 5, para 21 (Saudi Arabia); UN Doc A/CONF 183/C 1/SR.5, para 71 (Iran) The attempted to introduce a reference to 'human beings' in the preamble was widely viewed as an attempt to raise the abortion issue, and was rejected for this reason: Tuiloma Neroni Slade and Roger S Clark, 'Preamble and Final Clauses', in Lee S R (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, US 2001) 421–50,426.
[283] ICCSt (n 1) Article 7(2) (f).
[284] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 101-108; Barbara Bedont, 'Gender-specific provisions in the Statute of the International Criminal Court' in Flavia Lattanzi, William A. Schabas (ed) *Essays on the Rome Statute of the International Criminal Court* (Volume 1) 198–9.
[285] *Prosecutor v Kunarac para 150.*

Crime of rape cannot be captured in a mechanical description of objects and body parts.'[286] It defined the crime as: 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'[287] The definition was broad enough to encompass forced penetration by the tongue of the victim's mouth, which most legal systems would not stigmatise as rape, but prosecuted as a form of sexual assault. But the trial Chamber of the ICTY had a mechanical and technical definition of rape to be 'sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator'.[288]

The Elements of Crime lean towards the second of these approaches, but with some slight divergences: 'The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.' Many legal systems consider that only a woman may be a victim of rape.[289] The EOC provides a signal that men may also be victims of the crime in a footnote indicating that '[t]he concept of 'invasion' is intended to be broad enough to be gender-neutral.[290]

3.2.7 Persecution and Some other Crimes Against Humanity

Persecution is a criminal act under Article 7 (1) (h) ICCSt. 'Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, and gender as defined in paragraph 3, or other grounds recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.' The list of groups is considerably larger than any previous definition. However, the words 'in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court' narrow its scope considerably. This is a departure from previous definitions and reflects recent judicial interpretations which require acts of persecutions to be 'of the same gravity or severity as the other enumerated crimes' in

[286] *Prosecutor v Akayesu* (ICTR-96-4-T) (1998).
[287] ibid; *Prosecutor v Delalic´ et al* (IT-96-21-T) (1998) paras 477–8.
[288] *Prosecutor v Furundz˙ija* IT-95-17/1-T) (1998) 185.
[289] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011).
[290] ICCSt (n 1) Article 7(1) (g) & 7 (3).

the provision on CAH.[291] A Trial Chamber of the ICTY said, 'although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1) (h) is not in consonant with customary international law', and rejected in particular the requirement that persecution be connected with a crime within the jurisdiction of the Court or another act of CAH as too narrow,[292] by comparison with earlier interpretations of CAH, the Appeals Chamber of the ICTY described the provision as 'expansive' in *Blas˘kic*.[293] The Elements of Crime explain that, in the act of persecution, the perpetrator 'severely deprived, (contrary to international law), one or more persons of fundamental rights'.[294] A judgment of the ICTY holds that the CAH of persecution 'derives its unique character from the requirement of a specific discriminatory Intent.'[295] The case law has defined persecution as an act or omission that discriminates, denies or infringes on a fundamental right laid down in international customary or treaty law.[296]

The Rome Statute leaves open opportunity for further development in the final paragraph of the list of CAH, dealing with 'other inhumane acts'. In the case law of the *ad hoc* tribunals, concerns have been expressed that 'this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal, hence, contrary to the principle of the 'specificity' of criminal law'.[297] According to Professor Kai Ambos, the provision is 'a classic example of punishment by analogy in contradiction to the *lex stricta* requirement under Article 22(2) of the ICC Statute.'[298] The ICTY suggested that the legal parameters of 'other inhumane acts' could be found in a set of basic rights appertaining to human beings drawn from the norms of international human rights law. It views 'other inhumane acts' as a residual category, providing CAH with the flexibility to cover serious violations of human rights that are not specifically enumerated in the other paragraphs of the definition, on the condition that they are of comparable gravity. The examples given by the Tribunal of inhumane acts not specifically listed in the definition of CAH in the Statute of the Yugoslav Tribunal are the forcible transfer of groups of civilians, enforced prostitution and enforced

[291] *Prosecutor v Kvočka et al, IT 98-30/1-T* (2001) 185; *Prosecutor v Kupres˘kic´ et al* (IT-95-16-T) (2000) 618–19; *Prosecutor v Kordic´ et al* (IT-95-14/2-T) paras 193–5,102.
[292] ibid, *Kupres˘kic* 579–81; Mohamed Elewa Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity' (2004)125 *San Diego Intl L Journal* 73
[293] *Prosecutor v Blas˘kic´* para148.
[294] ICCSt (n 252) Article 7(1) (h).
[295] *Prosecutor v Krnojelac* (IT-97-25-T) (2002) para 436.
[296] ibid.
[297] *Prosecutor v Kupres˘kic´* para 563; *Prosecutor v Stakic´* (IT- 97-24-T) Decision on Rule 98 *bis* (31 October 2002) para 131.
[298] Kai Ambos, 'Remarks on the General Part of International Criminal Law' (2006) 4 *Journal of International Criminal Justice* 660,670.

disappearance of persons.[299] In the *Akayesu* decision, the ICTR used 'other inhumane acts' to encompass such behaviour as forced nakedness of Tutsi women.[300] The ICTY concluded that the compulsory bussing of thousands of women, children and elderly persons from *Potocari*, in the Srebrenica enclave, consisted of 'inhumane act'.[301] The bussed victims being unaware of their destination, struck and abused by *Serb* soldiers as they boarded the buses, overcrowded, unbearably hot and stoned as they travelled, after disembarking, the victims had to march several kilometres.[302]

Under the Rome Statute, the concept of 'other inhumane acts' may actually be narrowed by the addition of the words 'of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. It is open to question whether the acts of sexual indignity condemned by the ICTR would now fit within the restrictive language of the Rome Statute. The provision was criticised by a Trial Chamber of the ICTY for failing 'to provide an indication, even indirectly, of the legal standards which would allow identification of the prohibited inhumane acts.[303] Article 7[304] concludes with two further paragraphs that define some of the difficult terms of paragraph 1. Accordingly, the term 'attack' is defined, as well as 'extermination', 'enslavement', 'deportation or forcible transfer of population. Torture, forced pregnancy, persecution, the crime of apartheid and 'enforced disappearances of persons', some of these definitions reflect customary law, but some go further. They are also influenced by and have themselves influenced the case law of the *ad hoc* tribunals.

Article 7(2) (b) describes the CAH of 'extermination' as 'the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population', noting that previous judgments had not defined the term, a Trial Chamber of the ICTY adopted the definition proposed in the Rome

[299] *Prosecutor v Kupres˘kic´ et al* para 566.
[300] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T.
[301] *Prosecutor v Mico Stanisic and Stojan Zupljanin*, IT-08-91-T Judgment (2013); The Trial Chamber of the ICTY sentenced *Mico Stanisic and Stojan Zupljanin* to twenty-two years imprisonment for CAH and war crimes committed in *Bosnia and Herzegovina*. ... that *Stanisic and Zupljanin* participated in a joint criminal enterprise to permanently remove non-Serbs from the territory of a planned Serbian ...both convicted of CAH, including: persecution . . . acts of killings; torture, cruel treatment, and inhumane acts; unlawful detention; establishment and perpetuation of inhumane living conditions; forcible transfer and deportation; plunder of property; wanton destruction of towns and villages, including destruction or wilful damage done to institutions dedicated to religion and other cultural buildings; and the imposition and maintenance of restrictive and discriminatory measures. They were also convicted of murder and torture as violations of the laws or customs of war. *Stanisic* was found not guilty of extermination as a crime against humanity.
[302] Prosecutor v *Krstic´* (IT-98-33-T) paras 50-2 and 519.
[303] *Prosecutor v Kupres˘kic´ et al* (n 346) 565.
[304] ICCSt (n 1).

Statute. It held that insertion of this provision means 'that the crime of extermination may be applied to acts committed with the intention of bringing about the death of a large number of victims either directly, such as by killing the victim with a firearm, or indirectly, by creating conditions provoking the victim's death'. The Trial Chamber also referred to the EOC, which states that 'the perpetrator should have killed one or more persons' and that the conduct should have been committed 'as part of a mass killing of members of a civilian population.'[305]

Torture is defined in Article 7(2) (e) as 'the intentional infliction of severe pain or suffering, whether physical or mental upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'. There is nothing to suggest that the perpetrator must be in some official capacity, or that the torture must be conducted for a prohibited purpose. Nonetheless, Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[306] includes, in its definition of torture, the requirement that it be inflicted 'for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or suspected of having committed, intimidating, coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, at the instigation of, with the consent, acquiescence of a public official or other person acting in an official capacity'. The *ad hoc* tribunals have regularly described the definition in the Convention against Torture as a reflection of customary international law.[307] However, decisions in *Kunarac et al* take the view, consistent with the text of the Rome Statute, that customary international law does not require that torture be committed by a person acting in an official capacity.[308] The ICTY specifically referred to the Rome Statute (*Miroslav Kvocka et al)* as evidence that customary law does not impose an official capacity criterion as part of the crime of torture.[309]

[305] *Prosecutor v Krstic´* para 498.
[306] 1465 UNTS 85; 23 ILM 1027 (1984) UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment*.
[307] *Prosecutor v Anto Furund* (2000) para 111.
[308] *Prosecutor v Kunarac et al* para 148.
[309] *Prosecutor v Miroslav Kvocka et al*, IT-98-30/1-T (2001).

3.2.8 Conclusion

This part of the chapter examined CAH principally from the Nuremberg trials to the Rome Statute, noting that the ICTY went beyond the Nuremberg precedents by declaring that 'CAH could be committed in peace time.' Hence, the nexus with violence is seen as 'obsolescent' as 'there is no logical or legal basis for the requirement' anymore, hence the requirement of a nexus with violence set out in Article 5 ICTYSt has been described as 'purely jurisdictional'. The section also considered the debate on 'policy' as an element of CAH, the varying views and authorities, including the opposing views on the meaning of 'state like' or 'organisation' and the implication of its interpretation as an element of crime against humanity. Above all, it is obvious that the reach of ICC's jurisdiction over customary CAH is limited in several ways. It is therefore suggested that states seeking to enact legislations to adequately reach the breadth of CAH should not enact legislation that simply copies Article 7 of the Statute.[310]

Enacting legislations that can reach all customary CAH can be important for a state that prefers to have an option to prosecute accused persons while fulfilling its duty under customary international law '*aut dedere aut judicare'.* [311] Consequently, if states ever adopt a general or regional multilateral treaty on CAH as such, definitional elements should be broader than those currently found in Article 7 of the Rome Statute in other not to be limiting.[312] The constitutive instrument should be broader than the definitional elements of CAH as is in Article 7 of the Rome Statute.[313]

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[310]The Statute of the Extraordinary African Chambers (30 January 2013) In 2012, the African Union (AU) Commission and Senegal agreed to establish a new hybrid court within the Judiciary of Senegal to prosecute violations of international law committed in the territory of Chad between 1982 and 1990. Called the Extraordinary African Chambers, the Court opened on 8 February 2013. The Statute published January 30, 2013. The mandate of the Extraordinary African Chambers (EAC) is to prosecute those responsible for crimes and serious violations of international law, international custom and international conventions ratified by Chad during the period of June 7, 1982 and 1 December, 1990. The Court has jurisdiction over four crimes: genocide, CAH, war crimes, and torture.

[311] Concerning the duty '*aut dedere aut judicare'* with respect to crimes under customary international law If a state cannot or will not prosecute, its duty shifts to a duty to extradite an accused to another state or to render an accused to an international tribunal with jurisdiction; the Rome Statute, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level, . . . recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . . .

[312] The Statute of the Extraordinary African Chambers; Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7June 1982 and 1 December 1990.

[313] Stuart Ford, 'The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit all of the International Criminal Court's Trial to Take Place at Local or Regional Chambers, Professor Stuart Ford's suggestion concerning a regional extension of the ICC, but such an extension will necessarily have the same drawback in connection with the limited reach of ICC jurisdiction over customary crimes against humanity under its Statute; (2010) 43 *John Marshall Law Review* 715; also noting that Professor

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'... an attack upon human diversity, that is, upon a characteristic of the "human status" without which the very words 'mankind' or 'humanity' would be devoid of meaning.'[314]

David Luban

3.3.1 Introduction

This part of the chapter will examine the concept of Genocide defined in Article 6 of the Rome Statute (the Statute),[315] in conjunction with the 1948 Genocide Convention (GC).[316] The background to the Crime of Genocide (a crime against humanity), the development of the law on genocide and the present state of international criminal jurisdiction encompassing relevant contributions from the International Court of Justice (ICJ), the ICTY[317], the ICTR[318] and numerous domestic courts on Genocide will further be examined. Genocide is a crime under customary international law, the legal analysis of its specific intent requirements (*Dolus Specialis*) will be highlighted with decided cases and reports. The main purpose of the chapter therefore is to fully analyse and understand the theory of genocide in order to appreciate its relevant prosecutorial challenges under the Statute, the chapter concludes by establishing that although genocide is a crime against humanity, it is of the highest threshold requirement of intent to establish its liability under international criminal law.

3.3.2 The Concept of Genocide

The definition of Genocide in the Genocide Convention has been incorporated into the Rome Statute, ICTYSt, ICTRSt and other court's instruments established by or with the support of the UN.[319] The Genocide Convention defines genocide in Article 2 as:

> '... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such':

Burke-White had raised this point; citing William Burke-White, 'Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration' (2003) 38 *Texas International Law Journal* 729.

[314] David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal of International Law* 85.

[315] 2187 UNTS 3; 37 ILM 999 (1998) ICCSt (n 1).

[316] 78 UNTS 277; Convention on the Prevention and Punishment of the Crime of Genocide1948 (GC).

[317] UN Doc S/RES/827 (1993); 32 ILM 1203 (1993) Statute of the International Criminal Tribunal for Yugoslavia (ICTYSt).

[318] UN Do S/RES/955 (1994); 33 ILM 1598 (1994) Statute of the International Criminal Tribunal for Rwanda (ICTRSt).

[319] Diane F Orentlicher, *'*Genocide*'* in Roy Gutman, David Rieff and Anthony Dworkin (ed) *Crimes of War: What the Public Should Know* 2.0 (Reprint – edition W W Norton & Co 1999) 191.

(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 acts must be committed with specific intent (an additional *mens rea*) to destroy in whole or in part, a national, ethnic, racial, or religious group as such. The ICTR in *Akayesu*[320] found that the systematic rape of *Tutsi* women in *Taba* province constituted the Genocidal act of 'causing serious bodily or mental harm to members of the targeted group.'

Additionally, the crime of genocide within the 1948 Convention includes: conspiracy to commit genocide, direct public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.[321] Although, earlier drafts of the convention listed political groups amongst those covered by the intent requirement, but this category did not make it to the final list. Some governments feared they would be vulnerable to the charge of genocide if deliberate destruction of political groups fell within the crime's compass.[322] Excluded also was the concept of cultural genocide destroying a group through forcible assimilation into the dominant culture. The drafting history makes clear that the 1948 convention was meant to cover physical destruction of a people; the sole echo of efforts to include the notion of cultural extermination in the convention refers to forcibly transferring children of a targeted group to another group.[323]

3.3.3 Responsibility for Genocide under the Rome Statute

Genocide has two phases: the first being the destruction of the national pattern of the oppressed group (which the overall objective would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic

[320] *Prosecutor v Akayesu* ICTR-96-4-T.
[321] Genocide Convention (n 316) Article 3.
[322] William Schabas, An *introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 99-106.
[323] ibid.

existence of national groups, and the destruction of the personal security, liberty, health and dignity of the individuals belonging to such groups) the other being the elimination of the lives of the individuals/key individuals belonging to such groups. The imposition may be made upon the remaining oppressed population or upon the territory alone after removal of the population and colonisation of the area by the oppressor's nationals.[324] The legal foundation was laid during the Nuremberg trials, although, the Nuremberg charter did not use the term Genocide in its definition of CAH, but the term was used in indicting major war criminals at Nuremberg, accused of having conducted deliberate and systematic extermination of national groups within the civilian population of certain occupied territories in order to destroy in particular, a class of people. The Prosecutors invoked the term in their closing arguments and appeared in the judgments of several US military tribunals at Nuremberg.[325]

Building on the intellectual and legal foundation laid by the IMT in the *Streicher* decision,[326] Article 3 (c) of the GC declares that *'direct and public incitement* (communication, broadcasts, publications, drawings, images, or speeches) *to commit genocide' is a crime*.[327] The 'public' nature distinguishes it from an act of private incitement (punishable under the Genocide Convention as 'complicity in genocide')[328] incitement must be 'direct,' the listener should understand the speech to be a call to action.[329] Moreover, public incitement to

[324] Diane F Orentlicher, *'*Genocide*'* in Roy Gutman, David Rieff and Anthony Dworkin (eds) *Crimes of War: What the Public Should Know* 2.0 (Reprint – edition W W Norton & Co 1999) 191.

[325] 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJIL 258 (1945); United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945.

[326] Streicher Julius, the publisher of 'Der Sturmer' anti Semantic weekly newspaper (1923 to 1945); editor until 1933for speaking, writing, and preaching hatred of the Jews, he became known as 'Jew-Baiter Number One.' infected and incited German people to active persecution, 'Der Sturmer' a highly circulated paper filled with articles, often lewd and disgusting; National Archives and Records Administration < http://www.archives.gov/dc-metro/college-park> accessed 10 March 2015.

[327] Thomas Escritt(*Reuters*), A Dutch court sentenced a Rwandan-born woman to jail for inciting genocide two decades ago - Judges confirmed *Yvonne Besabya*, now a Dutch citizen, had stoked hatred against her ethnic Tutsi neighbours before Rwanda's 1994 genocide in which 800,000 Tutsis and moderate Hutus were killed. The conviction, under universal jurisdiction principle (*aut dedere aut judicare*) the first genocide conviction in a Dutch court since World War 11. District court judges said Besabya, the wealthy Hutu wife of a Rwandan lawmaker, had used her influence to incite her Hutu neighbours to violence against Tutsis. Presiding Judge *Rene Elkerbout* held '... committed the crime of publicly calling for ...genocide.' ...They sang: *'Tubatsembesembe'*, meaning 'We will kill them all,' 'her Tutsi neighbours spent several years in deathly fear as a result. The Rwandan genocide has increasingly become the focus of court cases in Europe, despite the existence of a dedicated U.N tribunal in *Arusha*, Tanzania that has tried those suspected of masterminding the killings. Reuters. <http://uk.reuters.com/> accessed 24 June 2014.

[328] Genocide Convention (n 361) Article 3 (e).

[329] William A Schabas *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 99 - 107.

genocide can be prosecuted even if Genocide is never (*inchoate crime*) perpetrated.[330] Proof of result is not necessary for the crime to have been committed, but has potentials to spur genocidal violence. The intent of the speaker matters, not the effectiveness of the speech in causing criminal action making the law preventative rather than reactive.[331]

The ICTR regards it 'the crime of crimes';[332] it became the first crime adopted in the Statute with virtually no controversy.[333] Article 6 of the Statute defines Genocide;[334] the provision is essentially a copy of Article 2 of the GC, often criticised for being excessively restrictive and difficult to apply to many cases of atrocities, but has stood the test of time, for the Rome Conference to maintain a fifty year old text evinces' that Article 6 of the Statute codifies a customary international norm.[335]

[330] Inchoate crimes are incomplete crimes connected to substantive crimes to gain conviction. Examples are conspiracies, criminal solicitation, and attempt to commit crimes, despite the crime not been completed. It's the act of preparing to commit another crime. Inchoate offense occurs even though the intended crime does not; the merger principle prohibits prosecution of both. An inchoate offense requires specific intent to commit the core crime such as Murder where the substantive crime fails on account of arrest, impossibility, or accident preventing execution of the crime, note a person may be found guilty of attempted murder (inchoate crime) for firing an unloaded gun at someone with intent to kill.

[331] Schabas (n 329).

[332] Prosecutor v *Kambanda* (ICTR-97-23-S) (1998) para 16; *Prosecutor v Serashugo* (ICTR-98-39-S) (1999) para 15; *Prosecutor v Jelisic´* (IT-95-10-A), Partial Dissenting Opinion of Judge Wald, (2001) para 1; *Prosecutor v Stakic´* (IT-97-29-T) Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October (2002) para 22.

[333] UN Doc A/CONF 183/C1/SR 3, paras' 2, 18&20 (Germany) para 22 (Syria) para 24 (United Arab Emirates), para 26 (Bahrain), para 28 (Jordan) para 29 (Lebanon) para 30 (Belgium) para 31 (Saudi Arabia) para 33 (Tunisia) para 35 (Czech Republic) para 38 (Morocco) para 40 (Malta) para 41 (Algeria) para 44 (India) para 49 (Brazil) para.54 (Denmark) para 57 (Lesotho) para 59 (Greece) para 64 (Malawi) para 67 (Sudan) para 72 (China) para 76 (Republic of Korea) para 80 (Poland) para 84 (Trinidad and Tobago) para 85 (Iraq) para 107 (Thailand) para 111 (Norway) para 113 (Cote d'Ivoire) para 116 (South Africa) para 119 (Egypt) para 122 (Pakistan) para 123 (Mexico) para 127 (Libya) para 132 (Colombia) para 135 (Iran) para 137 (United States) para 141 (Djibouti) para 143 (Indonesia) para 145 (Spain) para 150 (Romania) para 151 (Senegal) para 153 (Sri Lanka) para 157 (Venezuela) para 161 (Italy) para 166 (Ireland) and para 172 (Turkey).

[334] Lyal S Sunga, 'The Crimes within the Jurisdiction of the International Criminal Court' (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 61; Hermann von Hebel and Daryl Robinson, 'Crimes within the Jurisdiction of the Court', in Roy S Lee, edn, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, and Results*, (Kluwer L Intl, The Hague 1999) 79–126; Williams Schabas, 'Article 6' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (Baden-Baden: Nomos *Verlagsgesellschaft* 1999) 107-16; Emanuela Fronza, 'Genocide in the Rome Statute', in Flavia Lattanzi and William A Schabas (ed) *Essays on the Rome Statute of the International Criminal Court* (Rome: Editrice il Sirente, 2000)105–38; Christine Byron, 'Genocide', in Dominic McGoldrick, Peter Rowe and Eric Donnelly (ed), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford and Portland: Hart Publishing 2004)143–77; Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court, Genocide, Crimes Against Humanity, War Crimes* (Antwerp, Intersentia, 2002) 401–54.

[335] ICCSt (n 1) Article 6.

3.3.4 Intent to Destroy in Whole or in Part (*Dolus Specialis)*

Dolus specialis or 'special intent',[336] distinguishes Genocide from other crimes defined in the Rome Statute[337] the act of killing or other acts defined in Article 6[338] must be committed with specific intent to destroy in whole or in part a national, ethnical, racial or religious group as such. The perpetrator's intent must be 'to destroy' the group. During the debates surrounding the adoption of the Genocide Convention, the forms of destruction were grouped into three categories: physical, biological and cultural. Cultural genocide was the most difficult of the three, because it could well be interpreted in such a way as to include the suppression of national languages and similar measures. The drafters of the Convention considered such matters to be left to human rights and voted to exclude cultural genocide from the scope of the definition.[339]

But contemporary interpretation of genocide should not be limited by the intent of the drafters back in 1948.[340] The words 'to destroy' can readily bear the concept of cultural as well as physical and biological genocide, and bold judges might be tempted to adopt such progressive construction.[341] The decisions of the ICTY in *Krstic´* [342] suggest that the law may be evolving in this direction.[343] Other judgments (*Radoslv Brdanin)* adopt a more restrictive interpretation.[344] Though, evidence of *'*cultural genocide' has proven to be an important indicator of the intent (*Karadzic and Mladic)* to perpetrate physical genocide.[345] The definition of genocide contains no formal requirement that the acts must be committed as part of a widespread or systematic attack, or part of an organised plan to destroy the group.[346] Although, the *Jelisic´*case[347] upheld the theory of a lone genocidal maniac,[348] in the same

[336] *Prosecutor v Bagilishema* (ICTR-95-1-A-T) (2001) para 55.
[337] ICCSt (n 1) Article 6, 7, 8^2 & 8 *bis.*
[338] ibid Article 6.
[339] William A Schabas, *Genocide in International Law: The Crime of Crimes, CUP,* (2^{nd} edn 2009) 2 - 10.
[340] ibid.
[341] ibid.
[342]*Prosecutor v Krstic´* (IT-98-33-T) (2001) para 580; *Krstic´* (IT-98-33-A) 2004; Partially Dissenting Opinion of Judge *Shahabuddeen*, which was followed in *Prosecutor v Blagojevich´ et al* (IT-02-60-T) 2005.
[343] William A Schabas, *An introduction to the International Criminal Court* (4^{th} edn, Cambridge University Press, Cambridge 2011) 99-106.
[344] *Prosecutor v Radoslv Brdanin* (IT-99-36-T) 2004.
[345] *Prosecutor v Karadzic and Mladic* (IT-95-5-R61, IT-95-18-R61) Consideration of the Indictment within the framework of Rule 61 of the Rules of Procedure and Evidence (11 July 1996) para 94.
[346] ICCSt (n 1) Article 6; William A Schabas, *An introduction to the International Criminal Court* (4^{th} edn, Cambridge University Press, Cambridge 2011) 95-115.
[347]*Prosecutor v Jelisic* (IT-95-10); *Goran Jelisic* acquitted of Genocide and found Guilty of CAH and violations of laws or customs of war. The Chamber acquitted the accused of genocide, considering that the Prosecutor had failed to prove beyond a reasonable doubt that *Jelisic* acted with the required intent to destroy in whole or in part a national, ethnic or religious group.

case, the Appeals Chamber confirmed that 'the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases.[349]

The *Darfur* Commission of inquiry in 2004[350] concluded that genocide was not being committed in Sudan essentially because it failed to find evidence of a State plan or policy.[351] The Elements of crimes[352] require that an act of genocide 'took place in the context of a manifest pattern of similar conduct directed against the group or conduct that could itself effect such destruction.'[353] The words 'in whole or in part', indicate a quantitative dimension. The quantity contemplated must be significant.[354] Intent to kill only a few members of a group cannot be said to be genocidal. The prevailing view is that, where only part of a group is destroyed, it must be a 'substantial' (*Jelisic´)* part.[355] The reference to quantity is in the description of the mental element of the crime, what is important is not the actual number of victims but rather that the perpetrator intended to destroy a large number of members of the group. The number of victims becoming significant is the proof of such a genocidal intent. The greater the number of victims, the more logical the intent is to destroy the group 'in whole or in part'. Another interpretation is that genocide is deemed committed if a 'significant part' of the group is destroyed. This significant part may be persons of 'special significance' to the group (*Sikirica et al)* such as the leadership of the group.[356] Although, the ICTY extended the approach to cover men *(Krstic´)* of military age,[357] 'in part' could also

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[348] ibid para 100.

[349] *Prosecutor v Jelisic´* (IT-95-10-A) (200)1 para 48; The Appeals Chamber's *obiter dictum* was followed in Prosecutor v *Sikirica et al* (IT-95-8-I) Judgment on Defence Motions to Acquit (3 September 2001) para 62.

[350] SCR 1564 of 18 September 2004, establishment of the United Nations International Commission of Inquiry on Darfur (Darfur Commission).

[351] Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc S/2005/60, para 518.

[352] Elements of Crimes, Doc ICC-ASP/1/3, 113–15.

[353] ibid.

[354] William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011).) 95-115.

[355] *Prosecutor v Jelisic´* para 82.

[356] *Prosecutor v Sikirica et al* (IT-95-8-I) (2001) para 80,134; Prosecutor v *Krstic´* (IT-98-33-T) para 595.

[357] *Prosecutor v Krstic´* (IT-98-33-T) (2001) para 595. Case law also helps clarify when Genocidal intent can be established by virtue of a perpetrator's intent to destroy a protected group 'in part...' This requirement is held by the ICTY Appeals Chamber, 'where evidence showed that the alleged perpetrator intend to destroy at least a substantial part of the protected group.' Applying this standard in the case of *Prosecutor v Radislav Krstic´*, who commanded the Bosnian Serb Drina Corps during the infamous *Srebrenica massacre* of July 1995, ICTY trial chamber concluded that the intent to destroy the Bosnian Muslims of Srebrenica by killing their men constituted the intent to destroy a substantial part of a national group protected by the Genocide Convention, 'the Bosnian Muslims.' The trial chamber reasoned, in part, that 'Bosnian Serb forces should have known that by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group, they had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society. *The Prosecutor v Krstic´* was convicted

mean that the crime may be committed in a very small geographic area against a group defined by its borders, such as the Muslim population of the town of *Srebrenica*, attacked by Bosnian Serb forces in 1995.[358]

The destruction must be directed at one of the four groups listed in the definition: national, ethnical, racial or religious. The classification is often criticised because of its limited scope. Attempts to include political and social groups within the definition became rejected the second time after 1948 during the drafting of the Rome Statute.[359] The dissatisfaction with the narrowness of terms did reflect in the first conviction for genocide by the ICTR[360] it stated that the drafters of the Genocide Convention meant for the definition to apply to all 'permanent and stable' groups, a questionable interpretation because it goes beyond the text of the Statute.[361] The 'stable and permanent' approach to the definition of genocide was not followed by other Trial Chambers of the ICTR *(Kayishema*)[362] which also found no echo in the case law of the ICTY,[363] the common meaning of such concepts as 'racial groups' also has changed considerably since 1948.[364]

Taken as a whole, the four terms correspond closely to what human rights law refers to as ethnic or national minorities,[365] the real difficulty with attempting to find precise definition of the terms is its reliance on an objective conception of the protected groups. Almost without exception, the international tribunals have opted for a subjective approach, by which the groups are defined according to the attitudes of those who persecute them rather than pursuant to some scientifically verifiable list of parameters,[366] again using the Darfur

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of genocide, though the Court's Appeals Chamber later reduced this to a conviction for aiding and abetting genocide.

[358] ibid para 590.

[359] Conference decided not to, due to ICCSt (n 465) Article 7 (1) (h) on Persecution.

[360] *Prosecutor v Jean-Paul Akayesu*, Case ICTR-96-4-T, 37 ILM 1399 Judgment (2 September 1998); William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 95-115.

[361] *Prosecutor v Jean-Paul Akayesu*, Case ICTR-96-4-T, 37 ILM 1399 Judgment (2 September 1998) para 515; But in other cases before the Rwanda Tribunal, this approach has not been adopted; *Prosecutor v Kayishema and Ruzindana* (ICTR-95-1-T) Judgment, (21 May 1999) para 94; *Prosecutor v Rutaganda* (ICTR-96-3-T), Judgment (6 December 1999).

[362] *The Prosecutor v Clément Kayishema and Obed Ruzindana Case No. ICTR-95-1-T.*

[363] The Darfur Commission, which endorses the approach: Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc S/2005/60, para 498; William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press England 2011) 95-115.

[364] William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011).) 95-115.

[365] *Prosecutor v Krstic´* (IT-98-33-T) (2001) para 556.

[366] William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 95-115.

Commission example and concluding that the persecuted tribes of Western Sudan were subsumed within the scope of the Crime of genocide to the extent that victims and persecutors 'perceive each other and themselves as constituting distinct groups'.[367] This essentially subjective view towards the identification of groups contemplated by the definition of genocide has gained increasing acceptance in the case law *(Semanza)* of international tribunals.[368] The victims persecuted, were not only because the *Janjaweed* militias saw them as a 'permanent and stable group', but rather because they considered them to be a 'national, ethnical, racial or religious group'. Once the subjective approach, which relies essentially on the perpetrator's perception of the victim group, is adopted, no need to enlarge, by interpretation, the accepted definition of the crime of genocide.[369]

Defining the crime of Genocide ends with the words 'as such', according to the Appeals Chamber of the ICTR, the words 'as such' are 'an important element of genocide', included in the 1948 convention to reconcile the divergent views as to whether or not motive should be an element of the crime: The term 'as such' has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion.[370] The term 'as such' clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motives, legally irrelevant in the context.[371]

The definition of the mental element (*mens rea)* of Genocide, found in the provision, is followed by five paragraphs listing the punishable acts of genocide, an exhaustive list and cannot properly be extended to other acts of persecution[372] directed against ethnic minorities. Atrocities known as 'ethnic cleansing'[373] will for this reason be prosecuted as CAH rather

[367] The Darfur Commission, which endorses the approach: Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc S/2005/60, para 498; *Prosecutor v Krstic* para 509.
[368] *Prosecutor v Semanza* (ICTR-97-20-T), Judgment (15 May 2003) para 317; *Prosecutor v Kajelijeli* (ICTR-98-44A-T) (2003) para 811.
[369] William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 95-115.
[370] UN Doc A/AC 249/1998/CRP 8, at 2, also William A Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, Cambridge 2000)111-112.
[371] William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 95-115.
[372] *Prosecutor v Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic,* IT-95-16-T (2000), held that Persecution and Genocide are perpetrated against people who belong to a particular group and targeted because of being members of that group; Ilias Bantekas, & Nash, Susan, *International Criminal Law* (4th edn, Hart Publishing, 2010) 388.
[373] Roger Cohen, 'Ethnic Cleansing' in Roy Gutman, David Rieff and Anthony Dworkin (eds) *Crimes of War: What the Public Should Know* 2.0 (Reprint – edition W W Norton & Co 2007)175*;* Ethnic cleansing is a blanket

than as genocide,[374] killing is the core of the definition, the most important of the five acts of genocide. The *ad hoc* tribunals held that killing is synonymous with murder or intentional homicide.[375] (Although the Elements of Crimes say the term 'killing' is 'interchangeable' with 'causing death', which seems to leave room for unintentional homicide).

The second act of genocide, causing serious bodily or mental harm, refers to acts of major violence falling short of homicide. In the *Akayesu* decision,[376] the ICTR gave rape as an example of such act and that such conduct may include 'acts of torture, rape, sexual violence or inhuman or degrading treatment'.[377] The third act of genocide, imposing conditions of life calculated to destroy the group, applies to cases like the 'forced marches' of the Armenian minority in Turkey in 1915, but none of the acts defined in Article 6 ICCSt is genocidal if not accompanied by the specific intent. In cases where the intent falls short of the definition, prosecution may prevail (*Jelesic)* for CAH or war crimes.[378] Specific intent to destroy is inherent to genocide, distinguishing it from CAH.[379] However, genocidal acts could be treated as CAH.[380]

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term, and no specific crime goes by that name, the practice cover a host of criminal offenses. The United Nations Commission of Experts in a 1993 report to the Security Council defined 'ethnic cleansing' as 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.' ethnic cleansing was carried out in the former Yugoslavia by means of murder, torture, arbitrary arrest, detention, extrajudicial executions, rape, sexual assault, confinement of the civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of properties.

[374] *Prosecutor v Milos˘evic´ et al* (IT-99-37-I) (1999) The Prosecutor of the ICTY indicted Slobodan Milos˘evic´ for crimes against humanity and not genocide with respect to allegations of 'ethnic cleansing' in Kosovo during 1999.

[375] *Prosecutor v Akayesu* paras 228–9.

[376] ibid, Jean Paul Akayesu served as mayor of the *Taba* commune (Southwest of Kigali, Rwanda), from April 1993 until June 1994.Akayesu was responsible for maintaining law and public order in his commune and had exclusive control over the police, as well as any gendarmes at the disposal of the commune, about 2000 Tutsi(s) were killed in Taba between 7 April and the end of June 1994. On 13 February 1996, Jean Paul Akayesu was charged with genocide; complicity in genocide; direct and public incitement to commit genocide; and extermination, murder, torture, rape, inhumane acts CAH; and murder, cruel treatment and outrages upon personal dignity including rape (violations of the laws and customs of war). On 2 October 1998, the Trial Chamber at the ICTR found Akayesu guilty of genocide, direct and public incitement to commit genocide and all the counts of CAH. He was sentenced to life imprisonment. This judgment was upheld on appeal.

[377] William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press Cambridge 2011) 95-115.

[378] *Prosecutor* v *Jelesic* (IT-95-10-T); Andrew T Cayley, 'Recent Steps of the ICC prosecutor in the Darfur situation: *Prosecutor v President*.' The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al-Bashir on Charges of Genocide, (2008) 6 Journal of International Criminal Justice 829; *Prosecutor v Jelisic* Appeal Judgment was an important standing point to separate genocide from persecution. The ICTY Appeal Chamber held that genocidal intent is a specific intent which should be separate from and go beyond the discriminatory intent and that genocidal intent is more specific than the discriminatory intent which is included within the crime of persecution. Proof of a plan to destroy the target group selected on certain discriminatory grounds should make it easier to prove the genocidal intent.

[379] Genocide Convention (n 1) Article 2.

[380] Yavuz Aydin, 'The distinction between crimes against humanity and genocide focusing most particularly on the crime of persecution'. A conference presentation by Judge General Directorate of European Union Ministry of Justice of Turkey (2011) <www.justice.gov.tr/e-journal/> accessed 24 June 2014.

3.3.5 Responsibility, Intent and Joint Criminal Enterprise

Liability for genocide could be established under the extended form of joint criminal enterprise (JCE) within Article 25(3) (a) ICCSt, laid down in the legal characterisation offered by *Brdanin* responsibility[381] that a crime not part of the common purpose arises if the commission of the crime is foreseeable and the accused willingly took the risk to commit the Crime. In *Brdanin*, the Appeals Chamber of the ICTY stated that a participant in this extended form of JCE could be guilty of genocide even without having the specific intent to destroy a protected group.[382] Judge *Shahabuddeen* dissenting in *Brdanin* is of the opinion that 'specific intent has always ever been present.[383] William Schabas also adds a voice by pointing out that the physical perpetrator could be ignorant of the genocidal plan whilst the guiding mind behind the physical perpetrator is the individual likely to possess such specific intent required.[384] Evidence must show an accused, guilty of genocide pursuant to Articles 25, 27, 28 and 30 of the ICC Statute. Article 25 refers to 'Individual criminal responsibility.' The specific intent requirement for genocide would be difficult to prove for a lower level perpetrator, who many times would not be wholly conscious of the big picture in relation to the events immediately occurring.[385]

Cherif Bassiouni also pointed out that the crime of genocide articulated in Article 6 of the Rome Statute focuses on those who plan, initiate, and carry out the genocidal policies,[386] for instance the a*ctus reus* for persecution in the ICTY Statute does not require a link to crimes enumerated in the Statute, but on the other hand, its definition may encompass crimes not listed in the Statute because of its broad concept. However, there must be undoubtedly defined limits on the extension of persecution type of crimes stated in *Kupreskic*.[387] The *mens rea* for persecution is higher than other types of crimes within the ambit of CAH, but lower than that for genocide. Persecution 'derives its unique character from the requirement of a

[381] *Prosecutor v Radoslav Brdanin* (Appeal Judgement), IT-99-36-A (ICTY), 3 April 2007.
[382] *Prosecutor v Radoslav Brdanin, Decision on Interlocutory Appeal*, IT-99-36-A, (2004).
[383] ibid, Partially Dissenting Opinion of Judge Shahabuddeen para 11.
[384] William A Schabas, *Genocide in International Law The Crime of Crimes* (2nd edn, Cambridge University Press, Cambridge 2009)111- 286 The 'accomplice' is often the real villain and the 'principal offender' a small cog in the machine.
[385]John Shamsey, '80 Years too late: The International Criminal Court and the 20th century's fist Genocide' (2001) 11 *Journal of Transnational Law & Policy* 327.
[386] Cherif Bassiouni, 'Strengthening the Norms of International Humanitarian Law' in Burns H Weston and Stephen P Marks (eds), *The Future of International Human Rights* (Brill Nijhoff, 1999)257-61.
[387] *Prosecutor v Kupreskic et al* (IT-95-16-T) (2000).

specific discriminatory intent'[388] and in various cases,[389] it was emphasised that discriminatory intent can be shown in different forms of denial or infringement on a fundamental right laid down in international customary or treaty law.[390] The distinction between genocide and persecution lies in *mens rea* that is, the perpetrator 'of Genocide must intend to destroy all or part of a protected group, while the perpetrator of Persecution need not have such intent, though persecution can be seen in many other forms of inhuman and discriminatory intent other than intent to destroy.[391]

A perpetrator can be an individual acting in private capacity[392] provided his acts find support from a general state policy, but if state officials commit this offence acting in a private capacity, there must be some sort of explicit or implicit approval or endorsement of the State authorities or at least his offence must fit clearly within such a policy,[393] similar to genocide, the jurisprudence of *ad hoc* tribunals clarified that CAH can be committed by state authorities and their agents, as well as by non-state entities.[394]

3.3.6 The Auto-Genocide Principle

Where majority of victims share same ethnic (*Khmer* Rouge*)* identity, scholars have invoked the concept of auto-genocide, arguing that it is possible to satisfy the 1948 Convention's definition even where perpetrators sought to kill a substantial portion of their own ethnic/national group, others admit that if majority of victims got killed for reasons that may be broadly termed political, but form certain minority groups, such as the Muslims and *Khmer Buddhists*, being specifically targeted for destruction, the argument would be that the crimes against these groups remain genocidal.[395] The Jurisdiction of the Court established in

[388] *Prosecutor v Krnojelac* IT-97-25-T, ICTY (2002).
[389] *Prosecutor v Kordić & Čerkez* (IT-95-14/2) 'Lašva Valley'.
[390] William A Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 60- 75; Cassese Antonio, *International Criminal Law*, Cases and commentary (Oxford University Press, Oxford 2011) 167.
[391] ibid Cassese 168.
[392] Genocide convention Article 4; Short Jonathan M H, 'Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court' (2003) 8 *Michigan Journal of Race and Law* 503; Guenael Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 *Harvard International Law Journal* 237.
[393] W A Schabas *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011) 99 - 106.
[394] Ilias Bantekas, & Nash, Susan, *International Criminal Law*, (4th edn, Hart Publishing; 2010) 388,384.
[395] Diane F Orentlicher, *'*Genocide*'* in Roy Gutman, David Rieff and Anthony Dworkin (eds) *Crimes of War What the Public Should Know* 2.0 (Reprint – edition W W Norton & Co 2007) 192; also, In April 1975, a Communist group known as the Khmer Rouge, led by Pol Pot, seized control of Cambodia, renaming the country Democratic Kampuchea. Civil war existed in Cambodia five years prior to this, and between 1970 and 1973, during the Vietnam War, the United States bombed much of the countryside of Cambodia and

2006 to prosecute senior surviving *Khmer* Rouge leaders, a joint enterprise of the United Nations and the Government of Cambodia[396] includes genocide.[397] The lack of precedents enforcing the Genocide Convention left experts able to do little more than speculate knowledgeably about whether well-known candidates for 'Genocide' met the legal definition.

In recent times, international tribunals and national courts are increasingly clarifying definitional ambiguities and serving notices that those responsible for genocide may face justice. If States meet their obligations to convict for genocide, they have then begun to meet their duties to prevent it or stop it in its deadly tracks.[398]

3.3.7 Obligation to Cooperate Under the Genocide Convention

At what point does the obligation under GC kick in? Professor Schabas argues that no obligation to cooperate arises under the GC unless it is established that genocide has in fact occurred. Where there is in fact no genocide, parties to the Convention do not have the obligations that the Convention imposes to cooperate with relevant international criminal tribunals and in particular no obligation to arrest.

However, Article VI of the Convention[399] states: 'persons charged with genocide' shall be tried (by an international tribunal or by the Courts of the territorial state). If this obligation does not arise, until it is established that genocide has occurred then how is it to be determined whether genocide has occurred? Seemingly, this issue is only determined when prosecutions take place for genocide. Professor Schaba's views may result in a situation where a State simply refuses to prosecute for genocide because it has not been established to its satisfaction that genocide has indeed occurred, instead, letting the matter to be determined

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manipulated Cambodian politics to support the rise of pro-West Lon No l the leader of Cambodia the Khmer Rouge used the United States' actions to recruit followers and as an excuse for the brutal policies they exercised when in power. The Khmer Rouge's polices were guided by its belief that the citizens of Cambodia had been spoiled by exposure to ideas outside, by the West. The Khmer Rouge persecuted the educated, such as doctors, lawyers, and current or former military and police. Christian, Buddhist and Muslim citizens also were specifically targeted. In an effort to create a society without competition, in which people worked for the common good, the Khmer Rouge placed people in collective living arrangements or communes and enacted "re-education" programs to encourage the commune lifestyle.

[396] Reach Kram NS/RKM/0801/12/ as amended by NS/RKM/1004/06.

[397] The United Nations-Khmer Rouge Tribunal known as the Extraordinary Chambers in the Courts of Cambodia (ECCC), this international tribunal formed in 2003 by a Treaty between the UN and the Kingdom of Cambodia. Operated jointly by Cambodian and international judges, prosecutors, defence attorneys, investigators and victim representatives, the ECCC was established to investigate and prosecute the surviving leaders of the 1970s ultra-radical Khmer Rouge regime. It is considered as a hybrid court.

[398] Diane F Orentlicher, *'*Genocide*'* in Roy Gutman, David Rieff and Anthony Dworkin (ed) *Crimes of War What the Public Should Know* 2.0 (Reprint – edition W W Norton & Co 2007) 191.

[399] 78 UNTS 277 Convention on the Prevention and Punishment of the Crime of Genocide 1948 (Genocide Convention) entered into force 12th January 1951.

by relevant judicial processes, are there relevant obligations for ICC parties? Arising under the Rome Statute or under the UN Charter? This is significant in that Article 103[400] of the UN Charter obligates over other obligations for UN members under any other treaty.[401] The possibility that relevant obligations are UN Charter obligation arises because the Darfur situation was referred to the ICC through Security Council Resolution otherwise the situation could have been clumsy prosecuting under intervention law.[402]

3.3.8 Direct and Public Incitement to Commit Genocide

State Parties to the Rome Statute are under obligation to cooperate with the ICC[403] in the enforcement of arrest warrants. However, two decisions of the African Union (AU) binding on its member States require arrest warrants not be enforced.[404] Thus, African States that are members of the AU and State Parties to the Rome Statute are confronted with conflicting obligations.[405] These cannot be resolved by principles of interpretation. The impasse requires a political solution.[406]

The Incitement Provision of the GC took on new importance in the wake of the Genocide in Rwanda, between April and July 1994, members of the Hutu majority annihilated the Tutsi minority, the ICTR in 1997 indicted three Rwandans for 'incitement to genocide': *Hassan Ngeze* who founded, published, and edited *Kangura* (Wake Others Up!), a Hutu-owned tabloid that in the months preceding the Genocide published vitriolic articles dehumanising the Tutsis as *inyenzi* (cockroaches) though never called directly for killing them; and *Ferdinand Nahimana* and *Jean-Bosco Barayagwiza* founders of a radio station called *Radio Télévision Libre des Milles Collines* (RTLM) that indirectly and directly called for murder, providing names and locations of people to be killed. In the days leading to and during the massacres, RTLM received help from Radio Rwanda, the government-owned station;

[400] Article 103 UN Charter reads: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
[401] Article 2 (2) UN Charter All Members..., shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
[402] Security Council with Resolution 1593 (2005) Adopted by vote of 11 in favour to none against, with 4 Abstentions (Algeria, Brazil, China, United States) refers situation in Darfur, Sudan, to the Prosecutor of the International Criminal Court.
[403] ICCSt (n 1) Article 86.
[404] Al-Bashir and Kenyatta arrest warrants by the ICC.
[405] *Dapo Akande*, 'Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003)1 *Journal of International Criminal Justice* 618.
[406] William A Schabas, 'On the Genocide Convention' *a paper delivered at the human right international criminal law forum [2011] (London).*

programs relayed to villages and towns throughout the Country by a network of transmitters operated by Radio Rwanda. At the heart of the Rwanda 'Media Trial' in 2000 which centred on free speech rights. 'A key question is what kind of speech is protected and where does the limits lie'? Said Stephen Rapp a senior prosecutor for the Tribunal, 'it is important to draw that line, and give the world some guidance.'[407]

In December 2003, the ICTR handed down its verdict in *Prosecutor v Ferdinand Nahimanaen et al*.[408] the Judges convicted *Ngeze, Nahimana*, and *Barayagwiza* for direct and public incitement to genocide. The Tribunal held: 'Without a firearm, machete or any physical weapon, you caused the death of thousands of innocent civilians.'[409] In framing their verdict, the judges noted: 'This case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg.[410] The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control the media are accountable for its consequences. The prosecutors' burden involved the interpretation of euphemisms (in order to prove the 'direct' nature of the incitement), such as the phrase "go to work" as a call to kill the Tutsi and the Hutu who opposed the Rwandan regime. That an individual or group killed someone in response to the radio broadcasts or newspaper articles was not required, to prove the incitement to genocide charge.

In January 2007 lawyers for the defendants in the Rwanda 'Media Trial'[411] appealed the Tribunal's decisions on numerous grounds, but the Tribunal in November affirmed the charge of 'direct and public incitement to commit genocide' for *Ngeze and Nahimana*.[412] The Judges reversed the finding of guilt against *Barayagwiza,* ruling that only RTLM broadcasts made after 6 April 1994 (when the genocide began), constituted 'direct and public incitement to commit genocide,' and that *Barayagwiza* no longer exercised control over the employees of the radio station at that time. (The Tribunal did affirm the findings of guilt against *Barayagwiza* on different grounds, for instigating the perpetration of acts of genocide and CAH) because of the reversal of some charges against the three defendants, the Judges

[407] ibid.
[408] *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* ICTR-99-52-A (Judgment) (28 November 2007) 'the Genocide case.'
[409] ibid.
[410] ibid.
[411] Zahar Alexander, 'The ICTR's Media Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide' (2005) 16 *Criminal Law Forum* 33.
[412] *Prosecutor v Nahimana, Barayagwiza and Ngeze* ICTR-99-52-T Judgment (3 December 2003).

lowered the defendants' sentences: *Nahimana's* from life to 30 years, *Negeze's* from life to 35 years, and *Barayagwiza's* from 35 to 32 years.[413]

Does 'hate speech' or 'direct public incitement' to commit genocide create liability? The Rwanda Media case emphasises that incitement to commit genocide requires a calling on the audience (be they listeners or readers) to take action of some kind, absent such call, inflammatory language may qualify as hate speech but does not constitute incitement.[414]In many jurisdictions 'hate speech' has been criminalised.[415] The Trial judgment in the *Bikindi* case,[416] Simon *Bikindi* was a famous composer and singer from Rwanda who distinguished himself in the run-up to the 1994 genocide by using his music and fame to drum up support for the Hutu-led regime, and by fostering ethnic hatred throughout the carnage. He was accused of incitement for composing and performing songs like *Nanga Abahutu* (I hate these Hutu an anti-Tutsi song). According to prosecution witnesses who appeared before the ICTR, *Bikindi's* song was not only an invitation to hate Tutsi, given the context of the civil war, but to be ready to kill them as well. The ICTR Trial Chamber was not in the end persuaded that *Bikindi's* songs amounted to incitement to commit genocide. Instead, the Judges convicted *Bikindi* for statements that he made (using loudspeakers) in the Rwandan

[413] William A Schabas, 'On the Genocide Convention' a paper delivered at the human right international criminal law forum [2011] London.

[414] Hate Speech and Incitement to Genocide: Being the text of a paper delivered at a UNGA Conference, 1 February 2013 organised by United States Holocaust Memorial Museum & United Nations Office on Genocide Prevention and the Responsibility to protect.

[415]In England, Wales, and Scotland, the 'Public Order Act 1986' prohibits in Part 3, expressions of racial hatred, which is defined as hatred against a group of persons by reason of the group's colour, race, nationality (including citizenship) or ethnic or national origins, under s 18 of the Act; Also the 'Criminal Justice and Public Order Act 1994' inserted Part 4A into the Public Order Act 1986. That part prohibits anyone from causing alarm or distress. Part 4A states: (1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he:(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress... The Racial and Religious Hatred Act 2006 amended the Public Order Act 1986 by adding Part 3A. That Part says, 'A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.' The Part protects freedom of expression by stating in Section 29 J: ...antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system. The Criminal Justice and immigration Act 2008 amended Part 3A of the Public Order Act 1986. The amended Part 3A adds, for England and Wales, the offence of inciting hatred on the ground of sexual orientation. All the offences in Part 3 attach to the following acts: the use of words or behaviour or display of written material, publishing or distributing written material, the public performance of a play, distributing, showing or playing a recording, broadcasting or including a programme in a programme service, and possession of inflammatory material. In the circumstances of hatred based on religious belief or on sexual orientation, the relevant act (namely, words, behaviour, written material, or recordings, or programme) must be threatening and not just abusive or insulting. The Football Offences Act 1991 (amended by the Football (Offences and Disorder) Act 1999) forbids indecent or racialist chanting at designated football matches.

[416] *The Prosecutor v Simon Bikindi* ICTR-01-72-T Judgment (2 December 2008).

countryside during the Genocide (where he asked his audience, among other things, Have you killed the Tutsi here? and referred to Tutsis as 'snakes'. The *Bikindi* case illustrates that a sophisticated understanding of cultural context (notably linguistic usage and subtlety) is critical for the legal determination of the directness of any alleged incitement to genocide.

In contrast to the Rwanda Tribunal, the International Crime of direct and public incitement to commit genocide has played virtually no role in the prosecution of genocide at the ICTY the prosecution of atrocities other than genocide has pre-dominated the proceedings, most experts believe that mass communication in the former Yugoslavia was employed chiefly for spewing hate propaganda, rather than incitement to commit genocide as defined in strictly legal terms.[417] The Crime of Incitement remains firmly in place on the international legal stage, in 1998 an incitement provision was included in Article 25(3) (e)[418] in conjunction with Article 6 ICCSt on Genocide. In 2008, after seven years of negotiations, the European Union (EU) adopted a framework decision on combating racism and xenophobia.[419] The document's principal contribution is the EU-wide prohibition of public incitement and hatred against persons of a different race, colour, religion and national or ethnic origin, punishable by a prison sentence of one to three years. The document also prohibits public approval, denial, or gross trivialisation of international crimes, notably genocide, and is an outgrowth of pre-existing European laws prohibiting Holocaust denial. The Genocide Convention's Article 3 (c) has recently been invoked in the spirit of genocide prevention.[420]

[417] William A Schabas, 'On the Genocide Convention' *a paper delivered to the human right international criminal law forum [2011]* London.
[418]ICCSt (n 1) Article 25.
[419] The Council of the European Union, on 28 November 2008 adopted the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law 16325/1/08 REV 1 (Presse 344); Publicly inciting to violence or hatred, via public dissemination or distribution of tracts, pictures or other material; publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal of 8 August 1945, as well as crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or members of a group.
[420] On 26 October 2005, Iranian president *Mahmoud Ahmadinejad* at the 'World without Zionism' conference in Tehran called for the State of Israel to be 'wiped off the map.' *Ahmadinejad* has continued to make public speeches either directly or indirectly calling for Israel's destruction; in 2006, Israeli diplomats proposed to charge *Ahmadinejad* with direct and public incitement to genocide before the International Criminal Court. *Irwin Cotler*, the former Canadian Minister of Justice and Member of the Canadian Parliament, has also argued that the Iranian president is guilty of state-sanctioned incitement to genocide, incitement that is both "direct and public" as defined in the Genocide Convention. Additionally, in June 2007, the US House of Representatives passed a resolution calling upon the UNSC to charge *Ahmadinejad* with violating the Genocide Convention by his repeated calls for Israel to be annihilated. Government officials in the United Kingdom and Australia have adopted similar stances to that of the Americans, to date, no international legal proceedings for incitement to genocide have moved forward against *Ahmadinejad*.

3.3.9 Conclusion

This part of the Chapter evaluates genocide as a crime under the Rome Statute, the status of the Crime is customary under international law, and defined in the 1948 Genocide Convention. The section also examines the specific intent requirement to establish liability for the crime of genocide and the crime of persecution which can only be committed against individuals/group members on the ground of their identifiable properties,[421] characterised either by national, ethnical, racial, or religious identity.[422]

Genocide as a crime of 'universal jurisdiction'[423] can be prosecuted by courts other than those where the offence is committed.[424] It is also established that the Crime of genocide can be committed against any individual, civilian or combatant whilst CAH 'may only be committed against any civilian population.'[425] 'Persecutions embrace actions that may not be prohibited by national legal systems. …such actions may take the form of acts other than murder, extermination, enslavement, or deportation', since no specific target group is necessary for persecutions to be established, therefore 'civilians or members of the armed forces may be victims of this class of crimes.[426] While nearly all instances of genocide would constitute CAH, not all CAH will meet the legal definition of genocide. Unlike CAH which does not have a specific international convention, there is a convention for genocide and also included in the Rome Statute.

The section concludes with the relevance of hate speech and the Media as tools for perpetrating or inciting to commit genocide. In the next section the Theory and the Kampala definition of the Crimes of Aggression will be examined as specified within the Rome Statute

[421] Yavuz Aydin, 'The distinction between crimes against humanity and genocide focusing most particularly on the crime of persecution.' A conference presentation by Judge General Directorate of EU Ministry of Justice of Turkey [2011]; Short M H Jonathan, 'Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court' (2003) 8 *Michigan Journal of Race and Law* 503.
[422] Genocide Convention (n 1).
[423] Cherif M Bassiouni, 'Strengthening the Norms of International Humanitarian Law' in Burns H Weston and Stephen P Marks (ed), *The Future of International Human Rights* (Brill Nijhoff, The Hague 1999) 257-61.
[424] Yavuz Aydin, 'The distinction between crimes against humanity and genocide focusing most particularly on the crime of persecution.' A conference presentation by Judge General Directorate of EU Ministry of Justice of Turkey [2011]; Short M H Jonathan, 'Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court' (2003) 8 *Michigan Journal of Race and Law* 503.
[425] *Guénaël Mettraux,* '*Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda'* (2002) 43 *Harvard International Law Journal* 237; Short M H Jonathan, 'Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court' (2003) 8 *Michigan Journal of Race and Law* 503.
[426] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press, Oxford 200) 85.

of the International Criminal Court in conjunction with the General Assembly resolution GAR 3314 (xxix).

Part Four

The Crime of Aggression

'Universal peace has been one of the great historical dreams of humankind. Unfortunately, it remains a dream whose realisation eludes the desperate needs of man.'

Cherif M Bassiouni

3.4.1 Introduction

This segment examines, the Crime of aggression (aggression) under Articles 5^{1} (d); defined in Article 8 *bis* of the Rome Statute (the Statute),[427] in consonant with relevant provisions of the United Nations Charter.[428] Aggression is a core crime within the Court's jurisdiction, although an unsettled area of law, but the Kampala conference in 2010,[429] defined and adopted 'Aggression' into the Statute pending full ratification and enforcement by 1 January 2017. The lack of sufficient resources and jurisprudence relating to aggression will limit analysis in this section for the most part to textbooks, writings/opinions of relevant authorities and academic publications. Although, aggression was not to be added as a substantive crime under the Statute, at the Rome Conference (RC),[430] but the German and Japanese delegations insisted on the inclusion of the Crime of Aggression in the statute, having been an international crime,[431] 'crimes against peace', the term used during the Nuremberg and Tokyo tribunals.[432] Prosecution of the crime then, makes it part of customary international law, in confirmation, the House of Lords, in *R v Jones*[433] held that 'aggression' formed part of customary international law, therefore, part of a country's domestic law. Also, the High Command case held: 'that aggression needs both a criminal act and a mental element'[434] and where there is no aggressive intent, there is no evil inherent in a nation being militarily

[427] UN Doc A/CONF 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 Rome Statute of the International Criminal Court, 17 July 1998 ICCSt (n 1).
[428] 1 UNTS XVI, *Charter of the United Nations*, 24 October 1945 (UN Charter).
[429] The first-ever Review Conference on the Rome Statute of the International Criminal Court (ICC) took place in Kampala, Uganda from 31 May to 11 June 2010 (ICC - Review Conference).
[430] Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', (1999) 93 *American Journal of International Law* 2,10 (discussing the treatment of the crime of aggression in the negotiation of the Rome Statute).
[431] Report of the *ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc A/50/22, paras 63–71; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc A/51/22, vol I paras 65–73.
[432] Historical Review of Developments Relating to Aggression, UN Doc PCNICC/ 2002/SGCA/L 1 and Add 1.
[433] *R* v *Jones et al*. [2006] UKHL 16.
[434] *United States* v *von Leeb*, para 379.

strong,'[435] for instance, Switzerland being heavily armed to protect its neutrality, same applies to military build-ups of years, as long as they were undertaken on grounds of self-defence,[436] the leadership actions cannot be regarded as criminal.[437] Having established that aggressive action must be committed with criminal intent, it remains to be assessed how it can be shown that an individual intended his acts to be of an aggressive nature.

This section will also examine the procedures and consensus reached at the Kampala conference on the amendments of the Statute, the definition and adoption of the Crime of Aggression and current state of affairs of the Crime pending its ratification and concludes with expectation towards enforcement of the Crime by the International Criminal Court (ICC).

3.4.2 Background to the Crime of Aggression

The doctrine of 'just war' (*jus ad bellum*)[438] depicts attempts made by early scholars[439] to restrict recourse to confrontation; the emergence of the Westphalian system[440] (a notion of State sovereignty and equality) brought the acceptance of the right of States to wage war in self-defence.[441] War, *Von Clausewitz* proclaimed is the 'continuation of political activity by other means.'[442] However, efforts have been undertaken to limit the traditional *jus ad bellum*, with the Hague Peace Conferences of 1899 and 1907[443] although, it failed to ban war, due to

[435] ibid.
[436] 1 UNTS XVI, *Charter of the United Nations*, 24 October 1945; Article 51 (UN Charter).
[437] Yoram Dinstein, *War, Aggression and Self-defence* (5th edn, Cambridge University Press 2011)106.
[438] Latin for 'right to war' a set of criteria consulted before engaging in war, in order to determine whether entering into war is putative; whether it is a just war.
[439] St Augustine (354-430), St. Thomas Aquinas (1225-1274) and Victoria (1480-1546).
[440] The term refers to the Peace of Westphalia of 1648, which ended the Thirty-Years War, acknowledging the doctrine of *cuius regio, eius religio (*The Peace of Augsburg (1555) generally, and the principle of *cuius regio, eius religio* specifically, marked the end of the first wave of organised military action between Protestants and Catholics; however, its limitations did not address the emerging trend toward religious pluralism (co-existence within a single territory) developing throughout the German-speaking lands of the Holy Roman Empire) and finally establishing the European balance of power system. See, for details: Ahmed M Rifaat, *International Aggression: A study of the Legal Concept – Its Development and Definition in International Law* (Prometheus Books, 1979) 355.
[441] The UN charter (n 436) Article 51, expresses the fact that self defence is an inalienable right of Nations.
[442] Carl von Clausewitz, *On War* by Michael Eliot Howard and Peter Paret (ed) (Princeton University Press, 1989) 87.
[443] The Hague Conventions of 1899 and 1907 are a series of international treaties and declarations negotiated at two international peace conferences at The Hague in the Netherlands. The First Hague Conference was held in 1899 and the Second Hague Conference in 1907. Along with the Geneva Conventions, the Hague Conventions were among the first formal statements of the laws of war and war crimes in international law; A third conference was planned for 1914 and later rescheduled for 1915, but it did not take place due to the start of World War I; The Hague Conventions of 1899 and 1907, the first multilateral treaties addressed to the conducts of warfare and largely based on the Lieber Code, signed and issued by US President Abraham Lincoln to the

the outbreak of the First World War (WW1),[444] it was undisputed that 'States had an unrestricted right to go to war and acquire territories (*Uti possidetis*)[445] by right of conquest.' Unleashed conflicts, unprecedented destructions, deaths and eroding traditional power balance created opportunities to re-evaluate ideas aimed at preserving peace. Consequently, the Versailles negotiations a crucial part of the final peace deal established the League of Nations. Article 10 of the Covenant of the League of Nations (LN) provides that: 'the League is to protect the territorial and political integrity of States from aggression'. Although, it could not be interpreted as a legal prohibition of aggression since other provisions in the Covenant allowed recourse to war in certain circumstances. Meanwhile, the Paris Peace Conference endeavoured to deal with those who, in the eyes of the Victors, had initiated the war.

The period between the two world wars saw a number of attempts to outlaw wars and define the Concept of Aggression. The 1928 Kellogg-Briand Pact[446] in its provisions, outlawed war

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Union Forces of the United States in April 24, 1863, during the American Civil War. The Lieber Code was the first official comprehensive codified law that set out regulations for behaviour in times of martial law; protection of civilians and civilian property and punishment of transgression; deserters, prisoners of war, hostages, and pillaging; partisans; spies; truces and prisoner exchange; parole of former rebel troops; the conditions of any armistice, and respect for human life; assassination and murder of soldiers or citizens in hostile territory; and the status of individuals engaged in a state of civil war against the government. As such, the codes were widely regarded as the best summary of the first customary laws and customs of war in the 19th century and were welcomed and adopted by military establishments of other nations. The 1874 Brussels Declaration (which was never adopted by all major nations) listed 56 articles that drew inspiration from the Lieber Code. Much of the regulations in the Hague Conventions were borrowed from the Lieber Code.

[444] The fist World War or the Great War (1914- 1919).

[445] Acquisition of territory by force; the annexation of Crimea by the Russian Federation refers to the 2014 incorporation of most of the Crimean the annexation in March 2014.

[446] *P46 Stat. 2343, TS No 796, 94 LNTS 57;Act of Paris or Treaty Providing for the Renunciation of War as an Instrument of National Policy,* The Kellogg–Briand Pact did not live up to its objective of ending war, hence, made no immediate contribution to international peace and proved to be ineffective in the years to come. Moreover, the pact erased the legal distinction between war and peace since the signatories, having renounced the use of war began to wage wars without declaring them as evidenced by the US intervention in Central America, the Japanese invasion of Manchuria in 1931, the Italian invasion of Abyssinia in 1935, the Soviet invasion of Finland in 1939, and the German and Soviet Union invasions of Poland. Nonetheless, the pact is an important multilateral treaty because, in addition to binding the particular nations that signed it, it has also served as one of the legal bases establishing the international norms that the threat or use of military force in contravention of international law, as well as the territorial acquisitions resulting from it, are unlawful. Remarkably, the pact served as the legal basis for the creation of the Notion of crime against peace prosecuted at Nuremberg. The interdiction of aggressive war was confirmed and broadened by the United Nations Charter, which provides in article 2, paragraph 4, that "members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN" making it illegal or unlawful to annex territory by force. However, neither this nor the original treaty has prevented the later use of annexation, broadly, there is a strong presumption against the legality of using or threatening military force against another country. Nations that have resorted to the use of force since the Charter came into force have typically invoked self-defence or the right of collective defence.

as an 'instrument of national policy.' without a definition of aggression[447] neither did it contain penal sanctions in this respect.[448] Two draft treaties prepared under the auspices of the League of Nations;[449] declared aggression an international crime.[450] Although, the Council of the League of Nations later condemned the Italian invasion of Ethiopia and the Soviet action against Finland as acts of 'aggression', but did not base its decisions on Article 10 of the Covenant[451] and therefore did not apply any legal notion of aggression.[452] Ultimately, the outbreak of the Second World War (WW11)[453] and the decline of the League of Nations rendered obsolete further discussion on defining Aggression.[454]

But, at the London Conference the Allies decided to include aggression as an international crime, Article 6(a) of the Nuremberg Charter[455] provided for individual criminal responsibility for crimes against peace namely, planning, preparation, initiation, waging of a war of aggression in violation of international treaties, agreements, assurances, participation in a common plan and or conspiracy for the accomplishment of any of the foregoing is a

[447] Julius Stone, *Aggression and World Order* (Lawbook Exchange, 2010)32.
[448] The term refers to the Peace of Westphalia of 1648, which ended the Thirty-Years War, acknowledging the doctrine of *cuius regio, eius religio* and finally establishing the European balance of power system. See, for details: Ahmed M Rifaat, International Aggression: A study of the Legal Concept – Its Development and Definition in International Law (Prometheus Books, 1979)76-80
[448] A draft Treaty of mutual assistance, sponsored by the League of Nations, described aggressive war as an international crime in 1923. In the following year the same description was used in the preamble to a protocol recommended by the League of Nations Assembly but not ratified. In 1927 the League of Nations assembly unanimously adopted the preamble which used that description. The Pan American conference in 1928 unanimously resolved that war of aggression constitutes an international crime against humanity. In the same year the General Treaty for the Renunciation of war (94 LNTS 57) the Kellogg Briand Pact condemned recourse to war as an instrument of international policy.
[449] A draft Treaty of mutual assistance, sponsored by the League of Nations, described aggressive war as an international crime in 1923. In the following year the same description was used in the preamble to a protocol recommended by the League of Nations Assembly but not ratified. In 1927 the League of Nations assembly unanimously adopted the preamble which used that description. The Pan American conference in 1928 unanimously resolved that war of aggression constitutes an international crime against humanity. In the same year the General Treaty for the Renunciation of war (94 LNTS 57) the Kellogg Briand Pact condemned recourse to war as an instrument of international policy.
[450] Draft Treaty of Mutual Assistance (1923) and Geneva Protocol for the Pacific Settlement of International Disputes (1924), both in Defining International Aggression: The Search for World Peace 77, Benjamin B. Ferencz, 'Defining International Aggression: The Search for World Peace' (2 volumes, Oceana publications, Dobbs Ferry, New York, 1977) 132.
[451] The term refers to the Peace of Westphalia of 1648, which ended the Thirty-Years War, acknowledging the doctrine of *cuius regio, eius religio* and finally establishing the European balance of power system; Ahmed M Rifaat, *International Aggression: A study of the Legal Concept – Its Development and Definition in International Law* (Prometheus Books, 1979)100.
[452] Julius Stone (n 447)37.
[453] Second World War 1939-1945.
[454] *Draft Treaty of Mutual Assistance* (1923) and *Geneva Protocol for the Pacific Settlement of International Disputes* (1924), both in Defining International Aggression: Benjamin B Ferencz, *Defining International Aggression: The Search for World Peace* (2 volumes, Oceana publications, Dobbs Ferry, New York, 1975)
[455] United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), 8 August 1945.

culpable offence.[456] Additionally, the IMT Charter,[457] for the first time in international law, stated that Heads of States or high officials were not immune from prosecution.[458] Although, defendants during trials argued that they were subjected to *ex post facto* law which was in contradiction of internationally recognised principle of *nullum crimen sine lege*.[459] But the Tribunal in its judgment rendered on 30 September to 1 October 1946, proclaimed 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,'[460] thereby laying the groundwork for what is now an established principle of international criminal law - individual criminal responsibility.[461]

Aggression can be seen in Articles 1(1) and 39 Of the United Nations Charter with no amplification of its meaning. The General Assembly (GA) asks the International Law Commission (ILC) to formulate the principles emanating from the Nuremberg trials and work began in 1950: Principle VI repeats the definition of 'crimes against peace' from the Nuremberg Charter.[462] The difficulties in defining 'aggression' led to the suspension of work of the ILC on the Code of Crimes in 1954. The General Assembly further appointed a fifteen-member special committee on the definition of Aggression[463] attempts to agree on a definition of aggression generated 'more aggression than the definition sought.'[464] It took

[456] Nuremberg Charter Article 6 (a); The paper that was prepared by the Secretariat for the use of the Preparatory Commission's Working Group on the Crime of Aggression at its Ninth Session (8-19 April 2002): Historical Review of Developments Relating to Aggression, UN Doc. PCNICC/2002/WGCA/L1; Historical Review of Developments Relating to Aggression (Addendum), UN Doc PCNICC/2002/WGCA/L1/Add1.
[457] United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945.
[458] L C Green, *The Contemporary Law of Armed Conflict* (3rd edn, Juris Publishing Inc, 2008) 10-25; This is stated as a customary international law doctrine as one of the 7 principles after the Nuremberg judgment.
[459] ICCSt (n 1) Article 22; The term refers to the Peace of Westphalia of 1648, which ended the Thirty-Years War, acknowledging the doctrine of *cuius regio, eius religio* and finally establishing the European balance of power system; Ahmed M Rifaat, *International Aggression: A study of the Legal Concept – Its Development and Definition in International Law* (Prometheus Books, 1979)150.
[460] The Nuremberg Trials, *Judgment of the International Military Tribunal for the Trial of Major German War Criminals*, (1947) 41 *American Journal of International Law* 172, 221.
[461] ICCSt (n 1) Article 25, (Individual Criminal Responsibility) The paper that was prepared by the Secretariat for the use of the Preparatory Commission's Working Group on the Crime of Aggression at its Ninth Session (8-19 April 2002); Historical Review of Developments Relating to Aggression UN Doc PCNICC/2002/WGCA/L1 and (Addendum) UN Doc PCNICC/2002/WGCA/L1/Add1.
[462] Ahmed M Rifaat, International Aggression: A study of the Legal Concept – Its Development and Definition in International Law (Prometheus Books, 1979)182-186; although, subsequently discussed by the sixth Committee of the General Assembly, the International Law Commission's formulation of the Nuremberg Principles was eventually neither adopted nor rejected by the Committee.
[463] GA Res 688(VII).
[464] B Ferencz, 'An International Criminal Code and Court: Where They Stand and Where They're Going' (1992) 30 *Columbia Journal of Transnational Law* 375, 377

three more special committees to deliberate on the definition,[465] in December 1974 after stormy debates[466] the GA adopted a consensus definition of aggression.[467] The preamble proves, it was meant to be an instrument of guidance for the SC in its determination of aggression under Article 39 of the UN Charter.[468] After listing a number of acts that constitute aggression, Article 5(2),[469] of the GA definition of aggression establishes that a 'war of aggression is a crime against international peace' and distinguishes between 'Acts of aggression' and the 'Crime of aggression'. 'Aggression gives rise to international criminal responsibility'**,** the resolution was aimed at States not individuals[470] hence, no mention of individual liability; Resolution 3314 (xxix)[471] had not been intended as an instrument of criminal prosecution, though became a starting point in defining the Crime of Aggression.[472]

At the Rome Conference, due to varying objectives, a precise meaning of the term 'war of aggression' could not be reach. Some pressed for a precise definition (the United States) that could be applied in future, whilst the Soviet Union, wanted something vague.[473] Over the years, different political states agendas shaped the discussions on aggression.[474] Discussions surrounding the definition of aggression to be included in the Rome Statute came to a halt as States involved found it difficult to agree on what constitutes acts of aggression.[475] The Bureau of the Rome Conference suggested on 10 July 1998, that if generally acceptable provisions and definitions of the Crime of Aggression could not be developed forthwith,

[465] GA Res 895(IX) 1956-1957; (GA Res. 1181(XII); 1959-1967; (GA Res 2330(XII)1968-1974 The condemnation of aggressive war found further expression in General Assembly Resolutions 2131 (xx) of 21 December 1965, 2625 (xxv) of 24 October 1970 and 3314 (xxix) of 14 December 1974.

[466] Benjamin B Ferencz, Defining International Aggression: The Search for World Peace (2 volumes, Oceana publications, Dobbs Ferry New York 1975) 328.

[467] GA Res 3314(xxix).

[468] Benjamin B Ferencz, *Deterring Aggression By Law - a Compromise Proposal* (2001) <http://www.benferencz.org/> accessed 24 June 2014.

[469] A/RES/3314(xxix)14 December 1974.

[470] Benjamin B Ferencz, *Deterring Aggression By Law - a Compromise Proposal* (2001) < http://www.benferencz.org/> accessed 24 June 2014.

[471] A/RES/3314 (xxix).

[472] Lyal S Sunga, 'The Crimes within the Jurisdiction of the International Criminal Court' (1998) 6 European *Journal of Crime, Criminal Law and Criminal Justice* 61, 65.

[473] Grant M Dawson, 'Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?' (2000)19 *New York Law School Journal of International and Comparative Law* 413, 418.

[474] The paper that was prepared by the Secretariat for the use of the Preparatory Commission's Working Group on the Crime of Aggression at its Ninth Session (8-19 April 2002): 'Historical Review of Developments Relating to Aggression', UN Doc PCNICC/2002/WGCA/L.1 and (Addendum) UN Doc PCNICC/2002/WGCA/L.1/Add1.

[475] Leila Wexler Sadat, 'The Proposed International Criminal Court: An Appraisal*'* (1996) 29 *Cornell International Law Journal* 665.

aggression would be dropped from the Statute.[476] This provoked discontent amongst delegates and forced the Bureau to reconsider its stand.[477] The non-aligned countries insisted and pursued a 'compromise on the addition of aggression as a generic crime within the jurisdiction of the Court[478] pending the definition of its elements by the preparatory committee or a review conference at a later date'.[479] Agreements on the final day of the conference authorised the Court to exercise jurisdiction over aggression once the crime is defined and its scope designated in a manner consistent with the purposes of the Statute and ideals of the United Nations with a provision adopted in accordance with Articles 121 and 123 ICCSt defining the crime and setting out the conditions under which the Court shall exercise jurisdiction.

During the Rome Conference, the Preparatory Commission had a working group on aggression which met throughout the life of the Commission, the Coordinator of the Working Group issued a paper in 2002 setting out parameters of the issue framing the debate,[480] a number of complex questions including the definition to be adopted, the roles for the United Nations Security Council (UNSC) and relevance of other provisions of the Statute concerning issues of complicity in prosecution for the crime; its work continued by the Special Working Group on the 'Crime of Aggression' (SWGCA)[481] established under the authority of the Assembly of States Parties (ASP) with a view to preparing proposals well ahead of the 2009 Review Conference.

3.4.3 Deliberations up to Kampala

The first review conference of the Rome Statute took place in Kampala, Uganda from 31 May to 11 June 2010. While the 8th session of the ASP, the last opportunity States Parties had

[476] UN Doc A/CONF183/C1/L 59.
[477] UN Doc A/CONF 183/C 1/SR 33 para 17 (Movement of Non-Aligned Countries) para 29 (Syria) para 63 (Ghana) para 73 (Germany); UN Doc A/CONF183/C1/SR 34 para 9 (Trinidad and Tobago) para 43 (Azerbaijan), para 54 (Southern African Development Community) para 61 (Iran), para 68 (Cuba) para 72 (Jordan) para 94 (Sudan) para 98 (Poland) UN Doc A/CONF183/C1/SR 35 para 1 (Egypt) para 10 (Greece) para 12 (Nigeria) para 18 (Tunisia) para 29 (Afghanistan) para 30 (Algeria) para 33 (Indonesia) para 47 (Tanzania) para 57 (Qatar) para 58 (Philippines) para 64 (Iraq) para. 70 (Mozambique) para 83 (Madagascar) UN Doc A/CONF183/C1/SR.36, para 9 (Angola),para 11 (Congo) para 19 (Oman) para 27(Malta) para 32 (Zimbabwe) para 38 (Bolivia) para 45 (Cameroon).
[478] William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, Cambridge 2011)145.
[479] ibid; UN Press Release L/ROM/16 13 July 1998.
[480] Discussion paper proposed by the Coordinator, UN Doc PCNICC/2002/WGCA/RT1/Rev 2.
[481] Assembly of States Parties (ICC) *Report of the Special Working Group* , 7th Session (second resumption) para 10 ICC Doc ICC-ASP/7/SWGCA/2 (20 Feb. 2009).

to decide on important issues before the Conference, took place on 18-26 November 2009, to deliberate on issues to be discussed at the Review Conference in Kampala, thus, the ASP forwarded to the Review Conference proposals for amendments concerning the revision of Article 124 of the Statute, possible adoption of provisions on the Crime of Aggression and the first of the proposals put forward by Belgium to extend the jurisdiction of the Court to cover the use of certain weapons in armed conflicts not of international character. Furthermore, the ASP created a working group on amendments to serve as an apparatus to examine deliberations submitted for future intended proposals at the review conference.

The main objective of the Review Conference is to consider a limited number of amendments to the Statute, focusing particularly on the Crime of Aggression; the revision of Article 124 ICCSt and the amendment to Article 8 of the Statute to include the use of certain weapons as war crimes in conflicts not of international character. The Bureau of the ASP was determined to limit the scope and number of amendments for fear of undermining the integrity of the Statute. Mr Rolfe Fife, focal point for the Review Conference, said: 'the key criteria for the success of the Conference may have less to do with amendments to the Statute than with the kind of overall message conveyed to the international community at large about international justice.'[482] The Review Conference was ideally placed to redress the prevailing negative perception that the ICC is a western construct focused on targeting Africa, rather, that Africa is a crucial partner in the development of international justice mechanisms to combat impunity.

3.4.4 Challenges before the Review Conference

As States parties to the ICC met in 2010 to consider the future of the Crime of Aggression, two issues emerged. First, what is the relationship between the Crime which denotes individual responsibility and State's responsibility and how would the ICC's jurisdiction over the Crime be triggered. The Crime of Aggression presupposes an aggressive war by a State or non-State actors, though the UN assigns the SC the responsibility to determine when a State has engaged in aggressive war, (Article 2(4), Article 39, Article 41 and 42 UN charter); to maintain or restore international peace and security. Secondly, the ICC had to decide on the precise definition and elements of the Crime of Aggression not every act of aggression needs constitute a crime and not every participant in the Aggression should be liable. The Crime

[482] Mr Rolf Einar Fife, 'Progress Report by the focal point' ICCASP/ 6/INF 3, 4 December 2007.

requires an act of aggression by a state or non-state actor and knowledge of participation in the policy or plans of aggression on the part of the accused, who must have direct high level responsibility for the conduct of the war. So, defining the Crime of aggression at the RC involved three approaches.[483] One favours generic approach, the other advocates specific approach and the third suggests a combination of the two approaches, those favouring the 'specific approach' argues that a detailed list such as the GAR 3314 (xxix) will be clearer, legally more certain and consistent with other definitions set out in Articles 6–8 of the Statute, contending that this is a requirement of Article 22[484] ICCSt. The generic approach proponents' believe it is more pragmatic to acknowledge the impossibility of predicting all instances (some space for 'ironing out the creases')[485] of which the Crime of Aggression might be established.

The third school argues a combination of the two analogous to the definition of 'crimes against humanity' in Article 7 ICCSt. A proposal preferred the concept of 'crime of aggression' using the term 'war of aggression', the prevailing view believed, this is too restrictive, debates surrounded whether the result of an act of aggression should be reflected in the definition, by requiring that it leads to military occupation,[486] regarding Article 5(2) (this is the version of the Statute before the amendments) ICCSt[487] that the definition 'shall be consistent with relevant provisions of the UN, 'implying the role the SC may or should play'[488] noting that Article 39 UN Charter declares that determining situations of aggression is a prerogative of the SC,[489] but could other bodies make such a determination? The International Court of Justice (ICJ) in its Opinion in *Congo* v *Uganda*[490] determined that an act of aggression had occurred. Judge Bruno Simma wrote:

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[483] Annex II A Doc ICCASP/4/32; Definition of Aggression in the Context of the Statute of the ICC.

[484] ICCSt (n 1) Article 22 (2) 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'

[485] *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481 case law concerning interpretation of an Act of Parliament. *Eyston v Studd 1579;* Lord Denning, in the "The Discipline of Law" said: …language is not an instrument of mechanical precision…and should iron out the creases (Butterworths London1979) 12.

[486] Doc ICC-ASP/5/SWGCA/INF1 paras 7–50; Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression.

[487] ICCSt (n 1) before amendments had article 5(2), after amendments in Kampala, this provision was deleted the whole of the Article 5 changed to Article 5^1.

[488] Hermann von Hebel and Daryl Robinson, 'Crimes within the Jurisdiction of the Court', in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, and Results* (The Hague, Kluwer Law International, 1999) 79,126.

[489] UN Doc A/CONF183/SR 9 para 51.

[490] *Democratic Republic of the* Congo v Uganda General List No 116; ICGJ 31 (ICJ 2005); Sean D Murphy, 'Criminalising Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 241 at 103-104, the ICJ concluded that certain acts in violation of Article 2(4) might not rise to the level of being an

> It is true that the UNSC, … [paragraph 150 of the Judgment] never gone as far as expressly qualifying the Ugandan invasion as an act of aggression, even though it must appear as a textbook example of the first one of the definitions of ..Illegal use of force' laid down in GAR 3314 (xxix). The Council will have had its own – political – reasons for refraining from such a determination. But the Court, as the principal judicial organ of the United Nations, does not have to follow that course. It's very *raison d'être* is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations.[491]

The SC being the only arbiter of situations of aggression implies that the ICC can only prosecute aggression after the Council pronounces on the subject, a view seen as an encroachment on the independence of the Court; could mean, no permanent member of the SC would ever be subjected to prosecutions of aggression.[492] Furthermore, leaving the determination by the Court essentially to a political body is implausible. Judge *Schwebel* of the ICJ noted that a SC determination of aggression is not a legal assessment but based on political considerations, such as the Nicaragua case;[493] that the SC is not acting as a court.

Other difficult issues involved characterising individual participation in the Crime of aggression profoundly a 'State crime'.[494] Appling Article 25 ICCSt, dealing with participation within the jurisdiction of the Court seems complex. Concepts, like superior responsibility Article 28,[495] seem irrelevant in cases of aggression. Defining aggression as a 'leadership crime' appears to be the consensus, limiting liability to persons who 'exercise control over or direct the political or military action of a State.' What about accomplices and allies - encouraged - attacking other countries? The occupation of East Timor by Indonesia,

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'armed attack' for the purposes of Art. 51, and therefore could not be responded to through the exercise of self-defence. The lack of symmetry between Arts 2(4) and 51 is well grounded textually in the Charter but - in a system which relies heavily on self-help measures for enforcement of norms - arguably encourages coercive behaviour which falls short of 'armed attack'. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] ICJ Rep 14.

[491] *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v *Uganda*) 19 December 2005 (ICJ) Separate Opinion of Judge Simma, para 3 See also Separate Opinion of Judge Elaraby.

[492] Lionel Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', in R Lee, *The International Criminal Court*; further discussion of the two views on aggression; see Daniel D Ntanda Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues', (1999) 10 *Criminal Law Forum* 87 at 94–7.

[493] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v *United States*) Merits [1986] ICJ Reports 14 at 290.

[494] The Crime of Aggression and Article 25, Paragraph 3, of the Statute, Doc ICC-ASP/ 4/32, Annex II B.

[495] ICCSt (n 1).

(suspecting the United States (1974)) meeting the proposed definition of aggression.[496] It would be necessary if the Statute includes similar cases of inciting or abetting aggression, punishable with other crimes within the Court's jurisdiction. Confining prosecutions to leaders, be they those of the State committing the Crime or accomplices, is consistent with existing policy of the Office of the Prosecutor as well as the preliminary case law of the Pre-Trial Chambers on the gravity threshold of admissibility.[497] Regulation 29 of the Court provides:

1. In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a chamber made there under, the Chamber may issue any order that is deemed necessary in the interests of justice.

2. This provision is without prejudice to the inherent powers of the Chamber.

It is not clear what these inherent powers may be. The subject of inherent powers of the international criminal tribunals is one of considerable controversy in case law and literature but not within scope of this chapter.[498]

3.4.5 The Kampala Definition of the Crime of Aggression

The definition of the Crime of Aggression in RC/Res 6 (Article 8 *bis* ICCSt) adds a political element to the ICC, undermining its independence. The definition is based on UNGAR 3314 (xxix) of 14 December 1974, designed as a political guide in determining States responsibility for aggression.[499] RC/Res 6 also introduces an element of gravity, not otherwise recognised by the UN Charter. Resolution 3314 (xxix) adopted in Kampala allows for special jurisdictional requirements compared to other crimes under the Rome Statute; demonstrates 'fundamental unwillingness' of States to accept judicial intervention but risks lack of support.[500] RC/Res 6 is said to undermine the fundamental purposes of the ICC.[501]

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[496] Christopher Hitchens, *The Trial of Henry Kissinger* (New York: Verso Books, 2002).

[497] William Schabas; *An introduction to the International Criminal Court* (4th edn, CUP England 2011)147- 53

[498] *Prosecutor v Kanyabashi* (ICTR-96-15-A) Dissenting Opinion of Judge Shahabuddeen, (3 June 1999) 17; Prosecutor v Nsengiyumva (ICTR-96-12-A); Michael Bohlander, 'International Criminal Tribunals and Their Power to Punish Contempt and False Testimony' (2001) 12 *Criminal Law Forum* 91.

[499] GA Res 3314 (xxix), 29 UN GAOR Supp No 31, 142 UN Doc A/9631 (1974); see overt references to Resolution 3314 in Article 8*bis* (2) of RC/Res 6; Adopted by the General Assembly in 1974 Definition of Aggression.

[500] Dov Jacobs, 'The Sheep In the Box: The Definition of the Crime of Aggression at the ICC' in Christoph Burchard, Otto Triffterer and Joachim Vogel (eds), *The Review Conference and the Future of the International Criminal Court* (Wolters Kluwer, The Netherlands, 2010) 131; It may also be said that it avoids the Prosecutor transcending the role of the Security Council as arbiter of international peace and security.

[501] Robert Manson, 'Identifying the Rough Edges of the Kampala Compromise' (2010) 3 *Criminal Law Forum* 1; Sergey Sayapin; 'A Great Unknown: The Definition of Aggression Revisited' (2009) 17 *Michigan Journal of*

The jurisdictional reliance on the SC may erode the independence of the Prosecutor and or the Judiciary which may consequently lead to impunity. To allow States determine whether the ICC can exercise jurisdiction over the Crime of Aggression in respect of their nationals result in continued impunity and a failure to reaffirm the UN Charter.[502] Resolution 3314 (xxix) subjects' determination of criminal liability to political motivations and reduces judicial independence. The final definition of aggression included in the Statute is that recommended by the (SWGA) prior to Kampala. No changes were made to the text; the definition under Article 8 *bis* of the Statute, states:

> 1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
> 2. For the purpose of paragraph 1, 'act of aggression' means 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly Resolution 3314 (xxix) of 14 December 1974, qualify as an act of aggression.

The Act of aggression is the use of armed force by one State against another without the justification of self-defence or authorisation by the SC. The ASP met in Kampala, Uganda, in 2010; adopted amendments to the ICC Statute which define the Crime of Aggression and provides for the Jurisdiction of the Court over it, enabling the ICC to exercise jurisdiction over the crime if 30 States ratify or accept the Amendments. Furthermore, the Court may not exercise jurisdiction over aggression until 1 January 2017. The amendment provides for a further decision of the ASP to activate jurisdiction of the Court over aggression in addition to the Statute ratification of the Kampala amendments which is slow,[503] 30 ratifications by the

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International Law 377; Oscar Solera, 'The Definition of Aggression: Lessons not learned' (2010) 42 *Case Western Reserve Journal of International Law* 801, 812.

[502] 1 UNTS XVI; UN Charter Article 39.

[503] Botswana 4/06/2013, Estonia 27/03/2013, Germany 3/06/2013, Liechtenstein 8/05/2012, Luxembourg 15/01/2013, Norway 10/06/2013, Samoa 25/09/2012, San Marino 26/09/2011 and Trinidad and Tobago 13/ 11/ 2012. On the 3 June 2013 – Germany's Foreign Minister Guido Westerwelle deposited Germany's instrument of ratification of the Kampala Amendments with the United Nations, thus making *Germany* the sixth ICC State Party to ratify the Amendments on the Crime of Aggression and the Amendments on War Crimes adopted in

beginning of 2016 is needed for the court to exercise jurisdiction over aggression in 2017, the amendments take effect for each state party one year after depositing the instrument of ratification.[504]

After the Kampala conference, the question arose whether the ICC will be able to exercise jurisdiction over aggression committed by a State party which has not accepted the Kampala amendments and has not 'opted out' of the Kampala regime? Whether a state victim (or claims to be a victim) of aggression has accepted the Kampala amendment suffices to give the Court jurisdiction over the (alleged) crime,[505] will the aggression regime be the same as the Regime relating to other crimes? Would jurisdiction be on the basis of territoriality or nationality? Would States implement aggression into their national laws and on what jurisdictional regime? Would aggression be treated akin to other international crimes at national courts? Prosecute for it with broad universal or extraterritorial jurisdiction? Is aggression indeed different?[506] It is argued that domestic courts of the alleged aggressor state and domestic courts of the victim are the only domestic courts entitled to prosecute for aggression,[507] again to what extent would it be interpreted as being limited by any relevant international law principles regarding the Jurisdiction of the domestic courts? These issues the Court will have to contend with, and could take time to resolve.

3.4.6 Article 8 *bis and* Jurisdiction over the Crime of Aggression

Draft Article 8 *bis* distinguishes between 'Acts of aggression' (what a state does) and the 'Crime of aggression' (what a leader does). 'Acts of aggression' is defined as 'the use of armed forces 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

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Kampala in 2010. One day later, *Botswana* ratified the Kampala Amendments. The significance of the ratification by these two States Parties is that Germany not only represents the first NATO member to ratify but was the first State whose leaders were convicted of crimes against peace. Botswana is the first African state to ratify. On 8 May 2013, Liechtenstein became the first country for which the amendments have entered into force, as Liechtenstein ratified the amendments a year previously. Other countries that have ratified are: *Samoa* (25 September 2012); *Trinidad & Tobago* (13 November 2012) *Luxembourg* 15 January 2013; and *Estonia* (27 March 2013).

[504] ICCSt (n 1) Article 121 (4)

[505] Dapo Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' [2010] *Oxford Institute for Ethics, Law and Armed Conflict*.

[506] ibid.

[507] ibid.

Nations'.[508] This follows a reference to a list of 'Acts' in accordance with GAR 3314 (xxix) qualifying as acts of aggression'.[509] Although, Resolution 3314 (xxix) deals with state responsibility but had considerable support as the basis for the definition in the present context. The drafting of Article 8 *bis* is aimed at avoiding the open-ended nature of GA Resolution 3314 (xxix), that the SC may decide that something which meets the definition is nonetheless not an aggression and on the other hand, that acts other than those on the list may be regarded by the SC as acts of aggression. The SC being a political body may act in a completely unprincipled and arbitrary manner. A criminal court constrained by the principle of legality[510] must be more translucent. The list in Article 8 *bis* (2) may be open-ended to the extent not saying that no other acts can amount to aggression. However, any other potential candidate must surely be interpreted *ejusdem generis* with the existing list.

Article 15 *bis* (3) ICCSt stipulates ratifications, and adoption of the amendment to the Statute before[511] 1 January 2017 to activate ICC's jurisdiction over the Crime. As decided by the Review Conference in a consensus, so that the ICC can exercise jurisdiction over aggression once the amendments come into force, but could some of the decisions made in Kampala be legally questionable? Would the legal effect the drafters sought to achieve be questionable? Who will be bound by the amendments?[512] The agreement is examined and areas of significant ambiguity highlighted.[513] The negotiations on 'aggression' at the Conference generated debates as to whether the amendments should come into force under Articles 121(4) or 121(5) ICCSt. On the one hand is ratification by 7/8ths of the State Parties with the amendments binding on all, on the other hand any amendment to Articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification. In respect of a State

[508] Report of the Special Working Group on the Crime of Aggression, Doc ICC-ASP/7/SWGCA/2 (2009) (2009 Working Group Report); relevant issue is the Russia Ukraine crises.
[509] ibid; Article 3 in accordance with the provisions of Article 2, states certain acts as aggression, such as armed invasions or attacks, bombardments, blockades, armed violations of territory, permitting other states to use one's own territory to perpetrate acts of aggression and the employment of armed irregulars or mercenaries to carry out acts of aggression. Article 2 states that the first use of force in contravention of the UN Charter will be prima facie evidence of aggression, although the Security Council has the authority to determine that given the circumstances aggression has not taken place. A war of aggression is a series of acts committed with a sustained intent. The definition's distinction between an act of aggression and a war of aggression make it clear that not every act of aggression would constitute a crime against peace; only war of aggression does. States would nonetheless be held responsible for acts of aggression.
[510] ICCSt (n 1) Article 22 *'Nullum crimen sine lege'.*
[511] ICCSt (n 1) Article 15 bis (2), The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
[512] Dapo Akande, 'What Exactly was agreed in Kampala on the Crime of Aggression?' (2010) EJIL Talk, International Criminal Court, International Criminal Law; <http://www.ejiltalk.org/> accessed 24 June 2014.
[513] ibid.

Party that has not accepted the amendment the Court shall not exercise jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory. Argentina, Brazil and Switzerland submitted papers in Kampala which attempted to bridge the divide. However, the Review Conference decided that the amendments shall enter into force in accordance with Article 121(5) ICCSt.[514] Opposition arose from Japan, but not strong enough to block the consensus. It is not yet clear whether the decision taken in Kampala that the amendments shall come into force in accordance with Article 121(5) is binding. Can a State oppose this decision or an accused person arguing that the amendments can only come into force in accordance with Article 121(4)? Could an opposing State or defendant challenge the 'decision'? Arguably, all that was done in Kampala was to adopt a text (Vienna Convention)[515] the adoption of a text does not customarily create legal obligations for States or the Court and will not allow bypassing of the binding text of Article 121 as it exists.

The alternative view would be if Article 121(5) did not apply on its face, somehow the parties in Kampala have amended the Article such that it now applies. Such a conclusion would raise a number of issues of fact and (treaty) law which will require further examination. Whether the Kampala 'decision' to bring the amendments into force by Article 121(5) is in itself binding or not, the view that Article 121(5) is the applicable provision is a reasonable one. Article 121(5) applies only to amendments to Arts 5, 6, 7 and 8. Also, a claim can be made that the amendments are all a package intended to bring into effect the 'new' crime and that the intention behind Article 121(5) is that it applies to amendments dealing with the creation of new crimes.[516] By agreeing on Article 121(5), State Parties decided to impose additional conditions before the Court can prosecute for aggression. The Court may only exercise jurisdiction over aggression committed one year after 30 states have ratified the amendments. Furthermore, the Court's jurisdiction over aggression will only commence once a decision is made to that effect, after 1 January 2017 by the States Parties. The decision is to be made by at least 2/3rds majority. This is waiting for about seven years before the Aggression amendments become operational. These conditions apply to prosecutions commenced as a result of State Party referral and *proprio motu* prosecutions (Article 15 *bis*) as well as prosecutions resulting from SC referral (Article 15 *ter*). Additionally, an important procedural element of the Kampala package on aggression is when aggression proceedings

[514] ibid.
[515] Vienna Convention on the Law of Treaties 1969 UNTS vol 1155 p 331 Article 9 (VCLT).
[516] Dapo Akande (n 512).

are triggered by a state party or *propo motu* the entire Pre-Trial division need to authorise the commencement of investigations.[517] This specific institutional device complements the substantive requirement that a State's act of aggression must constitute a manifest violation of the UN Charter.

Determining how to go about the trigger mechanisms, enshrined in Articles 13 (a) and (c) ICCSt became contentious during the RC. Although, the jurisdictional scope for ICC's action on the Crime of aggression in cases of SC inaction will remain very limited for a while. Firstly, the ICC will be precluded from exercising jurisdiction over the Crime of Aggression with respect to acts of aggression by and against non-state parties.[518] Secondly, the exercise of jurisdiction in cases of acts of aggression committed by one state party against another will be governed by the consent principle. Though, the technique by which the latter principle will operate does not reflect the formulation of the second sentence of Article 121(5) of the Statute due to the 'opt-out regime' that is to apply with respect to an alleged aggressor state.[519]

The political approach of the SC to the determination of aggression would add a political context to the ICC's jurisdiction which may undermine its role as an independent court,[520] with the adoption of RC/Res 6, the Prosecutor is now required to notify the SC[521] of any potential investigation, which arises *proprio motu* or by State referral, before proceeding with the investigation of the Crime.[522] If the Security Council determines that an act of aggression has not occurred, or remains silent for six months from the date of notification, the Prosecutor can only proceed with the investigation if authorised to do so by the Pre-Trial Division,[523] such conduct by the SC results in a delayed prosecution.

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[517] ICCSt (n 1) Article 15 *bis* (8); RC/Res. 6 Annex I *sub* 3.
[518] ibid.
[519] ibid.
[520] Davis Cale, Forder Susan, Little Tegan; and Cvek Dali 'The Crime of Aggression and the International Criminal Court' (2011) 17 *The National Legal Eagle*.
[521] Carsten Stahn, 'The 'end', the 'Beginning of the end' or the 'end of the beginning?' Introducing debates and voices on the definition of Aggression' *Leiden Journal of International Law* (2010); US Department of State, 'US Engagement with the International Criminal Court and the Outcome of the Recently Concluded Review Conference', 15 June 2010; 'The CICC as a whole did not take a position concerning the adoption of specific provisions on the crime of aggression at Kampala. This was because CICC members developed varying positions concerning the complex discussions on the crime.' A comparison of Art 15 bis and Art 15 ter, which contains no opt-out option, nor the exclusion in relation to non-state parties; para. 2 of the Understanding on 'Referrals by the Security Council', which states, 'It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b) of the Statute, irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard'.
[522] RC/Res 6 Article 15*bis.*
[523] RC/Res 6, Article 15*bis* (8).

Furthermore, the entire pre-trial division is required to sit instead of an individual Chamber. This means the Prosecutor must satisfy a larger bench than for the other crimes listed in Article 5 ICCSt by implication it is argued that this creates a higher threshold for the Prosecutor to meet.[524] Although, the Prosecutor may ultimately be authorised by the Pre-Trial division to continue an investigation, such investigation may still be deferred at the behest of the SC under Article 16 ICCSt.[525] Prevailing diplomatic and political circumstances within the SC may cause the higher threshold to be applied selectively.[526] If any member of the P5 (SC permanent five) vetoes a determination of aggression, it may be 'tantamount to giving immunity to the P5 and their allies'.[527] Subjecting the Prosecutor to the SC power subordinates the ICC to an inherently political organisation affecting the independence of the Court.[528] This adds a political dimension to determining the Crime of Aggression and creates an 'imbalance' in relation to other crimes[529]. The politics of the SC will always play a part in the ICC's jurisdiction.[530] While RC/Res 6 was an important landmark in the development of international criminal law, the Role of the SC has highlighted the risks of a political body interfering in judicial proceedings.[531]

3.4.7 Who will be bound by Article *15 bis*?

The researcher is of the opinion that the opt-out provision is an unsettled area of the law. Who is required to opt-out? If the requisite ratification is achieved and decisions made on or after January 2017 to activate the aggression provisions, are all State Parties bound? Would the Court have jurisdiction over aggression committed by the nationals of all State Parties except they opt-out or does the Court only have jurisdiction over nationals of State Parties

[524] Robbie Manson, 'Identifying the Rough Edges of the Kampala Compromise' (2010) 21 *Criminal Law Forum* 417.
[525] ICCSt (n 1) Article 16.
[526] Vimalen Reddi, 'The ICC and the Crime of Aggression: A Need to Reconcile the Prerogatives of the SC, the ICC and the ICJ.' (2008) 8 *International Criminal Law Review* 655; Jane Verbitsky, 'What Should be the Relationship Between the International Criminal Court and the United Nations Security Council in the Crime of Aggression. (2008) 4 *Review of International Law and Politics* 141, 144; Justin Gruenberg, 'An Analysis of United Nations Security Council Resolutions: Are All Countries Treated Equally?' (2009) 41 *Case Western Reserve Journal of International Law* 469.
[527] Robert Schaeffer, 'The Audacity of Compromise: The UN Security Council and the Pre-conditions to the Exercise of Jurisdiction by the ICC with Regard to the Crime of Aggression' (2009) 9 *International Criminal Law Review* 411.
[528] Davis Cale, Forder, Susan; Little, Tegan; and Cvek, Dali, 'The Crime of Aggression and the International Criminal Court,' (2011) 17 *The National Legal Eagle*.
[529] Dapo Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', Working Paper, Oxford Institute for Ethics, Law and Armed Conflict, May 2010 <www.elac.ox.ac.uk/2010 pdf> accessed 02/05/14.
[530] Davis Cale (n 528)
[531] ibid.

that have ratified the amendment? Schabas and Kevin Jon Heller are of the opinion that all States parties are bound unless they opt-out.[532] Article 121(5) proffers that the amendments only enter into force for those States that have ratified or accepted it, further the provision states: 'the Court may not prosecute with respect to the Crimes committed by nationals of or on the territory of those whose State Parties have not accepted.'[533] 'Any State Party may lodge a declaration referred to in Article 15 *bis* prior to ratification or acceptance.' By referring to opt-out prior to ratification or acceptance, could it be referring to those who have not yet ratified or accepted? And opens up the possibility that such States need to opt-out. However, this clause may also be read as referring simply to the time within which a ratifying or accepting State must opt-out, if it wishes to do so, that is, if a State party ratifies or accepts the amendment and wishes to opt-out, it needs to have done so before it ratifies or accepts.[534]

Ratification by 30 States is necessary for the SC referral mechanism to be triggered.[535] A State may wish to ratify to bring that part of the amendment into effect but to opt-out of the State referral and *proprio motu* prosecutions mechanisms.[536] Secondly, a State may wish to bring the amendments into effect generally while excusing itself from ratification prosecution,[537] an argument consistent with Article 121 (5) of the statute that States parties who do not opt out are bound, meaning a presumption of acceptance to the amendment unless such a state opts-out. Only those who opt-out are to be regarded as not accepting the amendment thereby maintaining the principle of (presumed) consent by not expressly opting-out. The ability to opt-in and opt-out[538] may allow State Parties take an *à la carte* approach to the Crime of aggression,[539] which may reduce the ICC's chances of ending impunity and reinforcing the UN Charter prohibition on the use of force. Only State parties that ratify amendments to Article(s) (5^2) – 8*ter* of the Statute (by opting-in) are bound by the amendments.[540] It is argued that Article 121(5) of the Statute is a 'loop hole', as it allows States to decide whether they wish to be subjected to the ICC's jurisdiction over

[532] Dapo Akande, 'What Exactly was agreed in Kampala on the Crime of Aggression?' (2010) EJIL Talk, International Criminal Court, International Criminal Law; <http://www.ejiltalk.org/> 24 June 2014.
[533] ibid.
[534] ibid.
[535] ICCSt (n 1) Article 15 *ter*.
[536] ibid.
[537] Dapo Akande (n 532).
[538] ICCSt (n 1) Article 15*bis* (4).
[539] Davis Cale (n 528).
[540] ICCSt (n 1) Article 121(5); Kevin John Heller, 'Opt-Ins and Opt-Outs.' *Opinio Juris.* <http://opiniojuris.orgopt-ins-and-opt-outs/> accessed 25 June 2014.

aggression.[541] If States do not accept RC/Res 6, the ICC will not have jurisdiction over that State party's nationals as perpetrators or where aggression is waged upon it.[542]

The effect of allowing States to opt-out is that the ICC will have jurisdiction over that State as a victim of aggression, but not over that State's nationals as perpetrators.[543] As such, there are only two possible circumstances over which the ICC will have jurisdiction.[544] First, where a State Party that opt-in aggresses another State Party who has opted-in.[545] Secondly, where a State party has opted-in aggresses a State Party who has opted-in and subsequently opted-out.[546] The second scenario results in States being covered as victims but not as aggressors.[547] The ICC's ability to apply the Rules of international criminal law independently and equally to all State parties could be weakened, if not 'utterly destroyed.'[548] In addition, circumstances may arise in which the Court does not have jurisdiction over a potential crime of aggression because one of the State Parties has not opted-in, but would have jurisdiction over other crimes in relation to the same conflict,[549] on war crimes, crimes against humanity and genocide established through the Nationality of the perpetrator or the territory upon which the Crimes manifest. If one of these two States ratified the Rome Statute, the Court has jurisdiction. However, the Jurisdiction over the Crime of aggression requires both perpetrator and victim States to have opted-in to the Amendments. The alternative means of determining jurisdiction through the opt-in and opt-out provisions undermine the ICC's attempt to address all relevant crimes with equality. The circumstances which flow from these provisions have been labelled 'hypocritical,' 'discreditable' and having no legal basis.[550]

3.4.8 The Crime of Aggression and Liability of Non-Military Leaders

Defining the 'Crime of Aggression' indicates that not every act of aggression is the basis for criminal responsibility; it is only those which by their character, gravity and scale constitute a manifest violation of the UN Charter. The limitation was strongly debated, but most participants (Review Conference) accepted it in return for removal of any requirement that a

[541] Jelena Pejic, 'The United States and the International Criminal Court: One Loophole Too Many' (2000-2001) 78 *University of Detroit Mercy Law Review* 267.
[542] ICCSt (n 1) Article 121(5).
[543] Davis Cale (n 528).
[544] ibid.
[545] ibid.
[546] ibid.
[547] ibid.
[548] ibid.
[549] ibid.
[550] ibid.

'war of aggression' or that the list of acts in the definition of 'Act of aggression' be more limited than the GAR 3314 (xxix) list.

Consequently, the Crime of aggression is a 'leadership' crime, a proposition captured by the element that the perpetrator has to be in a position effectively to exercise control over or to direct the political or military action of a State. Extensive discussions ensued about how this applies to the likes of an industrialist closely involved in the organisation of the State but not a formal part of its structures,[551] could such persons be liable to prosecution? By choosing the language used at the Nuremberg, namely 'shape and influence' rather than 'exercise control over or to direct,'[552] then, what personal responsibility for those who plan, prepare and initiate aggressive invasions? In the *US v Von Leeb et al*[553] 'The High Command case' accents that in addition to knowledge, the accused must be in a position to affect the aggressive policy underlying the war. The case thus establishes that:

> War is the exerting of violence by one state or politically organised body against another, the implementation of a predetermined political national policy by means of violence. Wars are contests by force between political units but the policy that brings about their initiation and actual waging of the war is done by individuals, this principle applies to just and unjust wars, initiation of an aggression (criminal war) and also the waging of a defensive (legitimate) war against criminal aggression[554]

When war is formally declared or the first shot is fired the initiation of the war has ended, from then on there is waging of war between two adversaries. War whether lawful or unlawful is the implementation of a national policy. If the policy under which it is initiated is criminal in its intent and purpose it is so because the individuals at the policy making level had criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained then the waging of the war is but an implementation of the policy and the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level. An unlawful war of aggression

[551] Kevin Jon Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 *European Journal of International Law* 477.
[552] Doc ICC-ASP/6/SWGCA/INF1, Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, from 11 to 14 June 2007.
[553] *United States v Wilhelm von Leeb et al*, 'High Command case' 12 LRTWC 1 (1948) 59.
[554] ibid.

connotes of necessity a lawful war of defence against aggression.[555] The Court in the high command case provided further articulation of the meaning of aggressive war, and the elements to be found to hold a military commander responsible in the Crime of aggressive war. The Court focused on intent and purpose of a war to determine its lawfulness, waging a war of aggression can also be found within the meaning of Article 11(1) (a) of the Control Council Law No 10.[556]

Before the IMT, it was understood that international law concerned itself with actions of sovereign states and that to apply the Charter to individuals would amount to the application of an *ex post factor* law but the Tribunal said: The extension of punishment for crimes against peace to leaders of the *Nazi* military and government was a logical step. That acts of government and its military power are determined by individuals who are in control and determine the Policies that result in those acts. Mass punishment is illogical; there is no precedence in international law and no justification in human relations.[557] Individuals who plan and lead a Nation into an aggressive war should be held accountable for crimes against peace but not those who merely follow the leaders and aid in the participation, the same way that other productive enterprises aid in the waging of war.[558] Also the *IG Farben* case[559] demonstrates the difficulty attempting to assign liability for aggressive war outside top governmental and military policy makers. The Court considers the role of key leaders in industry who were indisputably essential to Germany's war effort. Yet the Court invokes a slippery slope argument; why did it do so? Was this strictly legal or a decision based on policy considerations? The result does not mean that individuals outside the Spheres of government and the Military could never be liable for aggression. In *US v Alfried Krupp et al*,[560] charging industrialists with aggression, the US Military Tribunal emphasised, we do not hold that industrialists as such, could not be guilty upon such charges, however, the Tribunal acquitted all 12 defendants, who held high level management positions in their businesses.

[555] UN Charter (n 1) Article 51.
[556]Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) (CCL No 10).
[557] Anthony Cassese, Acquaviva G, Fan M, Whiting A, *International Criminal Law: Cases and Commentary* (Oxford University Press, Oxford 2011) 251.
[558] IMT Judgment Vol 1 (1946) 330.
[559] *United States v Carl Krauch et al,* case #6, (the IG Farben case); The US Military Government for Germany (1947).
[560] *United States v Alfried Krupp et al,* (Krupp *et al*).

Additionally, a French military tribunal ultimately reached the same result with respect to five accused industrialists in the Case of *Rochling in Part 11*(1) (f) War Crimes. Initially, the General Tribunal convicted *Hermann Rochling* alone for aggression after finding that once the aggressive war was under way, he undertook a leadership position ensuring the continued production of steel and iron in the occupied countries to support the war effort. At that point, the Court found that *Hermann Rochling*[561] stepped out of his role, as an industrialist and accepted high administrative position in order to develop the German ferrous production. The judgment was later reversed. However, by the Superior Military Government Court of France, which cited both the IMT judgment and the decision in the *IG Farben case* in concluding that 'the degree of participation necessary to make an originator of a crime against peace punishable is very high' this is so, to avoid mass sentences of low ranks to be precise the ordinary soldier.

3.4.9 Consistency with the Rome Statute

Part II of the Statute deals with 'jurisdiction, admissibility and applicable law.' The 'definition' of Aggression[562] fits within the framework; along with genocide, crimes against humanity and war crimes. The 'precondition provisions to the exercise of jurisdiction'[563] and Article 17 (admissibility) give operational effect to the principle of complementarity which may raise some challenges. Part III, the 'General Principles of Criminal Law' needs careful examination. The principles in Part III are default rules which apply in the absence of other choices, would the provisions of Article 25(3)[564] ('Individual criminal responsibility') and Article 28[565] ('responsibility of commanders and other superiors') apply without modification? Does the basic structure of Article 30 ICCSt which distinguishes between 'mental' and 'material' elements provide a suitable framework conceptualising aggression?[566] Are the 'grounds for excluding criminal responsibility'[567] (Article 31)[568] apt for aggression?

[561] War Crimes Trials in French Occupation Zone in Germany (1945-1953), trials were based on CCL No 10 1945.
[562] ICCSt (n 1) Article 8 *bis.*
[563] ICCSt (n 1) Article 12.
[564] ibid.
[565] ibid.
[566] On the mental side, Article 30 speaks of intent and knowledge. On the material side, it has a structure of conduct, consequence, and circumstance elements, a structure followed in drafting the Elements of the other crimes within the jurisdiction of the Court; R Lee *et al* (ed), The International Criminal Court: Elements of Crimes and Rules of Evidence and Procedure (2001); R Clark, 'Elements of Crimes in Early Decisions of the Pre-Trial Chambers of the ICC' (2009) *New Zealand Yearbook of International Law.*
[567] Roger S Clark, 'Negotiating provisions defining the crime of aggression, its elements and the conditions for ICC exercise of jurisdiction over it' (2010) 20 *European Journal of International Law* 1103.

What about mistake of fact and mistake of law (Article 32)[569] and superior orders (Article 33)?[570]

Article 12 ICCSt on 'Preconditions to the exercise of jurisdiction' would it raise some conceptual and policy questions? It provides that, in the case of referrals by a State or where the Prosecutor is acting *proprio motu*,[571] the Court may exercise its jurisdiction if either the Territorial State or the State of which the accused is a national, is a party to the Statute or has made special acceptance of the Jurisdiction.[572] How does this play out in respect to the crime of aggression? It is generally agreed that if a national of a non-party commits genocide, CAH or war crimes on the Territory of a State Party there is jurisdiction in the Court because the Territorial State is a Party. But, in the case of aggression, what if the Aggressor State is not a party? Where is aggression committed? Is it committed only where the leader acts in the capital of the aggressor state? Or is it committed also where its effects take place - on the victim's state? The widespread support in the SWGCA for the view that, in accordance with the principle of the (*France v Turkey)* Lotus case,[573] the effects in the victim's State enables territorial categorisation thus sufficient to trigger the Jurisdiction of the Court.[574]

On 'ratification' issue, there might be no need for ratification of the provisions by both the Aggressor State and the Victim State. Earlier suggestions from ILC with little support from state practice makes jurisdiction over 'aggression' rest either in the aggressor state or in an international tribunal, but not in the victim state or in a state exercising universal jurisdiction.[575] If such is so then, the argument for requiring both the Victim State's and the Aggressor State's consent to jurisdiction would become stronger. Article 17 ICCSt on admissibility/complementarity may raise some potential problems which have not been addressed in the literature on complementarity. It provides that the Court shall determine a case to be inadmissible in several situations. The first is when a case is being investigated or

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[568] ICCSt (n 1).
[569] ibid.
[570] ibid.
[571] Roger S Clark, 'Negotiating provisions defining the crime of aggression, its elements and the conditions for ICC exercise of jurisdiction over it' (2010) 20 *European Journal of International Law* 1103.
[572] ibid.
[573] *The SS Lotus (France v Turkey),* PCIJ, Ser A No 10 (1927), at 4 (negligence on board a French ship resulting in deaths on a Turkish ship on the high seas - criminal jurisdiction in the Turkish courts).
[574] Doc ICC-ASP/7/SWGCA/1 (2008), at 6-7 (discussing The Lotus); 2009 Group Report of the Special Working Group on the Crime of Aggression, (discussing whether the point should be clarified explicitly or whether it was so obvious that nothing more needed to be said).
[575] Draft Code of Crimes against the Peace and Security of Mankind [1996] Year book of International Law Commission (Part Two) Draft Article 8.

prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.[576] The second situation is where 'the case has been investigated by a state with jurisdiction and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute'.[577] A third is where the person 'has already been tried for conduct which is the subject of the complaint' another trial by the Court is not permitted under the *ne bis in idem* provision.[578] The question to be resolved ultimately by the Judges is: what is meant by 'a State which has jurisdiction'? Obviously territorial and nationality States must in principle be encompassed. What about a state acting on the basis of universal jurisdiction? Many states claim universal jurisdiction over genocide, war crimes, and crimes against humanity. Can such an exercise of jurisdiction trump the Court's? Aggression is believed to be more complicated; universal jurisdiction over it seems controversial as has been noted.[579]

Issues relating to Part III were reasonably resolved, applying the general provisions[580] such as Article 25 (3) ICCSt. Defining the 'Crime of aggression' inherited from the Preparatory Commission and the ILC tended to include all the modes in which a leader could participate in the Crime within a single provision.[581] Drafting Articles 6, 7, and 8 of the Statute took cognisance of the 'Principal' perpetrator in mind, the responsibility of other participants fell within Article 25(3)[582] and a clarification of Article 25(3)[583] was thought necessary by some,[584] which helped the structure to fit within the Statute. A comparable problem was whether the attempt provision in Article 25 ICCSt[585] should be applied to aggression, as it applied to other crimes within the Statute. Following earlier ILC drafts, suggestions made about responsibility for a threat to commit aggression being rejected after desultory

[576] ICCSt (n 1) Article 17(1) (a); 'Unwillingness' and 'inability' are defined in paras 2 and 3 respectively.
[577] ibid Article 17(1) (b).
[578] ibid Articles 17(1) (c) and 20.
[579] Draft Code of Crimes against the Peace and Security of Mankind [1996] *Year Book International Law Commission* (Part Two) Draft Article 8.
[580] Roger S Clark, 'Negotiating provisions defining the crime of aggression, its elements and the conditions for ICC exercise of jurisdiction over it' (2010) 20 *European Journal of International Law* 1103.
[581] ibid.
[582] ICCSt (n 1).
[583] ibid.
[584] Draft Article 25(3bis) recommended by the SWGCA, 2009 Report 'In respect of the crime of aggression, that the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.
[585] ICCSt (n 1) Article 25(3) (f).

discussion,[586] but agreed that the way 'act of aggression' was drafted,[587] it would be impossible to conceive of an 'attempted' aggression by a state, the definition applies only to completed acts[588] though, there could be extreme cases where a leader tried participating in an 'aggression' but unable to do so. Thus, no amendment made to the existing attempt provision, a related issue could have been whether an inchoate conspiracy to commit aggression might be rendered criminal, as was the case at Nuremberg[589] but the consensus articulated not to go down that road.[590]

Article 28 ICCSt provides an alternative mode of liability to Article 25,[591] namely the principle of command responsibility. It establishes the negligence of a military commander to crimes committed by his forces if he fails to take necessary steps to prevent or punish. The issue of superior responsibility based on the theory of recklessness. It may seem unlikely that prosecutions for aggression would be brought on such theories (or that they are consistent with the basic nature of the crime), but no specific provision was made by the Working Group on this.[592] Article 30 default rule of 'intent and knowledge' in respect of material elements was thought adequate, which is why the definition of aggression has no specific reference to a necessary mental element.[593] Article 31 ICCSt has a handful of grounds for the exclusion of responsibility which could be agreed upon, like insanity, intoxication, self-defence, and duress. There may occasionally be some mileage here for an accused leader. More importantly is paragraph 3 of the Article which provides that at trial, the Court may

[586]Doc ICC-ASP/5/SWGCA/INF 1 (2006) 9-10 Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression (SWGCA).

[587] ibid, the resolution of this issue may have been influenced in part by the timing of the discussion. When it was being considered, it was still possible that the Security Council or some other United Nations organ might make the definitive decision on whether there was an act of aggression. It was inconceivable that the Security Council would ever take a decision framed along the lines that a state had committed an attempted aggression.

[588] Roger S Clark, 'Negotiating provisions defining the crime of aggression, its elements and the conditions for ICC exercise of jurisdiction over it' (2010) 20 *European Journal of International Law* 1103.

[589] The Nuremberg Charter had a puzzling requirement of a 'war of aggression' which prompted the IMT to draw an unclear distinction between the conquests of Austria and Czechoslovakia (achieved without actual fighting) on the one hand, and the invasions of Poland and others (achieved with considerable fighting) on the other. The former were classified as 'Acts of aggression' (and not yet 'criminal'), the latter as 'wars of aggression' and proscribed under the Charter. CCL No10 had language broad enough to treat Austria and Czechoslovakia as criminal aggressions. R Clark, 'Nuremberg and the Crime against Peace' (2007) 6 *Washington U Global Studies Law Review* 527.

[590] On a related issue of inchoate offences, the Rome Statute, Article 25(3) (e) echoing the Genocide Convention, makes it a crime directly and publicly to incite genocide. There is no comparable inchoate incitement provision for war crimes or crimes against humanity, and there was no disposition to include one for aggression.

[591] ICCSt (n 1).

[592] Doc ICC-ASP/6/20/Add. 1 (June 2008) Report of the Special Working Group on the Crime of Aggression (tossing the question to the judges).

[593] Roger S Clark, 'Negotiating provisions defining the crime of aggression, its elements and the conditions for ICC exercise of jurisdiction over it' (2010) 20 *European Journal of International Law* 1103.

consider a ground for excluding criminal responsibility other than those … where such a ground is derived from applicable law as set forth in Article 21.[594] The procedures relating to the consideration of such a ground shall be provided for in the Rules of Evidence and Procedure'.[595] The procedure for asserting international law defences[596] is likely to be particularly significant where a leader alleges that in fact the state was acting in self-defence, with the approval of the SC, or pursuant to any other ground which he or she alleges has the support of treaty or customary law, arguments about the legality of humanitarian intervention may need to be structured.[597] When Resolution 3314 (xxix) was being negotiated, consideration arose as to detailed examination of potential defences. A crime in many domestic systems is a combination of the *prima facie* case minus the defences. The principle of legality requires significant specificity in defining the defences. Some strategy of 'leaving it to the judges' is, however, in play during (aggression) negotiations.

Article 33 ICCSt permits a defence of superior orders in some cases, perhaps only in the case of war crimes. It became difficult to get a specific agreement rendering it inapplicable to the Crime of Aggression,[598] but the leadership nature of the Crime renders it extremely unlikely that the defence will work in this context.

3.4.10 The Consensus and Conditions For the Exercise of Jurisdiction

The five permanent members of the SC (P5) have taken the position that Article 39 UN Charter, confers on them 'exclusive' power to determine the existence of an act of aggression and thus a SC pre-determination of aggression is an essential precondition to the exercise of the ICC's jurisdiction. Article 24 UN Charter[599] confers 'primary' power on the Council for the maintenance of international peace and security. But that 'primacy' is not exclusive, the

[594] ICCSt (n 1).
[595] ibid Article 31(3).
[596] Defence seems to be the right word here but must be used with some caution. The structure of Art. 31(3) suggests that the accused has some burden of showing that the defence exists in the general law. On the other hand, Article 67(1) (i) of the Rome Statute states that the accused has the right *inter alia*, 'not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal'. Disproof of the factual basis for such a defence thus rests squarely with the Prosecutor.
[597] There were some informal NGO representations made that this was an opportunity to engage in progressive development of this branch of the law, but no Government took this up. See, generally, Leclerc-Gagné and Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 379.
[598] Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the *Liechtenstein* Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey from 13 to 15 June 2005, Doc ICC-ASP/4/32 (2005) 364-365 (expressing just about every possible position and deciding to do nothing).
[599] The functions and powers of the Security Council are covered by Articles 24-26 of the UN Charter.

GA made several findings of aggression, the United States, United Kingdom, and France co-sponsored the 1950 uniting for peace resolution,[600] which permits removal of aggression issues to the General Assembly and all five (P5) voted pursuant to that resolution. Non-permanent members added that the ICJ had addressed issues relating to aggression.[601] Therefore, the agreement on the conditions under which the Court will have jurisdiction over the Crime of Aggression became contentious, particularly the role of the SC. The compromise position reached in Kampala now codified in the Statute as Articles 15*bis* and 15*ter*. Article 15*bis, covers* State referrals and investigations commenced by the Prosecutor *proprio motu* whilst Article 15*ter* covers the exercise of jurisdiction resulting from SC referrals,[602] similar to the current regime under Article 13(b) of the Statute, a referral by the SC authorises the Prosecutor to investigate crimes committed by nationals of States parties and non-States parties equally.[603]

The RC adopted the amendments by consensus otherwise the decisions could have been taken by two-thirds majority of State Parties. The advantage of a consensus is that it puts the collective strength of members behind such decisions offering the best guarantee for full implementation. Disadvantages are its slowness and the risk of a single member blocking it. The threat of a vote is therefore crucial. The *conditio sine qua non* for successful decision-making by consensus is the chair of the meeting. His authority, expertise, and experience to guide the process, maintain good relations with all participants having their full confidence, to intervene whenever necessary which came to bear in Kampala.[604] The agreement in Kampala reflects a textbook model example of decision-making by consensus. Almost every State party from the outset indicated that it had a strong preference for consensus decision-making, wanting to avoid voting as it could be divisive for the ICC, the logic for consensus is the flexibility and willingness to compromise demonstrated by all the parties.[605]

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[600] GA Res 377A (1950).

[601] Most recently in *Armed Activities on the Territory of the Congo (DR Congo v Uganda),* Judgment of 19 December 2005 (ICJ).

[602] Lorraine Smith, 'What did the ICC Review Conference achieve?' Equality of Arms Review, (2010) 2 publication of the Intl Bar Association's ICC Monitoring and Outreach Programme.

[603] ibid.

[604] Niels Blokker, 'A consensus agreement on the crime of aggression: impressions from Kampala' (2010) 23*Leiden Journal of International Law* 889.

[605] It was widely noted that the role of the president in Kampala was exemplary, from June 2009 until the finale of the negotiations, the crime of aggression negotiations were chaired in an impressively wise and able manner by Prince Zeid Ra'ad Zeid Al-Hussein (Jordanian ambassador to the United States and the first president of the Assembly of States Parties). The president of the Review Conference, the Liechtenstein ambassador to the UN, Christian Wenaweser, had most ably chaired the Special Working Group on the Crime of Aggression (2002-9) and demonstrated strong, determined leadership in Kampala. He was assisted by an excellent team in which Stefan Barriga was the impeccable mastermind, both on substance and on process. There is no alternative

The Court will need to adjust its practice in light of the amendment in particular by developing procedures for the entire Pre-trial division to authorise an investigation.[606] The negotiations not only brought attention to important issues but also provided concrete recommendations and sterling examples of best practice that may be utilised by the ICC in seeking to fulfil its mandate.[607]

3.4.11 Beyond the Kampala Review Conference

The adoption of the Crime of aggression (definitions) in Kampala confirmed the sustained commitments of States to establish a new international legal order in which impunity for egregious crimes will no longer be tolerated. The importance of the Rome Statute system for international peace, the rule of law and human rights was re-confirmed in Kampala; the fact that the RC came to agreement on resolutions concerning the addition of new crimes to the Statute reflects the trust State Parties place on the role the ICC plays. Improving the effectiveness of the Statute, particularly in the areas of cooperation and complementarity during the RC is exemplary. The Conference highlighted the importance of concrete action by States in these areas, one key measure being the adoption of national implementing legislations. The stocktaking exercise conducted provided an excellent opportunity to reflect on key areas of interest for the ICC's functioning.[608]

Article 88 ICCSt obliges State Parties to ensure that there are procedures available under their national laws for cooperation with the ICC. Several States made pledges to adopt National legislation and other measures to enhance their ability to cooperate effectively with the ICC. The declaration on cooperation adopted by the RC also emphasised the importance of compliance with requests for cooperation from the Court,[609] complementarity a fundamental issue at the RC, reiterated the primary responsibility of States to investigate and prosecute the most serious crimes of international concern.[610] The Kampala compromise brought international criminalisation of aggression within effective jurisdiction of the ICC. The adoption marks a critical point in the completion of the Rome Statute. Although, France and

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history, but it is unlikely that there would have been this agreement on aggression without such strong leadership.

[606] Lorraine Smith, 'What did the ICC Review Conference achieve?' Equality of Arms Review, (2010) 2 publication of the Intl Bar Association's ICC Monitoring and Outreach Programme.

[607] Mark Ellis, 'What did the ICC Review Conference achieve?'Equality of Arms Review (2010)2 publication of the International Bar Association's ICC Monitoring and Outreach Programme.

[608] Sang-Hyun Song J, 'Reflections on the ICC Review Conference perspectives of the ICC President' (2010) 2 the International Bar Association, Equality of Arms Review 7.

[609] ibid.

[610] ibid.

the United Kingdom had firmly and consistently indicated that the compromise package was undermining the position of the SC but reconciled their loyalty to the ICC with their loyalty to the SC as members of the P5.

3.4.12 Challenges Ahead After the Kampala Conference Accord

Domestic implementation and some procedural elements of the criminalisation of aggression under the Statute will require further consideration. The opt-out and restriction of the exercise of jurisdiction over non-states parties under Article 15 *bis* may have to be reconciled with the regime of declarations of acceptance of jurisdictions under Article 12(3). It is unclear how Article 15 *bis* would operate in the context of Article 12(3) declaration by a non-state party, would such a declaration suffice to entail direct jurisdiction over the acceptance of aggression? Is there a possibility for the author of the declaration to opt-out of aggression despite the wording of Rule 44,[611] which states that 'the declaration under Article 12, paragraph 3, has as a consequence on the acceptance of jurisdiction in respect of the Crimes referred to in Article 5 in relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply?'[612]

Secondly, the issues of complementarity and implementation will need to be addressed by States.[613] At present, the prospects of domestic investigation and prosecution of aggression are limited, due to the character of aggression, a leadership crime; States immunity has significant relevance in the exercise of domestic jurisdiction. Jurisdictional immunities recognised by the ICJ in the *Arrest Warrant* case[614] limit the potential scope of investigations and prosecutions by the 'Victim State' or 'bystander' States. At the same time, many domestic legal systems are 'unable' to investigate and prosecute aggression in the light of its 'unavailability' within their 'national judicial system'.[615] The Crime of aggression is absent in many domestic penal codes, and where it is even codified, it is often defined by reference to 'war of aggression', rather than the 'acts of aggression' listed in GAR 3314 (xxix).[616] If

[611] Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-A).
[612] ibid Rule 44, sub-rule 2.
[613] Nicolaos Strapatsas, 'Complementarity and Aggression: A Ticking Time Bomb?' in C. Stahn and L van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press, The Hague, The Netherlands 2009) 450.
[614] *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v Belgium) Merits [2002] ICJ Rep 25 para 58*.
[615] ICCSt (n 1) Article 17(3).
[616] Astrid Reisinger Coracin, 'Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime', in Carsten Stahn and Göran Sluiter (ed), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, Leiden 2009) 725.

complementarity is meant to function as intended with respect to the Crime of aggression, then new implementing legislation will have to be adopted.[617] Otherwise, the ICC will remain the default point of entry for years to come.

Thirdly, aggression raises fresh issues with respect to victim participation under the Statute. The definition of victims under Rule 85 is tied to atrocities against individuals or protected property and objects of specific organisations and institutions.[618] However, in the context of many acts of aggression, the typical victim is a 'state'. What does this mean for victim participation? Are the interests of the 'Victim' States sufficiently taken into account by ordinary forms of state participation (Rule103) in proceedings? Extending victim participation to state representatives in the context of aggression would give the reparations regime a completely new direction. It would introduce a surrogate forum for interstate reparation through criminal proceedings before the ICC. This may ultimately run against the purpose and mandate of the Court.

Finally, an observation is whether the ICC is ripe to take on the exercise of jurisdiction over aggression at this early stage of its existence, in light of its current docket**,** such as its record of proceedings in the first cases, and unresolved issues (eg the treatment of the 12(3) declaration by the Palestinian Authority), one may assume that officials inside the institution are not particularly unhappy that the exercise of jurisdiction over the Crime of aggression is not an immediate reality after Kampala. Academics like Niels Blokker and Claus Kress analyse the compromise from a negotiator's perspective. They argue that the Consensus in Kampala marks a 'historic achievement,' which is likely to face criticism from different interest groups, but represents a breakthrough for international criminal justice and international security law. David Scheffer, former US war crimes ambassador and negotiator at the Rome Conference, takes a closer look at some of the critical points and open ends of the substantive provisions on the crime of aggression. He offers fresh thoughts relating to four areas: (A) the 'magnitude test', (B) Security Council determinations, (C) temporal jurisdiction, and (D) the scope of ICC jurisdiction. He argues that the jurisdictional division resulting from the Kampala compromise is 'a slap on the equality of states', but concedes that 'most major shifts in the international system begin that way.'

[617] The understanding is that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.
[618] Rule 85 of the Rules of Procedure and Evidence ICC-ASP/1/3 at 10 and Corr 1 (2002) UN Doc PCNICC/2000/1/Add.1 (2000).

Donald M *Ferencz* a member of the Non-governmental organisations (NGO) delegation in the SWGCA places developments in Kampala in perspective to 'the promise of Nuremberg' and the dynamics of power politics. He argues that the Kampala compromise treated aggression as a 'patient' who has been put 'in a medically induced coma in order to save its life'. Taken as a whole, these contributions send a signal of 'cautious optimism'. Kampala is neither 'the end', nor the 'beginning of the end', but a fresh impulse for the continuing journey towards the criminalisation of aggression.[619]

3.4.13 Conclusion

This part of the chapter has examined the Kampala accord, the finale of almost a century old debate about the criminalisation of aggression as a crime, the codification of the existing body of crimes under customary international law and the closure of the last remaining important *lacuna* contained in the substantive part of the ICC Statute. The final package adopted in Kampala reflects the complexity of various interests at stake. Perceptibly, the solution provoked criticisms and concerns about the ICC's limited jurisdictional reach in cases of SC inaction. Kampala signifies good legal milestone in the most sensitive area of international criminal justice and by implication, international security law in general. 'Kampala' brought the Crime of aggression not only into the effective jurisdiction of the ICC, but also a significant step to the advancement of international criminal law.[620]

This part of the chapter also examined the prospect of the exercise of ICC jurisdiction over the Crime, removes aggression partly from the realm of policy and places it more firmly on the 'radar screen' of domestic legislators, prosecutors, and judges. A fundamental step towards greater accountability of political and military elites and compliance and entails a seismic shift in international criminal justice. The Kampala definition extends criminalisation from its current focus on gross human rights violations and victims' rights to interstate relations, the protection of state interests 'sovereignty', 'territorial integrity', 'political independence', and the preservation of peace that is, the absence of the unlawful use of armed force. This strengthens the international justice system, in particular its application to and impact on politics. It also evaluated that the ICC may act in tandem with the UN system,

[619] Hens-Peter Kaul, 'From Nuremberg to Kampala - Reflections on the Crime of Aggression' [2010] At the 4th International Humanitarian Law Dialogs Crimes against Peace - Aggression in the 21st Century, The Hague, Netherlands.
[620] Christian Wenaweser, 'Reaching the Kampala compromise on aggression the Chair's perspective' (2010) 23 *Leiden Journal of International Law* 883.

and facilitates the work of the SC, to serve as a complement to collective security by providing independent checks and balances. This dualism is reflected in the Kampala resolution. The Prosecutor could be mandated to 'ascertain' the determination of an 'Act of aggression' by the SC.[621] The requirement to notify the UNSG of a situation under examination and the corresponding sharing of 'information and documents' may facilitate the work of the UN bodies.[622] But the ICC maintains independent decision-making authority as a judicial institution[623] and ultimately empowered to proceed with investigations and prosecution, even in the absence of a SC determination,[624] ultimately, reshaping the workings of the collective security system, where aggression has long remained a sleeping beauty,[625] a victory for the independence of the ICC. While the definition was always considered the easier part of the two big aspects of aggression - conditions for the exercise of jurisdiction being the other - this was no small achievement.[626]

Voices to extend the criminalisation of aggression to 'aggressive acts by non-state entities (such as terrorist armed groups, organised insurgents, liberation movements, and the likes) against a State'[627] have not been accommodated. The list of acts is taken verbatim from General Assembly Resolution 3314 (xxix). It will be for the Court to interpret whether the wording of Article 8 *bis* (2) leaves room for the extension of aggression to other acts of aggression.[628] The Kampala definition reflects shades of modernity, but remains 'conservative' at the same time. It extends individual criminal responsibility from the traditional concept of 'war of aggression' to 'acts of aggression' under Article 8 *bis*. This is

[621] ICCSt (n 1) Article 15 *bis* (6).
[622] ibid.
[623] ibid Articles 9 and 15 *ter* (4).
[624] ibid Article 15 *bis* (8).
[625] Niels Blokker, 'The Crime of Aggression and the United Nations Security Council' (2007) 20 *Leiden Journal of International Law* 867; the critique by Judge Simma of ICJ in (*Congo v Uganda*) Separate Opinion 'the unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2 paragraph 4 of the United Nations Charter so, why not call a spade a spade?'.
[626] Christian Wenaweser, 'Reaching the Kampala compromise on aggression: the Chair's perspective' (2010) 23 *Leiden Journal of International Law* 883.
[627] Anthony Cassese, 'On Some Problematic Aspects of the Crime of Aggression', (2007) 20 *Leiden Journal of International Law* 841.
[628] Resolution 3314 is open-ended; Article 8 bis (2) uses deliberately ambiguous language, noting that 'any of the following acts … shall in accordance with UNGAR 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.' Also, Elements of Crimes Article 8 bis Introduction; Direct parallels to Article 7(1) (k) 'other inhumane Acts' were invoked in the negotiations, but rejected, in light of the principle of legality (Article 22(2)).

reflected in the nexus of the leadership requirement to state action and the definition of the term 'act of aggression' 'the use of armed force by a State.'[629]

Finally, it is recommend that the ratification necessary from thirty State Parties should be deposited as a matter of urgency in order to possibly nip in the bud another pending world war calamity, having critically examined the behaviour of some current powerful nations and their activities in light of the recent aggressive action of Russian in Ukraine. In the next chapter the thesis will evaluate the core prosecutorial challenges the Court faces in exercising its jurisdiction over the substantive crimes enumerated in this chapter.

[629] ICCSt (n 1) Article 8 *bis* (2).

Chapter Four

Challenges Prosecuting under Article 5 of the Rome Statute

...the Court's strategic plan identifies establishing the International Criminal Court as a model of public administration (as) one of its three central goals...

Secret Human Rights Watch letter to the ICC OTP

'Justice is the first virtue of social institutions ... laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.'

John Rawls

4.1 Introduction

The search light of the International Criminal Court (ICC/the Court)[1] beams on countries engaged in egregious crimes. The conflict in the Democratic Republic of Congo (DRC)[2] is an overspill from Rwanda. Similarly, the overflow of violence from Syria to Iraq prompted Iran to be fully engaged. Whilst the crises in Libya, Central African Republic (CAR), Somali and Mali spread across Kenya; affecting countries like Cameroun and Nigeria due to the large out flow of ammunitions.

The ICC since its inception has encountered prosecutorial challenges, undermining its legitimacy and credibility within the international community.[3] These challenges must be confronted a *conditio sine qua non* for the Court's continued existence. Therefore, this chapter examines core challenges of the ICC in its attempt to address these atrocities. The Statute (the Rome Statute) provides a template for the definition of serious crimes reflecting our common heritage of law.[4] Critical analyses of the difficulties faced by the Court in navigating the complex relations with national governments, their judicial institutions and affected populations, to deliver justice, whilst investigating and prosecuting cases of atrocities in spite of on-going major human-rights violations will be evaluated.

[1] 2187 UNTS 3; 37 ILM 999 (1998) (ICCSt).

[2] *The Prosecutor v Thomas Dyilo* Case No (ICC-01/04-01/06) found guilty, on 14 March 2012, of war crimes of enlisting and conscripting children under the age of 15 years; sentenced 10 July 2012, to14 years imprisonment.

[3] African Union (AU) decisions on non-cooperation are contained in AU Assembly Decision on the Meeting of States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec 245(xiii) 3 July 2009, x 10; AU Decision on the Progress Report of the Commission on the Implementation of AU Decision on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, Assembly/AU/Dec 296(xv) 27 July 2010, x 5; AU Assembly Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/ Dec 397(xviii), 30 January 2012, xx 6 and 8, for ICC ASP decisions on cooperation. Report of the African Union High-Level Panel on Darfur (AUPD) PSC/AHG/2(CCVII) African Union Peace and Security Council 207th Meeting at the Level of the Heads of State and Government 29 October 2009 Abuja, Nigeria.

[4] ICCSt (n 1); Luis Moreno-Ocampo, Address as Prosecutor of the International Criminal Court (2004) 3 (The Hague: International Criminal Court.

To date, the ICC has produced four main verdicts: two convictions, one withdrawal of charges against President Kenyatta due to the Office of the Prosecutor (OTP) being unable to establish the elements of crimes 'beyond reasonable doubt' and one acquittal,[5] for this reason, the lack of efficiency and effectiveness by the Court in achieving expected results has led to a serious decline in the perception of its legitimacy; comprehensive improvements are critical for the Court's capacity to prosecute crimes that threaten international peace and security.[6] It is fundamental to ensure justice is served to fulfil the *raisons d'être* of the Court's creation.

The chapter concludes with the relevance of these challenges for future of international justice mechanisms by noting that decent internal productivity and cohesion does lead to positive external results. In other words external credibility or legitimacy is highly dependent on the legitimacy within.[7]

4.2 Stratifying the Challenges of the International Criminal Court

What challenges does the Court face? This chapter highlights on the one hand internal challenges and on the other hand external challenges. The ICC needs appropriate intervention to achieve the Court's intended purpose as an international organisation and a legal entity.[8] The operation of the Court needs to be improved upon, to increase acceptance, borrowing a

[5] *The Prosecutor v Thomas Lubanga, Case No ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (March14, 2012)*; *The Prosecutor v Germain Katanga,* Case No ICC-01/04-01/07; On 7 March 2014, Trial Chamber II found German Katanga guilty, as an accessory, within the meaning of article 25(3)(d) of the Rome Statute, of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC. The Chamber acquitted Germain Katanga of the other charges that he was facing. The Prosecutor and the Defence have appealed the judgment. On 23 May 2014, Trial Chamber II, ruling in the majority, sentenced Germain Katanga to a total of 12 years' imprisonment. The Chamber also ordered that the time spent in detention at the ICC – between 18 September 2007 and 23 May 2014 – be deducted from his sentence. Decisions on victim reparations will be rendered later; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui,* Case No ICC-01/04-01/07 on 18 December 2012, Trial Chamber II of the International Criminal Court (ICC) acquitted Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity. The decision was taken unanimously by the Chamber composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Christine Van Den Wyngaert (Belgium). Judge Van Den Wyngaert filed a concurring opinion; The Prosecutor v Uhuru Muigai Kenyatta ICC-01/09-02/11, situation in the Republic of Kenya Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta (05/12/2014), On the 3rd of December 2014, the Judges of Trial Chamber V (B) of the International Criminal Court (ICC) declined to further adjourn the trial of Mr Uhuru Muigai Kenyatta, given the state of the evidence in this case, I have no alternative but to withdraw the charges against Mr. Kenyatta. This is done without prejudice to the possibility of bringing a new case should additional evidence become available. Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983; *Woolmington v DPP [1935] UKHL 1*.

[6] Henry M and others, 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report*, University of Washington.

[7] Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, Oxford 1990) 41-50.

[8] ICCSt (n 1) Article 4 (1).

leaf from the theory of Organisational Behaviour (OB) the overall challenge of the Court has been stratified into intrinsic and extrinsic challenges. The intrinsic challenges are internal to the Court such as its administrative nature, group dynamics, information technology and its judicial work while the extrinsic challenges are external to the Court; may affect the Courts ability to dispense justice and combat impunity, such factors include: better acceptance, increased membership, and a 'pull on legitimacy.'[9]

4.3 Challenges Intrinsic to the Court

Investigations and situation referrals start with the Office of the Prosecutor (OTP), the OTP is a key organ of the Court;[10] results of its output translate to successes or failures of the Court to a large extent. Criticism of the Lubanga case is rooted in inadequate field investigations and narrow scope of charges,[11] whilst Germain Katanga became convicted (7 March 2014) as an accessory to war crimes and crimes against humanity (CAH),[12] Ngudjolo's case scrutiny stems from the prosecution's inability to offer proof beyond a reasonable doubt.[13] In 2006 during the third year of Ocampo's (first ICC prosecutor) term, public dissatisfaction began to mount. Antonio Cassese, the first president of the International Criminal Tribunal for Yugoslavia (ICTY),[14] severely criticised Ocampo's performance and investigation strategy, Louise Arbour the United Nations High Commissioner for Human Rights also submitted a report, which clearly expressed her discontent with the ICC investigation proceedings and performance.[15]

[9] Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Pres, Oxford 1990) 41-50.
[10] ICCSt (n 1) Article 34 (c).
[11] *The Prosecutor v Thomas Lubanga* ICC-01/04-01/06 (14 March 2012).
[12] Germain Katanga also known as Simba, a former leader of the Patriotic Resistance Force in Ituri (FRPI) on 17 October 2007, the Congolese authorities surrendered him to the ICC to stand trial on six counts of war crimes and three counts of CAH. The charges include murder, sexual slavery and using children under the age of 15 to participate actively in hostilities. On 7 March 2014 Katanga was convicted by the ICC on five counts of war crimes and crimes against humanity, as an accessory to the February 2003 massacre in the village of Bogoro in the Democratic Republic of the Congo, convicted of being an accessory to war crimes and crimes against humanity, the accused was acquitted of the most serious charges, and was only convicted because of a mid-course correction charging him with being an accessory to the crimes. The verdict was the second-ever conviction in the 12 years of operation of the International Criminal Court, following the 2012 conviction of Thomas Lubanga Dyilo.
[13] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case No ICC-01/04-01/07; Congolese Rebel Leader Acquitted in Court's Second Case: pprosecutor should step up investigations in DR Congo Cases, Human Rights Watch <www.hrw.org/> accessed 26 June 2014.
[14] SC res 827 UN SCOR 48th Sess 3217th mtg at 1-2 (1993); 32 ILM 1159 (1993).
[15] Antonio Cassese, 'ICC Observations on Issues Concerning the Protection of victims and the preservation of evidence in the Proceedings on Darfur Pending Before the ICC' ICC-02/05-14, 25 August 2006, Louise. Arbour, ICC, 'Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence,' ICC-02/05-19, 10 October 2006.

Five 'situations' have been referred to the Prosecutor by States Parties[16] (Uganda, the DRC, Mali and the CAR I & II) two situations (Darfur/Sudan and Libya) have been referred by the United Nations Security Council (UNSC),[17] the Darfur/Sudan situation referred 31 March 2005[18] and the Libyan situation at the beginning of March 2011, through unanimous UNSC decision.[19] Pre-Trial Chamber I issued arrest warrants against Al- Bashir,[20] and Muammar Gaddafi with two of his top aides in the Libyan situation.[21] The Prosecutor acting *proprio motu*[22] started investigation in Kenya (a request partly from Kofi Anan who mediated an end to the post-election violence in early 2008)[23] also the investigation into the situation in Cote d'Ivoire[24] is *proprio motu.*

A fundamental request exerted on the Prosecutor from the Chambers is that the OTP should not take steps to initiate pre-trial or trial proceedings, until there is certainty and sufficient evidence, such as, almost completed investigations are ideal before pre-trial proceedings so that focus shifts from investigations to prosecution, meaning that the Pre-Trial Chamber will have the ability to complete the preparatory work of the cases; the accused, informed of all facts, while the Pre-Trial Chamber rules on protective measures. Trials should commence soon after the decision confirming the charges without unnecessary time gap. There is need for improvement regarding the general work methodology and investigations within the OTP. Ensuring cooperation, efficient structures and efforts to have highly qualified prosecutorial staff is necessary. It is imperative that the OTP should have no room for improvisation or

[16] ICCSt (n 1) Articles 13 (a) & 14.
[17] ibid Article 13 (b).
[18] Adopting resolution 1593 (2005) by a vote of 11 in favour, none against with 4 abstentions (Algeria, Brazil, China, United States), the Council decided also that the Government of the Sudan and all other parties to the conflict in Darfur would cooperate fully with the Court and Prosecutor, providing them with any necessary assistance, referral of the situation in Sudan/Darfur since 2002.
[19] ICCSt (n 1) Article 13 (b).
[20] *The Prosecutor v Omar Hassan Ahmad Al Bashir*; Pre-trial ICC-02/05-01/09.
[21] *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* Pre-trial ICC-01/11-01/11.
[22] ICCSt (n 1) Article 13 (c) & 15
[23] The ICC fifth-ever investigation focuses on the period of violence that followed the disputed presidential elections in Kenya held on December 27, 2007. In December 2010, the Prosecutor requested that six individuals be summoned to appear before the Court in two separate cases. Charges against two of them, Henry Kiprono Kosgey and Muhammed Hussein Ali, were rejected by Pre-Trial Chamber II on January 23, 2012.while the OTP continued on *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11; Hans-Peter Kaul, 'The International Criminal Court (Current Challenges and Perspectives)' [2011] Salzburg Law School on International Criminal Law; post-election violence in Kenya.
[24] *The Prosecutor v Laurent Gbagbo,* ICC-02/11-01/11, the ICC opened its investigation in the situation of the Republic of Côte d'Ivoire in 2011; two arrest warrants have been issued for crimes against humanity for Laurent Gbagbo and Simone Gbagbo.

muddling through. The Court needs a highly professional prosecutorial engine to achieve its purpose.[25]

Transparency challenge entails a preliminary examination process requiring the Prosecutor to determine whether a situation meets reasonable basis to proceed with a formal investigation. In order to determine situations that most warrant investigations, the Prosecutor establishes a four-phase process. Once information is filtered and identified satisfactory under jurisdictional constraints, the OTP assesses its admissibility[26] using considerable discretion to determine a situation's admissibility. The OTP needs to prioritise to determine situations most grievous and thus warranting investigation. Clarified guidelines and methodology used for the gravity threshold when determining situations admissibility would alleviate prosecutorial discretion and inconsistencies in implementation. Once the gravity threshold is improved upon and legally supported, decisions reached using this threshold for admissibility would enhance legitimacy and credibility of the Court.

Improved transparency and communication would also show commitment to independence, objectivity, and impartiality in conducting preliminary examinations. Transparency promotes positive perception among stakeholders that the Court is committed to good process; upholding intentions for meaningful justice through adherence to guidelines and principles of independence, impartiality and objectivity. Transparency also assists in alleviating criticism concerning decisions made during the preliminary examination process.[27] The investigation team of the OTP provide the foundation on which all proceedings and trials are built. Thorough investigations are a critical challenge to ensure that the Prosecution presents strong cases. So far, the Prosecution has faced shortcomings why? The Court has handed down only a few judgments and a recent withdrawal of charges against the accused Kenyan President.[28]

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[25] Hans-Peter Kaul, 'The International Criminal Court (Current Challenges and Perspectives)' [2011] *Salzburg Law School on International Criminal Law*; post-election violence in Kenya.

[26] ICCSt (n 1) Article 17.

[27] Henry M and others, 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report*; University of Washington.

[28] *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06*; The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case No ICC-01/04-01/07; The Prosecutor v Uhuru Muigai Kenyatta ICC-01/09-02/11, situation in the Republic of Kenya Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta (05/12/2014), On the 3rd of December 2014, the Judges of Trial Chamber V (B) of the International Criminal Court (ICC) declined to further adjourn the trial of Mr. Uhuru Muigai Kenyatta. Accordingly, given the state of the evidence in this case, I have no alternative but to withdraw the charges against Mr. Kenyatta. Earlier today, I filed a notice to withdraw charges against Mr. Kenyatta; I am doing so without prejudice to the possibility of bringing a new case should additional evidence become available, notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983.

It has also released four accused for lack of evidence after charges failed to be confirmed during the Pre-Trial stage including some parties in the Kenyan trial. Much of this can be attributed to failures by the OTP.[29] Reasons behind such failures are structural obstacles within the OTP, paying specific attention to the organisation of the Office and its investigative teams is necessary, of the first 30 individuals charged by the Court, 15 have appeared before it, of the 15 individuals, the OTP failed to have charges confirmed against four at the Pre-Trial Chamber (PTC), prompting their release from custody.

Insufficient research coupled with lack of resources for investigation[30] lead to certain crimes being overlooked; poor investigation results in weak cases.[31] The OTP also instructs investigators to limit the number of charges in certain cases, for example, after 18 months of investigating killings and other crimes in the Lubanga case, the OTP directed investigators to focus only on child soldiers;[32] many critics felt the charges brought against of Mr Lubanga did not accurately reflect the Crimes committed by him.[33] The acquittal of *Mathieu Ngudjolo Chui* dented the external image of the Court. The decision attracted criticisms from human rights groups blaming the OTP for not building a strong case.[34] The Judges cited inconsistent and unreliable witness evidence, the lack of testimony from witnesses that could have played a key role, unfamiliarity with the region in question and no evidence collected until three years after the alleged atrocities weakened the case. The Prosecutor could not prove 'beyond reasonable doubt' that *Ngudjolo Chui* was commander of the military group at the time of the 2003 killing of approximately 200 residents of the *Bogoro* village in the DRC and thus not found guilty of the alleged crimes so released from custody.[35] Another major issue in the case was the interpretation of Article 25(3) (a) of the Rome Statute (indirect criminal responsibility).[36] Trial Chamber Judge *Christine Van den Wyngaert* opined under her

[29] Ryan Gilchrist, 'Issues with Investigations' in Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] Jackson School of International Studies Task Force Report University of Washington.
[30] Katy Glassborow, 'ICC Investigative Strategy under Fire' [2008] Global Policy Forum.
[31] ibid.
[32] ibid.
[33] ibid.
[34] Simons, Marlise 'Congolese Rebel Leader is Acquitted of War Crimes' *The New York Times* (New York, 18 December 2012)
[35] Sane Jelia, 'Mathieu Ngudjolo Chui: reflections on the ICC's first acquittal' Opinio Juris <http://opiniojuris.org> accessed 4th April 2013.
[36] ICCSt (n 1) Article 25: Individual Criminal Responsibility: 3: In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; Article 25(3)(a) of the Rome Statute.

interpretation of the Article, that the case could not be supported. She disagreed with the PTC, that she found no basis for indirect perpetration because 'perpetration through an organisation finds no support in the Statute,[37] a key aspect in this decision is the fact that the Judges found problems not just with the substance of the case, but also with the way it was handled by the Prosecution.[38]

The 'standard of proof elements' is another challenge within the Court's operation. The Prosecution often fail to meet the standards of proof necessary to confirm charges, due to heavy reliance on secondary evidence, bringing charges before the case is ready and broad claims being made without substantial evidence to back it up.[39] The OTP must improve its overall management in order to adopt better policies and procedures in the future that will build stronger cases which not only can be won at trials but also represent charges of crimes committed.[40] The Statute requires the OTP to meet high standards of proof at investigations. First, the OTP is to determine potential crimes in a situation and its admissibility, whether a reasonable basis exists, and a formal investigation follow.[41] Thus, the OTP may issue arrest warrants through the PTC by submitting charges that meet the lowest standard of proof provided that there are reasonable grounds to believe the accused person committed the crime.[42] Once the accused is in custody, the next standard of proof must be met to confirm the charges at the PTC, this standard of proof is sufficient (evidence) to establish substantial grounds to believe that the accused committed the crimes, if this standard is not met the accused is released from custody, otherwise it proceeds to trial.[43]

The final standard of proof required to convict the accused is to prove 'beyond reasonable doubt'[44] that the accused is guilty of the Crimes for which he/she is charged.[45] The OTP is often found wanting during the PTC stage because Judges feel the OTP came unprepared.

[37] *The Prosecutor v Mathieu Ngudjulo Chui*, Trial Chamber II, Judgement Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van Den Wyngaert, ICC-01/04-02/12 (ICC, 2012).
[38] *The Prosecutor v Mathieu Ngudjulo Chui,* ICC-01/04-02/12 (ICC, 2012);Trial Chamber II, Judgement Pursuant to Article 74 of the Statute; Concurring Opinion of Judge Christine Van Den Wyngaert.
[39] Ruto and Sang on trial for charges of crimes committed between 1- 4 January 2008 when violence erupted in Kenyan Presidential election dispute between the then incumbent president *Mwai Kibaki* and his challenger *Raila Odinga*. The OTP (Bensouda) moved to the appeals chamber to challenge a decision of Pre-Trial Chamber II, which rejected her request to amend the temporal scope of the charges. In dismissing her appeal, the judges said they relied on Article 61(9) of the Rome Statute which bars the prosecutor from amending charges once a trial is underway.
[40] ibid.
[41] ICCSt (n 1) Article 53(1) (a).
[42] ibid Article 58(1) (a).
[43] ibid Article 61(5).
[44] R v Woolmington [1935] UKHL 1.
[45] ICCSt (n 1) Article 66(3) Rome Statute.

This criticism shows two primary issues; (1) That the Chief Prosecutor was willing to move ahead before the case was fully developed, and (2) That the investigation team on site are unable to gather strong enough evidence to build the case.[46] In *Prosecutor v Callixte Mbarushimana*[47] (DRC), the Judges noted in accordance with Article 67(1) (a),[48] that the defendant must be told of the charges being brought against him prior to trial; that charges against him are broad crimes committed in a large geographic area, rather than specific incidents. The Chamber claims it appears to be an attempt by the Prosecution to allow for new charges to be added at a later date[49] and questioning why it was unable to present specific evidence regarding specific crimes committed in other regions,[50] this conflicts with Article 67,[51] in the view of the judges, the defendant is made unaware of the charges brought against him, also Article 74 (2)[52] does not allow for new charges without following the procedures outlined in the Statute.[53] Due to these issues as well as a lack of evidence or reliance on a single witness in some cases, PTC-I declined to confirm the charges against *Callixte Mbarushimana*. The Appeals Chamber upheld the decision, and the defendant was released from custody.[54]

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[46] Ruto and Sang on trial for charges of crimes committed between 1- 4 January 2008 when violence erupted in Kenyan Presidential election dispute between the then incumbent president *Mwai Kibaki* and his challenger *Raila Odinga*. The OTP (Bensouda) moved to the appeals chamber to challenge a decision of Pre-Trial Chamber II, which rejected her request to amend the temporal scope of the charges. In dismissing her appeal, the judges said they relied on Article 61(9) of the Rome Statute which bars the prosecutor from amending charges once a trial is underway.

[47] *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10.

[48] ICCSt Article 67; Rights of the accused: 1) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality; (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; Article 67 Rome Statute.

[49] Ruto and Sang on trial for charges of crimes committed between 1- 4 January 2008 when violence erupted in Kenyan Presidential election dispute between the then incumbent president *Mwai Kibaki* and his challenger *Raila Odinga*. The OTP (Bensouda) moved to the appeals chamber to challenge a decision of Pre-Trial Chamber II, which rejected her request to amend the temporal scope of the charges. In dismissing her appeal, the judges said they relied on Article 61(9) of the Rome Statute which bars the prosecutor from amending charges once a trial is underway.

[50] *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10; Pre-Trial Chamber 1, Decision on the Confirmation of Charges.

[51] ICCSt (n 1).

[52] ibid Article 74: Requirements for the decision: 2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial. Article 74 Rome Statute.

[53] *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10; Pre-Trial Chamber 1, Decision on the Confirmation of Charges.

[54] ibid; Mr Mbarushimana is allegedly criminally responsible for: Five counts of crimes against humanity: murder, torture, rape, inhumane acts and persecution; Eight counts of war crimes: attacks against the civilian population, murder, mutilation, torture, rape, inhuman treatment, destruction of property and pillaging. On 16 December 2011, Pre-Trial Chamber I decided by Majority to decline to confirm the charges against Mr

Another major problem for the Prosecution has been attaining reliable witnesses before going to trial. Several times the Prosecution found it difficult to establish the credibility of witnesses before the Court. The *Prosecutor v Bahr Idriss Abu Garda*[55] from Sudan is an example of a case where the OTP went to the PTC before they had strong witnesses prepared. The Judges at the PTC sought to find 'substantial grounds to believe' three specific allegations in order to confirm the charge against *Mr Abu Garda* that:

(1) He participated in a meeting to plan an attack,

(2) He participated in a second meeting before said attack, and

(3) He formed a 'common plan' with other military leaders to orchestrate the attack.

After citing inconsistent witness testimony, the Judges refused to confirm the first charge claiming that the witnesses presented by the OTP are unreliable and that others presented through anonymous confidential statements, are insufficient.[56] The second charge was fully contingent on the testimony of one witness, whose identity is said to be confidential and unknown to the defence. Whilst the Chamber had found that Mr *Abu Garda* controlled the militant group at some point, the third charge was unconfirmed as the judges cited a lack of and inconsistency in evidence.[57] The Judges concluded that 'the evidence tendered by the Prosecution in support of the allegations is scanty and unreliable, that the Chamber is unsatisfied; that there are substantial grounds to believe the Crime alleged against Mr *Abu Garda*.[58] While all three judges agreed not to confirm the charges, the case still produced separate opinions as Judge *Cuno Tarfusser* believed the Chambers went too far in analysing why the charges could not be confirmed stating 'the *lacunae* exposed by the mere factual assessment of the evidence is so basic and fundamental that the Chamber need not conduct detailed analysis of the legal issues pertaining to the merits of the case.'[59] The lack of strong, reliable witnesses and the failure to thoroughly assess the evidence noted by the Judges shows that the case is an example of the OTP willing to go to trial once it believes it can prove that there are 'sufficient grounds to believe' the charges, rather than when he believes the case is fully prepared.

Mbarushimana. Mr Mbarushimana was released from the ICC's custody on 23 December 2011, upon the completion of the necessary arrangements, as ordered by Pre-Trial Chamber I.

[55] *Prosecutor v Bahr Idriss Abu Garda* ICC-02/05-02/09.

[56] *The Prosecutor v Bahr Idriss Abu Garda, Pre-Trial Chamber* 1, Decision on the Confirmation of Charges, ICC- 02/05-02/09 (ICC, 2010).

[57] ibid.

[58] ibid.

[59] ibid.

Judge *Hans-Peter Kaul* noted that the underlying problem causing the OTP to go to trial before being sufficiently prepared may be that the OTP is looking to gather only enough incriminating evidence to meet the minimal standard of proof required to advance the case. While charges against the first two named defendants in the *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*[60] of Kenya were confirmed, Judge Kaul offered a dissenting opinion that criticised the OTP procedure.

His opinion partly rests on the fact that he does not believe the ICC has jurisdiction in the case, criticising the investigative techniques of the OTP, he noted that the OTP must present its allegations with 'sufficient evidence'[61] in accordance with Article 61(5) of the Statute.[62] He proceeds to explain how in pursuit of this 'sufficient evidence,' he believes that the Prosecutor violated Article 54 of the Statute.[63] He then explains that the Prosecutor is a truth seeker, rather than a partisan lawyer and by trying to make sure that charges are confirmed, he is proving to not investigate exonerating circumstances as equally as incriminating, thereby violating Article 54.[64] He adds, in his opinion that it would be 'risky; if not irresponsible' for the Prosecutor to go to the PTC with only sufficient evidence to believe while hoping to find new and stronger evidence to satisfy Article 66 (2), (3)[65] in trial, in which the 'beyond reasonable doubt' threshold is required.[66] This is a criticism of the policy and approach of the OTP as a whole, claiming that its methods of investigation cause it to lose confidence in cases presented by the Prosecution. The Statute states that for an accused to be convicted, the Prosecution must prove its case to the highest standard of proof.[67]

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

[61] ibid; Pre-Trial Chamber II, Decision on the Confirmation of Charges, Dissenting Opinion by Judge Hans-Peter Kaul, ICC-01/09-02/11 (ICC, 2012).

[62] ICCSt (n 1)Article 61(5) Rome Statute: Article 61(5): Confirmation of charges before trial: At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call witnesses expected to testify at trial.

[63] ibid Article 54: Duties and powers of the Prosecutor with respect to investigations: (1)(a): In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

[64] *The Prosecutor v Bahr Idriss Abu Garda,* Pre-Trial Chamber 1, Decision on the Confirmation of Charges, ICC- 02/05-02/09 (ICC, 2010) paras 185-186.

[65] ICCSt (n 1) Article 66 (2 & 3) on presumption of innocence (2) The onus is on the Prosecutor to prove the guilt of the accused; (3) In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

[66] *The Prosecutor v Bahr Idriss Abu Garda*, Pre-Trial Chamber 1, Decision on the Confirmation of Charges, ICC- 02/05-02/09.

[67] ICC Trial Chamber II acquits Mathieu Ngudjolo Chui, because they could not prove beyond reasonable doubt that *Ngudjolo Chui* was guilty, he was acquitted ICC Press Release, 12 December, 2012; see also the press statement of the Prosecutor in respect of the Kenyans case, on the 5th December 2014, decision by ICC

The Lubanga case also drew criticism from the Chamber at various points. While the Judges eventually ruled in favour of continuing the case, they concluded that the testimony from the intermediaries and associated witnesses could not be relied upon,[68] essentially because of unsupervised actions of three of the principal intermediaries.[69] Despite the fact that Lubanga was convicted, the OTP was criticised for using unreliable evidence, lack of evidence, and inconsistent witness testimony; in addition to a general feeling that the Crimes for which Lubanga was charged did not accurately reflect the damage he caused in the region. The numerous instances in which the Chamber criticised the OTP for weakness in its cases show that the unstated policy of the (former) Prosecutor was to take a case to Chambers as soon as he felt there was sufficient evidence to establish 'substantial grounds to believe' that the person committed the crime.[70] In addition this potentially violates certain Articles in the Statute, it also adds pressure on the Prosecutor and the investigation team to find enough evidence in continuing the trial and prove 'beyond reasonable doubt' that the accused is guilty in order to gain a conviction,[71] making it more difficult for the OTP to gather supplementary evidence whilst also proceeding with an active trial. These demonstrate the difficulties often faced in trial to establish conviction; the strategy could be for two reasons, first to save resources and to get to trial as quickly as possible, second, possible pressure on the Prosecutor to hold actual court proceedings hence wants to move as quickly as possible to court.[72]

The lack of resources, moving too quickly, inconsistent investigation team, and reliance on meeting only the lowest standard of proof necessary to proceed to trial created the problems the OTP faces today. Despite the reasons for short investigations some ex-investigators believe these ideas failed, in regard to representing the entire range of victimisation as the Lubanga case focused only on child soldiering. Limiting the scope of the charges frustrated investigators,[73] leading to damaging the morale of the investigation team, and the fact that they operate with inadequate numbers of investigators. This also led to high turnover amongst

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Prosecutor Fatou Bensouda to withdraw, without prejudice, the charges against President Uhuru Kenyatta, ICC-01/09-02/11-983.

[68] *The Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber 1, Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06.

[69] ibid.

[70] ICCSt (n 1) Article 61(5).

[71] ibid Article 66(3).

[72] Accused Individuals have the option to appear before court voluntarily, by doing so voluntarily, they are exercising their free will and not technically in custody; 'Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor.' [2012]War Crimes Research Office Washington College of Law, American University.

[73] Katy Glassborow, 'ICC Investigative Strategy under Fire' <www.globalpolicy.org> accessed 1 July 2014.

employees of the OTP, many citing 'burn-out' and dissatisfaction with the way in which their opinions are valued being the cause of the turnover.[74]

Losing experienced investigators can be costly, as new employees/investigators would take some time to learn to familiarise themselves with situations under investigation. Despite the change of leadership to Fatou Bensouda from Moreno-Ocampo as Chief Prosecutor, it does not appear that the OTP policy has changed. Calls for specific cases to only focus on certain crimes in a region frustrate investigators; they feel important crimes are being overlooked. Another problem created by focusing on certain crimes is that it does not really solve any problems, for example, Lubanga gained a conviction, but he is a relatively low rung on a low ladder, settling for him overlooks the real problem of why these crimes are occurring.[75] Outside influences also impact on the OTP's investigation, teams are relatively small and the Chief prosecutor wants to move to trial so quickly, that it relies significantly on secondary sources at times.[76] These include documentation and reports from organisations such as the United Nations and Non-governmental Organisations (NGOs). It also includes information from intermediaries used to identify witnesses. Relying heavily on such sources present risks to the Prosecution as individuals and organisations presenting such data are unlikely to scrutinise the material to ensure its accuracy and reliability. Furthermore, such organisations may have their own agenda not in alliance with the interests of the OTP. During testimony in the Lubanga case, the lead investigator testified that 'one must concede that the procedure of investigation of humanitarian groups, in my (sis) opinion, is more a sort of a general journalism than legalistic investigations.[77]

[74] Secret Human Rights Watch letter to the ICC OTP, 15 September 2008, a request for a meeting to discuss management practices within the Office of the Prosecutor. Excerpt of the letter reads: "We are writing to request a meeting to discuss management practices within the Office of the Prosecutor... [We] are deeply invested in the mission of the International Criminal Court...instrumental in its creation...dialogue with court officials on matters of policy, and intense advocacy with states parties and the broader international community to foster support for international justice...to ensure the court's success...defend the independence of the OTP and the court...increased attention to management practices within the office is needed, and seek this opportunity to discuss these concerns directly with you. As you know, the court's strategic plan identifies establishing the ICC as a model of public administration as one of its three central goals <www.hrw.org/.../human-rights-watch> accessed 1 July 2014.

[75] Accused Individuals have the option to appear before court voluntarily, by doing so voluntarily, they are exercising their free will and not technically in custody; 'Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor.' [2012] War Crimes Research Office Washington College of Law, American University.

[76] ICC – OTP Prosecutorial Strategy 2009-2012, 1 February 2010.

[77] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 Trial Chamber I, Deposition of Witness DRC-OTP-WWWW-0582.

A major obstacle within the Court is the Organisational Structure of the OTP. The OTP is divided into three divisions, the Investigation, Prosecution and Jurisdiction Cooperation/Complementarity Division (JCCD) each with a divisional head answerable to the Chief Prosecutor. Investigation teams assigned to cases have same structure. The structure is often problematic, leads to inefficiencies such as delays and damaged investigations. An analyst had stated that each division represented in the investigation team felt like a separate entity, operating with individual goals rather than working as a team.[78] When a situation comes under investigation, the OTP sends a team to gather information. The teams encompass each member of the three divisions and report directly to the Executive Committee (Ex Com), made up of the Chief Prosecutor and the heads of each division.[79] The divisions are to work together and build evidence to be used in court. However, a lack of cooperation amongst the different units leads to inefficient investigative practices,[80] such as: duplication, lack of communication and cooperation to mention a few. Also, by the time the Investigation division arrives to interview witnesses, it is often found that witnesses had been interviewed by the JCCD; not understanding why they needed to be interviewed again.[81] Unwillingness to share information among the three divisions even though they are supposed to be working together is noticeable and reported.[82]

4.4 Funding and Budgetary Challenges

Investigations run by the OTP are affected by resource allocation from 2009-2011 the OTP opened investigations into three more situations and ten cases; yet the added workload did not significantly increase the budget to account for this[83] despite additional situations and cases from Mali, Kenya, Côte d'Ivoire, and Libya in 2010-2013. However, the 2013 OTP budget is only 1.04% greater than that of 2010.[84] Over the first ten years of its existence, the amount of

[78] Accused Individuals have the option to appear before court voluntarily, by doing so voluntarily, they are exercising their free will and not technically in custody; 'Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor.' [2012] War Crimes Research Office Washington College of Law, American University.
[79] ICC Office of the Prosecutor; Regulations of the Office of the Prosecutor; Regulation (32)(1-5).
[80] Accused Individuals have the option to appear before court voluntarily, by doing so voluntarily, they are exercising their free will and not technically in custody; 'Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor.' [2012] War Crimes Research Office Washington College of Law, American University.
[81] ibid.
[82] ibid.
[83] Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[84] IRIN Africa English Service (Global) 'Analysis: Cash-Strapped ICC Takes on Mali' <http://www.irinnews.org/> accessed 1 August 2014.

money given to the OTP averaged 24.1% of the total ICC budget. This is low in comparison with the budgets of the OTP in the ICTY and the ICTR, which averaged 30.8% and 27.7% respectively of their tribunal's total budgets over their first 10 years.[85] In 2012, the ICC requested 19.6% increase in the overall budget to deal with the expanding caseload, but some of the biggest donors to the Court, specifically Japan, Germany, France, the UK, and Italy, insist on zero percent growth.[86] Requests for additional funds in 2013 have also been met with similar resistance by members of the Assembly of States Parties (ASP),[87] meaning that the workload of the Court and that of the OTP will continue to grow while finances lag, this indirectly affects overall performance. It is unlikely investigation teams will become larger; the 2013 budget called for 46 professional staff members, just two more than the 2012's.[88] Shortcomings in budgetary resources translate to restraints on human resources and manifest challenges. The Court cannot afford to staff adequately to deal with the innumerable duties of the Victims Participation and Reparations Section (VPRS),[89] Office of the Public Counsel for Victims (OPCV) and Chambers that have developed in respect of victims' participation, particularly in the application process, in effect, trial efficiency can be put at risk, which in turn may impair impartiality.[90]

Two situations referred by the Security Council (SC) to the ICC, Sudan in 2005 and Libya in 2011 came with a caveat stating that 'the expenses incurred in connection with the referral, including expenses relating to investigations or prosecutions in connection with that referral, shall not be borne by the United Nations but by parties to the Rome Statute and States that

[85] Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[86] Corey-Boulet Robbie, 'Concern over ICC Funding' *Inter Press Service News Agency* (28 September 2011) < http://www.ipsnews.net/ > accessed 1 August 2014.
[87] Article 112 of the Rome Statute establishes the Assembly of State Parties as an oversight/legislative mechanism of the Court; Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] Jackson School of International Studies Task Force Report University of Washington.
[88] ibid.
[89] The Victims Participation and Reparations Section (VPRS) of the Registry of the International Criminal Court (ICC) organises a training sessions such as in Bangui the capital of the Central African Republic (CAR), to strengthen the capacities of local intermediaries who help victims in order to bring them closer to the ICC and in particular to enhance communication with victims. The intermediaries with whom VPRS is in contact play a key role in enabling victims to exercise their rights in the proceedings before the Court. Intermediaries include members of human rights organisations and local associations, teachers, lawyers and other intellectuals. ICC-CPI-20121121-PR855.
[90] Heather Nunan, 'Victim Participation in the Judicial Process' in Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.

wish to contribute voluntarily.[91] Regardless of Article 115 ICCSt on possibility of a UN funding.[92] Without a policy change, Security Council referrals will become a financial burden on the Court.[93]

4.5 Charges Representative of Crimes

The selection of individuals to indict and the appropriate selection of crimes to charge them with are critical. So far the final verdict and charges against defendants are limited and not representative of the crimes committed.[94] Lubanga's conviction on conscription, enlistment and use of child soldiers are unrepresentative of the 'range of criminality' present in the DRC, or of that which Lubanga and the Union of Congolese Patriots (UPC) could be responsible for. *Mathieu Ngudjolo* charged with a broader spectrum of crimes; isolated to one attack on the village of *Bogoro* in February 2003. This also is clearly not representative of the range of criminality in the DRC.

Undue pressure on investigators to hasten performance has been an obstacle to gathering thorough, unbiased evidence sufficient for issuing a representative sample of charges. The OTP states that in the face of challenging investigative environments, it is required, 'whenever possible, to present expeditious and focused cases while aiming to represent the entire range of criminality.'[95] A former ICC analyst stated in an interview that he believes that Lubanga was only charged with the use of child soldiers due to the interest of time and that the intention was to bring additional charges later. The pressure to act quickly in this case is partly the Prosecutor's fear that Lubanga would soon be released from detention in the DRC.[96] This resulted in a hurried process; Lubanga was only charged on three counts involving the recruitment, conscription and use of child soldiers.

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[91] UNSC 5158th Meeting, 'Re S/RES/1593 (2005) [on Sudan]" (S/RES/1593) 31 March 2005'; UNSC 6498th Meeting. 'Resolution 1973 [on Libya]'; (S/RES/1973) 17 March 2011; Resolution 1593 (2005), Paragraph 7 states: [it] recognises that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.

[92] ICCSt (n 1).

[93] Lummy Lin,'The ASP and State Cooperation' in Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force* Report University of Washington.

[94] *The Prosecutor v Thomas Lubanga Dyilo* Case No ICC-01/04-01/06.

[95] Mahony Chris, 'Victor's Justice: What's Wrong With Warlord Charles Taylor's Conviction.' *The Atlantic US* (30 Apr 2012) < http://www.theatlantic.com/> accessed 1 July 2014.

[96] ibid.

Regardless of whether the OTP had sufficient evidence for the few crimes it charged Lubanga with but also ignoring other major international crimes such as murder and sexual violence allegedly committed. Judge Fulford stated that 'the Prosecutor failed to charge Mr Lubanga with sexual violence… even though Mr Moreno-Ocampo made repeated public claims that the militia was responsible for widespread rape.'[97] Thus, while Lubanga was ultimately convicted and sentenced to 14 years imprisonment, the case left out thousands of victims of other crimes, and justice was not fully served. While time is important, it should not impinge on the quality of investigation processes or affect which charges are brought against suspects.

Former ICC investigators claim disregard of expertise several times by the OTP due to the pressure to act quickly with instructions 'to drop a year and a half of investigative work and focus solely on the use of child soldiers,' despite a substantial collection of evidence for other crimes. Others claim investigations had to stop to present evidence at court as soon as possible[98] some claimed it was difficult to get the OTP's permission to conduct field investigations. Additionally, that the OTP's leadership repeatedly second-guessed investigators decisions and at times hindered the investigation process by re-directing investigative directions based on outside influences.[99]

In Kenya, the OTP cited government obstruction of access to evidence and threats to witnesses as a major obstacle in gathering sufficient evidence.[100] Nonetheless, many Kenyans felt that the Prosecutor could have conducted investigations more effectively to ensure that charges against the six initially accused were upheld.[101] The charges in the Kenya cases have been more representative of the nature of the crimes committed during the country's 2007-2008 political upheavals, with charges of rape and other inhumane acts being confirmed for two of the four individuals charged, in addition to charges of murder, deportation and persecution.[102] The appeal of a 'narrow approach' is that it appears to be clean, simple and more effective for obtaining a conviction. Prosecuting limited charges is clearly a less

[97] Simons Marlise. 'International Criminal Court Issues First Sentence.' *The New York Times*; accessed 1 July 2014 < www.nytimes.com >.
[98] Mahony Chris, 'Victor's Justice: What's Wrong With Warlord Charles Taylor's Conviction.' *The Atlantic US* (30 Apr 2012) < http://www.theatlantic.com/> accessed 1 July 2014.
[99] Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[100] Erika Murdoch, 'The office of the Prosecutor Charging Strategy' in Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[101] ibid.
[102] ibid.

daunting task than prosecuting for charges that address the breadth of crimes committed. Thus, using this narrow approach is potentially an effective way to get through investigations rapidly and secure a conviction. However, the pressure to reach a conviction should not outweigh the importance of discovering the truth and serving justice in a fair and representative manner. Furthermore, it is not necessarily true that prosecuting on limited charges will make it easier to secure conviction *Ngudjolo* was acquitted even though he was only charged for crimes committed during the attack on *Bogoro* in 2003.[103]

The OTP's narrow charging strategy has been very damaging to acceptance of the Court's credibility. A 2006 NGO conference the *Beni Declaration* stated that: '...a limited charge is treacherous; with no improvements made, [the] charges risk offending the victims and strengthening the growing mistrust in the work of the Court.'[104] *André Kito*, a Congolese human rights activist, stated: he 'regretted that crimes like 'sexual violence, summary executions and pillaging' were excluded from the trial.[105] To improve these perceptions and support for the ICC, the OTP must follow in practice its policy of charging crimes representative of the criminality and victimisation. Ensuring that justice is served to bolster support for the ICC is paramount. The OTP must ensure that investigations include examination of incriminating and exonerating evidence not only for crimes committed by opposition groups, but also by government officials.

4.6 Challenges within the Court's Judiciary (the Chambers)

The Court's Judiciary could be said to be inundated with a number of challenges including self-criticism to move the Court forward.[106] The role of the Pre-Trial Chambers and their relationship with the Trial Chambers set forth in the Statute has not been definitively clarified. How can a sensible division of labour be achieved between pre-trial and trial proceedings? How far can the Trial Chamber utilise the findings of the Pre-Trial Chamber in order to avoid repetition when taking evidence?[107]

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[103] FIDH 'The Office of the Prosecutor of the ICC – 9 Years On: Analysis of the Prosecutorial Strategy and Policies of the Office of the Prosecutor' [2003-2011]; Recommendations to the Next ICC Prosecutor' No 579, <www.fidh.org > accessed 1 July 2014

[104] Beni Declaration, 'Making a Statement: A Review of Charges and Prosecutions for Gender-based Crimes before the International Criminal Court' [2008]Women's Initiatives for Gender Justice; The Hague.

[105] Simons Marlise, 'International Criminal Court Issues First Sentence' *The New York Times* (NY,10 Jul 2012).

[106] Hans-Peter Kaul, 'The International Criminal Court (Current Challenges and Perspectives)' [2011] *Salzburg Law School on International Criminal Law.*

[107] ibid.

Another serious problem for the Court is adequate protection of witnesses and victims due to the far away location of 'situation States.' Those prepared to testify often face great risks and real threats. Procedural rules explicitly permit witnesses and victims to be made anonymous through 'redactions'.[108] Certainly, this fundamentally threatens the rights of the accused to a fair trial.[109] The increased practice of 'redactions' during trials has become challenging for the Court; difficult to change if tactical advantages are derivable.[110]

Disputes arise within the Court's chambers about the roles victims and their organisations can play during proceedings. The dilemma is the victims participation envisaged by the Statute, but how is this achieved without upsetting proceedings? The current system of victim participation looks disappointing. It is symbolic, often distorted, by certain practices of legal representatives of the victims, such as, the trend that lawyers collect mandates from victims; with these documents they apply to be admitted as legal representatives of victims and to obtain legal assistance funds from the Court, which are quite generous, but uncertain whether, afterwards, they still inform and seek the views of the victims concerned. Victims must be given genuine and authentic participation. Alternatively, why not through the appearance of elders or self-chosen representatives of villages affected by the Crimes in question?[111]

4.7 Speed of Proceedings and Trial

The fundamental right of the accused, to be tried without undue delay constitutes another challenge for the Court.[112] Prosecution of crimes at national and international levels differ,

[108] *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* (ICC-01/09-02/11-495-AnxA-Corr 05-10-2012 2/18 RH T); protocol establishing a redaction regime in the case; *Prosecution v Germain Katanga, ICC-01/04-01/07 (OA)* (13 May 2008) Situation in the DRC judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "first decision on the prosecution request for authorisation to redact witness statements.

[109] The right to a fair trial is protected in Articles 14 and 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) and other relevant legal instruments: Universal Instruments are; The Universal Declaration of Human Rights 1948; The International Covenant on Civil and Political Rights 1966; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; The Statute of the International Criminal Court, 1998; The Code of Conduct for Law Enforcement Officials 1979; The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988; The Standard Minimum Rules for the Treatment of Prisoners 1955; The Guidelines on the Role of Prosecutors 1990; The Basic Principles on the Role of Lawyers 1990; The Rules of Procedure of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Regional Instruments are: The African Charter on Human and Peoples' Rights 1981; The American Convention on Human Rights 1969; The European Convention on Human Rights, 1950.

[110] Hans-Peter Kaul, 'The International Criminal Court (Current Challenges and Perspectives)' [2011] *Salzburg Law School on International Criminal Law*.

[111] ibid.

[112] The Court took six years to prosecute and deliver its first conviction; the second case took three years to try, and resulted in an acquittal, the second conviction has just been concluded 2014 another long period of

although, the processes require thorough consideration and determination of the criminal charges, the complexity and magnitude of international crimes are exceptional which influence the pace of conducting and concluding such trials.[113] The reasons for the tempered pace of progress of the first proceedings before the ICC relate to a number of factors, such as interlocutory appeals, victims' participation and the disclosure process of incriminating and exonerating evidence by the prosecution to the defence.

Being the first permanent International Criminal Court, steps taken by the chambers, parties, participants and the Registry are on undiscovered grounds.[114] The Rome Statute represents an international legal framework, based on a fusion of fundamental concepts of criminal and procedural laws, mainly taken from the Romano-Germanic and common law systems.[115] Although the practice in the system from which the concepts originate have grown and developed for centuries, but the *sui-generis* character of proceedings before the Court confirms, no common practice to rely upon.[116] Furthermore, the character of the ICC leads to the conclusion that practices before the *ad hoc* international and hybrid tribunals[117] are not *per se* applicable before it, but may provide guidance on a case by case basis.[118] Some norms and provisions within the Statute resulted from compromises over legal, political and diplomatic views. Thus, there are *lacunae* within the legal framework of the Court which require a thorough process of interpretation.[119]As Professor Akande declared:[120]

> '...it took far too long for the ICC to issue a detailed decision on the immunity [Head of State] issue.[121] The decisions came almost three years after the ICC Pre-Trial Chamber first issued an arrest warrant for Bashir in March 2009 and after the ICC has on several occasions

prosecution. These prolonged trials are due to unproductive investigations, ineffectual evidence gathering, and problems inherent in the system. Internal and external Court relationships also play a decisive role in streamlining the trial process.

[113] René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) 6 *Journal of International Criminal Justice* 711.

[114] ibid.

[115] ibid.

[116] ibid.

[117] SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993) (ICTY); SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994) (ICTR); 2178 UNTS 138, 145; 97 *American Journal of International Law* 295; UN Doc. S/2002/246, appendix II (SCSL).

[118] René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) 6 *Journal of International Criminal Justice* 711.

[119] ibid.

[120] ibid; Dapo Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong' [2011] EJIL Talk < www.ejiltalk.org> accessed 12 July 2014.

[121] Dapo Akande, 'State Cooperation and Immunities the Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' [2012] Peace Palace, Universiteit Leiden, Grotius Centre for International Legal Studies, (The Hague, The Netherlands. September 26 – 27).

> reported States to the UN Security Council for failing to cooperate with regard to Bashir' arrest and surrender.'

The ICC judges delayed dealing with the immunity issue, then came the African Union (AU) argument that Al-Bashir was immune from arrest as a Head of State of a non-party State; calling on its members not to cooperate with the ICC; the resulting tension proved damaging to the Court; Article 98 ICCSt requires the Court to deal with the issue of immunity. In the decision of the Pre-Trial Chamber on Al-Bashir's arrest warrant and the Gaddafi Arrest Warrant, the Chamber had held that: The current position of Omar Al-Bashir as Head of a non- Party State to the Statute has no effect on the Court's jurisdiction over the present case.[122] The Court believes it addressed the question of the position of Heads of States, but it failed to consider customary international law of immunity and the interplay between Articles 27 and 98 of the Statute dealing with immunity but appears, contradictory at first glance, however, a supplementary discussion of the immunity will be examined in the next chapter.

4.8 Restorative Justice

The ICC's unique mandate to provide restorative justice challenges the Court to define and establish adequate support system for victims. Different from other international tribunals, the ICC is permanent, with the potential to alleviate victims of the after effects of horrific crimes experienced. To maximise this potential, the Court's overarching strategy must be streamlined to efficiently satisfy its four underlying principles, namely to: achieve positive complementarity, provide focused investigations/prosecutions, address the interests of victims, and maximise the impact of the Court's work.[123] Restorative justice is a judicial and social reform emerging from the legal framework of the Court. While the ICC proceedings enable victims to speak of their harms and experiences, their 'voices' are largely absent from its judgment. To address this issue, the ICC needs to develop and maintain a level of 'restorative justice coherence' to manage victims' expectations of its justice approaches.[124] A core idea of restorative justice is that the people most affected by a problem should discuss within themselves how it should be dealt with. This has not been the case with the ICC.[125]

[122] ibid.
[123] ICC – OTP, Prosecutorial Strategy 2009-2012, 1 Feb. 2010.
[124] Claire Garbetta, 'The truth and the trial: victim participation, restorative justice, and the International Criminal Court' (2013) 16 *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*193.
[125] Gerry Johnstone, Daniel Van Ness, *Handbook of Restorative Justice* (Willan publishers 2006) xxi.

Certainly, the global economic crisis dominates discussions of the Court's budget and future, the recession could be a factor affecting State Parties' financial obligations. Additionally, many State Parties have lost faith in the Court's ability to utilise its resources effectively. Hence, the ability of the Court to fully implement transitional justice is below expectation.

4.9 Internal Oversight Mechanisms

Complications inherent in complementarity and in determining gravity have exemplified problems in selecting situations by the OTP, further to these, politics and 'a presumed African bias' inhibits international support for the Court.[126] In recent years, the ICC has come under concerted attacks by the political elites, State Parties and governments whose leaders are under scrutiny of the Court.[127] These challenges have taken a range of forms, governments have at times sought to use the ICC as a political tool against political opponents, or to enhance leverage over recalcitrant States a tool which can be revoked when political interests require.[128] Attacks on the Court's legitimacy and manipulation as a political tool continue to affect the Court's credibility; State Parties to the Court have grown to about 123 States of which about 34 are AU members.[129]

Seventeen years after the Court's founding document and entering into force of the Rome Statute peace or justice is still illusive. The Court's unique structure and jurisdiction are meant to provide a permanent global challenge to impunity. However, its legitimacy and credibility are undermined by its deficiencies. The Court experiences difficulties achieving intended results, taking nearly ten years from inception to deliver its first (March 2012) conviction. The declining credibility elicited by various challenges is systemic enabled by the ASP,[130] an oversight mechanism for the Court.[131] Politics inherent in such an assembly have prevented serious pursuit of its role. The ASP has failed to hold the Court accountable for its

[126] Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[127] Sudan, Kenya and Uganda case including the CAR (all African Union members).
[128] Open Society Justice Initiative, 'Challenges Facing the International Criminal Court: Recommendations to the Assembly of States Parties' [2011] (unpublished).
[129] State membership of the International Criminal Court currently stands at 123 countries as States Parties to the Rome Statute of the International Criminal Court, of which 34 are African States Parties, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States <www.icc-cpi.in> accessed 1 July 2014.
[130] René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) *6 Journal of International Criminal Justice* 711.
[131] ibid.

dismal results; moreover,[132] it is yet to address personnel issues that affect strategic decisions and the rules inherent in the procedural process of the Court.[133] The ASP needs to be more assertive and more alive to its responsibilities, for the Court to ensure fruitful and reliable results.

4.10 Judges of the International Criminal Court

The ICC parades exceptionally qualified, capable, and committed judges but evident exceptions tend to overshadow this, such as 'Judges with little or no trial experience' that have allowed proceedings to drag coupled with 'legally unfounded rulings.'[134] These practices diminish the integrity of individual trials and create uncertain challenges for the future of the Court. William Pace from the Coalition for the International Criminal Court (CICC) observes thus: 'a number of shouldn't judges really be there.'[135] Are judges not fundamental to the success of the Court? Consequently, is it not essential that the Judges are qualified and well versed in the processes of the ICC and international criminal justice? The Rome Statute (Article 36) outlines that judges shall:[136]

• …be chosen from among persons of high moral character, impartiality and integrity…

• '…have established competence in criminal law and procedure and the necessary relevant experience… or have established competence in relevant areas of international law such as international humanitarian law and the law of human rights…'

• '…have excellent knowledge of and be fluent in at least one of the working languages of the Court.'[137]

Does recruiting Judges lacking these prerequisites ominously undermine the Court? It leads to loss of confidence in the Court; the fear that criminals will remain unpunished.[138] A former Judge Adrian Fulford noted: 'The Court will be judged by our ability to dispense international criminal justice at the highest level that means securing those accused of the

[132] ibid.
[133] Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[134] James Goldston, 'All Change at the ICC: Time to Focus on Merit, Not Connections,' *Open Society Justice Initiative* < www.opensocietyfoundations.org> accessed 2 July 2014.
[135] Afua Hirsch, 'System for appointing judges undermining international courts' *The Guardian*; < http://www.theguardian.com/law > accessed 02 July 2014.
[136] ICCSt (n 1) Article 36; qualifications, nomination and election of judges.
[137] ibid Article 36(3) (A-C).
[138] Cherif M Bassiouni, 'Perspective on International Criminal Law' Jones (2012)1 *International Criminal Law Network* 21.

world's most egregious crimes before the Court and delivering timely and fair justice.'[139] Cherif Bassiouni added another voice to Judge Fulford's by stating that the acceptance of the ICC is largely contingent on 'the respect and esteem in which its judges are held, of their competence and commitment to the cause.'[140] In other words, the legitimacy and credibility of the Court directly result from judges and their ability to efficiently and effectively administer trials. Their deficiencies undermine the authority of the Court.

Judges *Kuniko Ozaki*[141] and *Miriam Santiago*[142] illustrate the subpar quality of judges of the Court. Although *Judge Ozaki* fulfils the technical requirements of the Statute, she does not hold a law degree nor does she have any legal qualifications. Subsequently, the Court faces 'the prospect of a defence lawyer appealing a case on the basis that the judge was not qualified.'[143] The appeal process will only increase trial time which desperately needs a substantial reduction. Judge *Santiago*, on the other hand, is a judge that fails to meet the requirements of the Statute; she does not speak fluently an official language of the Court.[144] Therefore, *Ozaki and Santiago* exemplifies the lack of adequate oversight actions from the ASP.[145] This later resulted in the Bureau advancing the implementation of the Advisory Committee on nominations of judges[146] outlined in the Statute[147] and in 2011 the ASP

[139] Judge Adrian Fulford, 'The Reflections of a Trial Judge' (2011) 22*Criminal Law Forum* 215.
[140] Cherif M Bassiouni, 'Perspective on International Criminal Law' Jones (2012)1 *International Criminal Law Network* 21.
[141] Elected from the Asian Group of States, list B; Judge Ozaki holds MPhil in international relations, has academic experience in the field of international criminal law and human rights. She worked for the Japanese government in a number of positions. Judge Ozaki also taught as a professor of international law at the Tohoku University Graduate School of Law and at other national universities; has written extensively on international criminal law, refugee law and law of human rights.
[142] Elected from the Group of Asian States list B. Miriam Defensor Santiago served three terms as a senator of the Republic of the Philippines, She chaired the Senate Subcommittee on the International Criminal Court; sponsored the ratification by the Senate of the Rome Statute; was the principal author of the 'Philippine Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity' in Congress; and is one of the leading advocates of reproductive health in the Philippines, served as legal officer of the United Nations High Commissioner for Refugees; held other positions in the Philippine government, including trial court judge, decides on human rights violations cases under martial law regime; cases over juveniles, domestic relations cases; criminal cases involving sexual- and gender-based violence. she holds the degrees of Doctor of Juridical Science and Master of Laws from the University of Michigan.
[143] Afua Hirsch, 'System for appointing judges undermining international courts' *The Guardian*; < http://www.theguardian.com/law > accessed 02 July 2014.
[144] Cherif M Bassiouni, 'Perspective on International Criminal Law' Jones (2012)*1 International Criminal Law Network* 21.
[145] ibid.
[146] ICC-ASP, 'Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court' ICC-ASP/10/36, November 30, 2011.
[147] ICCSt (n 1) Article 36(4) (C).

adopted recommendations from the Bureau to establish the Advisory Committee[148] and in late 2012, elections decided the composition of the committee.[149]

4.11 Challenges Extrinsic to the International Criminal Court

Legitimacy- the ICTY and ICTR set precedents for international criminal justice by holding many perpetrators of heinous crimes accountable for their actions, which echoed the idea to establish a permanent international criminal court, the approval around the world is evinced by overwhelming participation at the Rome Conference. However, optimism for the Court's success was dampened at the outset when three of the UNSC's P5 members (the US, China and Russia) voted against its inception. Additionally, slow rate of adoption of the Statute, impact the Court in many ways. These factors served to undermine the intended apolitical nature of the Court, and greatly affect its legitimacy.[150]

Legitimacy is cardinal to the Court's success as it represents the collective acceptance of an authority that is deemed lawful and justified in their decisions over its sphere of influence.[151] This attribute is essential in maintaining the Court's prominence in the global community as an objective and believable institution. Credibility is public recognition of the Court's integrity and reliability; this credibility must first radiate from within the Court operations, structures, approaches and decisions a sum total of what can be said to be the behaviour of the Court which will manifest into external motivations towards the Court. Courts are inherently different from ordinary political institutions because they depend upon their unique makeup to fulfil the judicial commitments for which constituents hold them accountable. The processes and results of a court often contribute heavily to the framing of this opinion, and their capacity to 'do justice and otherwise contribute to better the human condition' relies heavily on democratic accountability and transparency.[152] Nienke Grossman states that: 'the extent to which an international court implements the objectives it was created for may also affect its legitimacy.'[153] Thus, a court's legitimacy is fundamentally

[148] ICC-ASP, ICC-ASP/11/Res 2, 21 November 2012.
[149] Election of the Advisory Committee on Nominations- 2012 Nomination; modified 27 November 2012.
[150] Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP Oxford 1990) 41-50; Henry M and others, 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[151] Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, Oxford 1990) 41-50.
[152] Henry M and others, 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[153] Grossman Nienke, 'The Normative Legitimacy of International Courts' (2013) 86 *Temple Law Review*; Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.

dependent on the public perception that it is operating to the fullest and best of its ability toward upholding the rule of law. The ICC is no exception. It is imperative that the ASP and other interested actors perceive the Court as fulfilling the goals laid out for it in the Statute.[154]

Confusion in defining institutional roles is evident in many international justice institutions that is, to what extent should they punish perpetrators due to moral responsibility and in pursuit of some broader social goals, such as peace or reconciliation? The ICC considers that punishing perpetrators combats impunity, contributes broadly to peace and stability. The Court is also able to rebuild relationships as evident through reparation in the Thomas Dyilo case,[155] the provisions on reparation and victim participation during trials provided for in the Statute, requires delivering justice that has direct and tangible impact on the parties involved.[156]

Consequently, the Court is often criticised for being detached from the realities on ground in the affected States being based at The Hague far away from the victims. These problems thus undermine its legitimacy.[157] The disengagement from local affairs is thus not merely a symptom of international approach to justice but a deliberate policy separating the act of punishing perpetrators from its likely political, legal, social and cultural consequences. Thus enhancing distributive justice -giving perpetrators what they deserve- or deterrent justice - eradicating a culture of impunity by dissuading future criminals from offending – should be a primary objective of the Court.[158] Considering that the impact of justice is beyond the remit of the Court, which may hamper the Court's work by jeopardising its perceived impartiality and serve to further distance the Court from and undermine its legitimacy in the eyes of the local population.[159] An objective in the preamble of the Statute is to deter egregious crimes by putting an end to impunity for perpetrators and thus contribute to the prevention, guaranteeing lasting respect for the enforcement of international justice.[160]

[154] ibid.
[155] *The Prosecutor v Thomas Lubanga* ICC-01/04-01/06 (14 March 2012).
[156] Brett Bowden, Hilary Charlesworth, Jeremy Farrall (ed*) The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)* (Cambridge University Press, Cambridge 2009)257.
[157] *The Prosecutor v Thomas Lubanga* ICC-01/04-01/06 (14 March 2012).
[158] Brett Bowden, Hilary Charlesworth, Jeremy Farrall (ed) *The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)* (Cambridge University Press, Cambridge 2009)258; Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, Oxford 1990) 41-46.
[159] ibid.
[160] ibid.

Thus, justice in the form of punishment should not be pursued for justice sake alone, but also to dissuade potential perpetrators from committing similar crimes. However, this challenge appears to be a narrower interpretation of its role going by the words of the former prosecutor of the ICC in 2007 in London. He held that:

> ...International justice can't bring change in a country, like Uganda with a leadership problem which is major, the ICC has to be modest in its inability to deal with all crimes, train lawyers and prosecutors for domestic jurisdiction (outside its scope) and still fulfil its judicial mandate.[161]

The inability of the Court to capture or arrest the indicted Lord Resistance Army (LRA) leaders of Uganda (*Joseph Kony*)[162] has made the Court more cautious approaching the situation in the DRC. Hence, focusing on less senior militia leaders such as Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo and emphasising that the Court's primary role is to fulfil its legal mandate rather than selecting cases that it believes may have a tangible impact on the conflict situation in the DRC,[163] such confused role is prevalent in international justice institutions because the actors involved usually come from and continue to be based outside the conflict zones they address. Questions of political impact take on greater significance for international institutions because of their openness to criticism that they unjustly impose international norms[164] and violate the Sovereignty of states and citizens engulfed by conflict.[165]

A Court of law must be perceived as legitimate[166] in order to be trusted to make judgments that satisfy the people it serves. Credibility is equally vital because the ICC serves the global community. Its lack of enforcement mechanisms forces the Court to rely on the cooperation of national governments for successful investigations and prosecutions. If the Court is perceived as legitimate and credible, domestic governments will be more inclined to support

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[161] Luis Moreno-Ocampo, 'The International Criminal Court and prospects for peace in Africa' [2007] War Peace and Reconciliation workshop (London School of Economics, 3 March 2007).

[162] Joseph Kony in hiding near South Sudan border near border with Central African Republic and Sudan, <http://www.telegraph.co.uk/news/worldnews/joseph-kony> accessed Friday 09 May 2014.

[163] Brett Bowden, Hilary Charlesworth, Jeremy Farrall (ed) *The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)* (Cambridge University Press, Cambridge 2009) 258.

[164] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 The Modern Law Review 1.

[165] Brett Bowden, Hilary Charlesworth, Jeremy Farrall (ed) *The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)* Cambridge University Press, Cambridge 2009) 259.

[166] Raymond Wacks, *Understanding Jurisprudence nn Introduction to Legal Theory* (3rd edn, Oxford University Press, Oxford 2012) 212- 230.

investigations and enforce arrest warrants.[167] If the legitimacy and credibility of the Court increase, there will be a direct improvement in its effectiveness.[168]

The Court's Relations with National Governments- the disparagement that the ICC represents a form of neo-colonial imposition in the domestic affairs States and responding to issues of such results in managing complex relations with domestic governments and balancing respect for sovereignty of States in which the Court investigates with the need to address crimes committed by National governments,[169] for instance, the ICTR faced difficulties in its relations with the Rwandan government which opposed the establishment of the Tribunal on grounds that it was based outside Rwanda with limited *temporal* jurisdiction[170] from January to December 1994. Thus, ignoring previous crimes committed by the Hutu regime, while eschewing the death penalty for convicted genocidaires. Relations between the ICTR and Kigali soured further in 2000 when the ICTR chief Prosecutor *Carla Del Ponte* announced, she intended commencing investigation into alleged atrocities committed by the Rwandan Patriotic Front (RPF), the ruling party in Rwanda. The government responded by blocking the travel of ICTR personnel and witnesses between Rwanda and Arusha, effectively stalling the Tribunal operations.[171]

Although, the ICC is aware of local political issues and tries to build positive relations with national governments. The complementarity principle enables it to consider whether States are unwilling or unable to prosecute crimes. To make such determinations, the ICC needs close working relations with the national political/judicial officials. Furthermore, as the ICC's *temporal* jurisdiction began in 2002 it will often have to investigate crimes during on-going conflict situations, thus requires it to cooperate with domestic officials to ensure the security of its investigators and other personnel.[172] Beyond these challenges, the ICC has avoided prosecuting members of the Congolese and Ugandan government in other to ensure the security of its personnel on the ground to facilitate efficient investigations. But is the ICC serious about investigating Museveni's role in the conflict? Or aligned with the political elite in Ugandan government? These are unanswered questions, on the lips of watchers after the

[167] Henry M Jackson, and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[168] ibid.
[169] Brett Bowden, Hilary Charlesworth, Jeremy Farrall (ed) *The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)* (Cambridge University Press, Cambridge 2009) 260.
[170] ibid.
[171] ibid.
[172] ibid.

former prosecutor Ocampo appeared with President Museveni at a London press conference in 2003 at the opening of the Uganda investigations.[173]

The case selection in the DRC and Uganda led to a perception among many affected communities that the Court is linked to the governments. The choice of the Ituri warlords (Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo) exemplifies that investigating atrocities is problematic with immense political caution characterising the ICC's strategy, other areas of serious conflict included Kinshasa with little evidence to connect President *Kabila* to atrocities committed in Ituri in spite suspicion of his previous support to various rebel groups including *Germain Katanga's* (2nd conviction).[174] FRPI (*Front de Résistance Patriotique en Ituri*) continuing violence in other provinces particularly North and South *Kivu* and *Katanga* where government forces and the *Mai-Mai* militia backed by *Kabila* are directly implicated in serious crimes,[175] whilst Ituri displayed little capacity to destabilise the government, the researcher thinks it is another trade-off to ensure the security of ICC investigators/personnel and United Nations peacekeepers working in the conflict prone eastern region.

It is also believed that the ICC intended to avoid implicating government officials in the lead-up to the DRC's first post-independence (July 2006) elections. Pressure from foreign donors on the ICC to avoid causing political instability was colossal.[176] Principally, the UN and European Union (EU) decanted millions of Dollars towards the election, regarded as the most

[173] ibid.

[174] Germain Katanga convicted by the ICC on five counts of war crimes and crimes against humanity, as an accessory to the February 2003 massacre in the village of Bogoro in the Democratic Republic of the Congo. The verdict (on 7 March 2014) was the second-ever conviction in the 12 years of operation of the International Criminal Court, following the 2012 conviction of Thomas Lubanga Dyilo; two of the three judges of the court's Trial Chamber II found Germain Katanga guilty as an accomplice in murders and an attack on civilians in the village of Bogoro, Ituri, on February 24, 2003. He was found not guilty of rape, sexual slavery, and the use of child soldiers. Katanga is the former chief of staff of the Patriotic Force of Resistance in Ituri (*Front de Résistance Patriotique en Ituri* – FRPI). The Judges unanimously ruled that the evidence presented at trial did not establish beyond reasonable doubt that Katanga was criminally responsible for rapes, sexual slavery, and the use of child soldiers committed by FRPI troops. One of the judges disagreed with the judgment and said that changing Katanga's responsibility for the crimes violated his right to a fair trial, as he was not able to properly prepare against this accusation. The majority found that Katanga's rights to a fair and speedy trial had been upheld despite the modified accusation against him. Katanga's case is the third to reach judgment at the ICC. Three other trials are under way, relating to crimes in the Central African Republic and Kenya. Decisions on the confirmation of charges against another Congolese rebel leader, Bosco Ntaganda, and the former Ivory Coast president Laurent Gbagbo are pending.

[175] Brett Bowden, Hilary Charlesworth, Jeremy Farrall (ed) *The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)* (Cambridge University Press, Cambridge 2009) 262.

[176] ibid.

expensive UN support poll in history.[177] This sends a message to major perpetrators that their senior political or military status could insulate them from prosecution;[178] apparently Bosco Natanda a senior military commander in the DRC and former leader of the Rwanda-backed rebel group the National Congress for the Defence of the People (CNDP), in 2009 became integrated into the Congolese army as part of a peace agreement.[179] However, in 2013 Natanda turned himself in and he is currently in custody of the Court at The Hague.

In Uganda, the ICC investigates the LRA not the Uganda Peoples Defence Force (UPDF) creating a perception of being one-sided, that the ICC has become Museveni's political tool.[180] In spite of local and international human rights groups reporting grave atrocities committed by the UPDF in Northern Uganda particularly the forced displacement of about 1.5 million civilians into Internally Displaced Persons (IDP) camps.[181] Though Ocampo emphasised, that the ICC may investigate UPDF suspects given the reliance on government for continued presence in Uganda and its good relationship with key Ugandan officials, the approach would not lead to the much desired judicial results to build support among State Parties that will perceive it as an institution in the fight against impunity. Conversely, the danger that the Court is unwilling to prosecute difficult cases relating to crimes committed by senior government and military officials jeopardises the Court's long time legitimacy among populations affected by conflict.[182]

National Justice Institutions and the Rule of Law- the complementarity regime of the ICC is designed primarily to overcome problems associated with the concurrent system of the *ad hoc* tribunals and establish a better relationship with the domestic/transitional justice institutions. In the DRC and Ugandan situation complementarity was undermined, why? The ICC's relation with national institutions could be said to be closer to the concurrent system than to complementarity, this is because the ICC played the dominant role. The Court's focus

[177] ibid.
[178] Museveni Uganda, DRC Kabila, Kenyatta Kenya.
[179] In April 2012, Ntaganda led a mutiny and became one of the main leaders of a new Rwanda-backed rebel group, the M23. M23 fighters have been responsible for widespread war crimes, including summary executions, rapes, and forced recruitment of children; but in March 2013, following infighting between two M23 factions, Ntaganda turned himself in to the US embassy in Rwanda and was flown to The Hague where he awaits trial before the International Criminal Court.
[180] Brett Bowden, Hilary Charlesworth, Jeremy Farrall (ed) *The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)* (Cambridge University Press, Cambridge 2009) 262.
[181] ibid; Rebecca Horn, 'Coping with displacement: problems and responses in camps for the internally displaced Intervention' (2009) 7 The Northern Uganda IDP Profiling Study110 – 129. *The Lead Donor Agency: United Nations Development Programme* (Uganda September 2005).
[182] ibid.

on Ituri which arguably has the best functioning local judiciary, while mass atrocities continue in provinces where judicial resources lack severely brings to question what complementarity is meant to achieve?[183]

In Northern Uganda the ICC opened the case on grounds for which it is not adequately equipped to respond, to open an investigation on the basis that Uganda's military and police capacity are deficient in addressing serious crimes, not minding the fact that the ICC itself has neither military nor police capacity.[184] It has inadequately recognised the capacity of domestic transitional justice institutions to investigate and prosecute serious crimes. The ICC, a global institution appears more concerned with achieving legal successes with minimum standards than cooperating with local institutions to ensure that the Court assumes responsibility only for cases that cannot be prosecuted domestically such as those concerning sitting members of government, that Countries refuse to prosecute,[185] without arrests there can be no trials and without the trials victims will again be denied justice and potential perpetrators may be encouraged to commit new crimes with impunity. As the Court does not have the power to arrest the accused, it is incumbent on states [in fact obligatory] or international organisations to help out. Thus, ensuring the necessary cooperation is a primary challenge for both the ICC and the State Parties.[186]

Integrating with Affected Population- to who is justice delivered? Is it the international community? Affected victims or other parties? The ICC reveals itself as victim centred,[187] encourages victim participation at all stages of its operation, victims may make submission to chambers during trials or appeals. The Statute allows judges to include reparations in sentences.[188] The first time an international court is empowered to require an individual to compensate victims. The ICC may require convicted perpetrators to provide reparations directly to the victims or through the Trust Fund for Victims (TFV) established in 2002 and overseen by a board of directors.[189] As the Court will rely on public acceptance for eyewitness testimony in gathering evidence, outreach therefore fulfils moral obligation and

[183] ibid.
[184] ibid.
[185] ibid.
[186] René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) 6 *Journal of International Criminal Justice* 711.
[187] ICCSt (n 1) Article 79.
[188] Brett Bowden, Hilary Charlesworth, Jeremy Farrall (ed) *The Role of International Law in Rebuilding Societies after Conflict (Great Expectations)* (Cambridge University Press, Cambridge 2009) 266*; Prosecutor v Thomas Dyilo* Judgment sentence 2012.
[189] ibid; ICCSt (n 1) Article 79.

vital to the Court's success. However, there are numerous challenges for the Court to fulfil its mandate, role and judicial activities, hence, the Court must be understood by a variety of audience. In this respect, the Court's outreach programme[190] has been created to ensure that affected communities in situations subject to investigation or proceedings can understand and follow the work of the Court through the different phases of its activities. Outreach is one of the Court's various external communications functions which also include external relations and public information as defined in the Integrated Strategy for External Relations, Public Information and Outreach.[191] The challenge of external relations refers to the constructive dialogue between the Court and States Parties, Non-States Parties, international organisations, Non Governmental Organisations (NGO) and other key partners with the aim of building and maintaining support and co-operation facilitating the Court's ability to fulfil its statutory mandate. Whilst the challenge of public information relates to the process of delivering accurate and timely information about the principles, objectives and activities of the Court to the public at large as well as to specific audiences, through a variety of means.[192]

Logistics, Safety and Security Challenges- the role of the ICC to bring an end to impunity for the perpetrators of the most serious crimes to the international community and to contribute to the prevention of such crimes constitutes a sombre challenge. Consequently, the Court is active in situations of on-going conflicts where crimes continue to be committed and providing challenges in terms of security and protection. The important tasks for field offices are to conduct investigations for the Court. Additionally, field operations of the Court target facilitating victims' applications for participation, protection, relocate witnesses and support counsel for the defence including conducting outreach programmes to the affected communities.[193] Operations in regions of on-going conflict emphasise that security in the field is of ubiquitous concern**,** sensitive and must be carried out to ensure the safety of all staff members', victims, witnesses and other parties involved. In this respect, field presence have, often, been reduced, cancelled or postponed.[194]

[190] Outreach is the process the Court uses in establishing sustainable, two-way communication between the Court and communities affected by the situations that are subject to investigations or proceedings, and to promote understanding and support of the judicial process at various stages as well as the different roles of the organs of the ICC; Outreach aims to clarify misperceptions and misunderstandings and to enable affected communities to follow trials.

[191] ICC-ASP/5/12, the Strategic Plan for Outreach was published by the Court in September 2006, on the occasion of the fifth session of the Assembly of States Parties.

[192] ICC-ASP/9/29 - Report of the Court on the public information strategy 2011-2013.

[193] René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) 6 *Journal of International Criminal Justice* 711.

[194] ibid.

The OTP faces significant logistic challenges due to the nature of the Court's field work. The speed with which they can perform their activities is influenced by the fact that the regions in which the work of the Court is conducted are not easily accessible. Moreover, the target groups with which the Court interacts with in the field represent a variety of ethnic groups within one region.[195] The language barrier that exists in these circumstances is another factor of influence contributing to the overall challenges.

Witness Reliability Challenges- a core problem with the ICC's witness protection programme is that it relies on local partners to carry out protection measures. In Kenya, for instance two witnesses disappeared, while others are 'recanting'. At times, witness protection agencies are accountable to the accused (Kenya) it is implausible that necessary testimonies would be obtained making it essential that the cases remain at the ICC. Initially envisaged in the Kenya case is that witnesses on one side of the political divide would testify against perpetrators on the other side. Now that Ruto and Kenyatta have formed a coalition, witnesses are required to testify, essentially, against their own. It is unclear how the Court would deal with this problem,[196] for instance dropped ICC Witnesses (Samuel Kosgei and Simon Rotich), Speak out on 'Coaching' by the OTP to testify against Ruto. Kosgei added that he was also asked to say that he was present at a place where it is alleged that an oathing ceremony took place.[197] 'I was given details about oaths and told by the OTP to say that dogs were slaughtered at the Molo Milk Plant. But I don't even know where this milk plant is,' he claimed. Kosgei, who was accompanied by another witness, Simon Rotich, further claimed that he was given Sh50, 000 for his accommodation and a further Sh373, 000 for him to testify against Ruto. Rotich also alleged that he was given 3,000 euros (Sh348, 683) as an inducement to remain on the case. They both explained how they were taken to Arusha where they were 'coached' before being taken to the Netherlands.

The duo claimed that they were intimidated by the OTP officials after indicating that they wanted to pull out of the case.[198] 'They took one of my children away and placed him in foster care to force me into testifying against Ruto and Sang. When I refused, they had me declared as an illegal immigrant in Netherlands but I was later released and my son was

[195] ibid.
[196] Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly 'Africa and the International Criminal Court' [2013] 1 *Chatham House International Law publication* <http://www.chathamhouse.org/publications/papers > accessed 2 July 2014.
[197] Samuel Kosgei and Simon Rotich ; <http://www.kenyamoja.com/featured/dropped-icc-witnesses-speak-out-on-coaching>a accessed 4th August 2014.
[198] ibid.

brought back to us,' alleged Rotich. Kosgei and Rotich both claimed that the initial accounts they gave to the Waki Commission and used by the OTP was changed and other details unknown to them inserted.[199] The ICC investigation covers a wide area, during and or after conflicts and does so with limited resources, resulting in depending on partners for information about the environment in question. The Court needs local partners to help conduct outreach in local languages; in the field to liaise with victims and witnesses, facilitate victims' participation in legal proceedings. The challenge is enormous to function efficiently and undertake these tasks. Thus, the Court relies on 'intermediaries'[200] who facilitate contact or provide a link between one of the organs of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations or affected communities on the other hand.[201] Without intermediaries, the Court would be unable to function reasonably properly[202] and implement the outreach helps to realise victims' rights to participate in Court proceedings entrenched in the statute.

Effectiveness and the Challenges of Victims Participation- the Rome Statute created the possibility for victim's participation in proceedings before the Court, a breakthrough innovation in international criminal justice.[203] Facilitating victim participation in proceedings before the Court allows victims' voices to be heard, not only as witnesses providing testimony, but in their own right, as participants to the proceedings.[204] The participation of victims is a key ingredient of trials and as such yet un-codified and undeveloped source of international criminal law. The Court therefore, creates a unique path for victims to participate as envisaged by the drafters of the Statute.[205] The opportunities for participation and reparations to victims should be given meaningful effect while ensuring that the implementation of these rights will not jeopardise the rights of the accused guaranteed under

[199] Witness in ICC case against Kenya's Ruto withdraws, <http://www.capitalfm.co.ke/news> accessed 10/05/2014.
[200] Jackson M H and others, 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[201] Hans-Peter Kaul, Construction Site for More Justice: The International Criminal Court after Two Years, 99 *American Journal of International Law* 370 (2005); Breakthrough in Rome The Statute of the International Criminal Court, 59/60 Law and State. 114 (1999); Towards a Permanent Criminal Court: Some Observations of a Negotiator, (1997) 18 *Human Rights Law Journal* 169.
[202] Challenges Facing the International Criminal Court: Recommendations to the Assembly of States Parties December 2011 unpublished.
[203] ICCSt (n 1) Article 68.
[204] René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) 6 *Journal of International Criminal Justice* 711.
[205] ibid.

the Statute and other international treaties resulting in unfair trials.[206] The participation of victims in proceedings creates several types of challenges.[207]

First, are practical difficulties, the Court operates in complex (conflicts areas) circumstances with obstacles to reach large numbers of victims in unstable situations to ensure they know how to participate in proceedings before the Court and have the support needed to assist them in applying.[208] Secondly, the challenges of victim participation are multi-faceted in legal terms. Although, the Statute and the Rules of the Court provide mechanisms for victims to participate directly in proceedings,[209] the Chambers must supplement the structure provided in the Statute and make several important decisions on fundamental questions relating to victim participation,[210] such as: at what stage can victims participate in proceedings before the Court? Who can be considered a 'victim' and what specific criteria should be applied during proceedings in Court? How can victims prove their identity and what document does the Court accept as evidence of their identity? What role should the Court's Office of Public Counsel for victims play, particularly in light of the large numbers of potential victims? How does the Court safeguard the safety and well-being of victims who participate in proceedings? What role could victims who want to remain anonymous have in proceedings before the Court? There have been several appeals on victims' issues before the Appeals Chamber highlighting the difficulty of determining the Chambers interpretation of these questions.

Victims' applications to participate in proceedings have been received in all situations in the DRC, Uganda and Darfur.[211] Considering the magnitude of crimes before the ICC, the number of participating victims may become such that their participation forms an additional factor of weight on the pace with which the proceedings can be concluded. Although, actual influence will depend on the scope of their right to present their views as part of the

[206] Universal Instruments are; The Universal Declaration of Human Rights 1948; The International Covenant on Civil and Political Rights 1966; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; The Statute of the International Criminal Court, 1998; The Code of Conduct for Law Enforcement Officials 1979; The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988; The Standard Minimum Rules for the Treatment of Prisoners 1955; The Guidelines on the Role of Prosecutors 1990; The Basic Principles on the Role of Lawyers 1990; The Rules of Procedure of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Regional Instruments are: The African Charter on Human and Peoples' Rights 1981; The American Convention on Human Rights 1969; The European Convention on Human Rights, 1950.
[207] René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) 6 *Journal of International Criminal Justice* 711.
[208] ibid.
[209] ICCSt (n 1) Articles 64 (2) & 68.
[210] René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) 6 *Journal of International Criminal Justice* 711.
[211] ibid.

proceedings and the modalities by which victims are to enjoy this right, it is important to note that this fundamental and novel concept is indeed one of the challenges for the ICC today.[212]

Procedural Challenges of Disclosure- apart from the potential challenge of witness and victims' protection and the power of the Trial Chamber to restrict disclosure of certain pieces of prosecution evidence to the defence. The need to consider how disclosure of information can impact on communities in the affected areas is important.[213] The Court has been confronted with intricate questions and particularly in relation to the situation in DRC where the Chambers have had to address the whole system of disclosure in relation to the confirmation of charges and the preparations prior to the commencement of the trial.[214] The Trial Chamber may authorise non-disclosure of the identity of witnesses prior to the commencement of a trial if the protection or the safety of witnesses, victims and members of their family requires doing so. The Court must also safeguard the rights of the accused and strike a balance to ensure that the safety and security of victims and witnesses are not compromised.[215] Additional factor relating to restrictions on disclosure which both Pre-Trial Chamber I and Trial Chamber I have had to confront is the treatment of confidential information, materials and the possible tension between the disclosure requirements pursuant to Article 67(2)[216] and agreements of confidentiality pursuant to Article 54(3) (e).[217] This in fact, created problems during the *Prosecutor v Thomas Dyilo* case (see chapter 3.1.8) that the Trial Chamber stayed the proceedings; awaited the determination of the Appeals Chamber on the issue.

The Court and States Cooperation- States cooperation is a crucial factor in determining the credibility of the ICC. The cooperation of States and other organisations in carrying out its responsibility is key to the success of the Court. Part 9 of the Statute provides legal framework of international cooperation and judicial assistance on the basis of which State Parties shall cooperate with the Court during investigation and prosecution of crimes within its jurisdiction.[218] Support and cooperation is required in a variety of activities including the

[212] ibid.
[213] ibid.
[214] ibid.
[215] ibid.
[216] ICCSt (n 1).
[217] ibid.
[218] ICCSt (n 1) Article 86 'Part IX' International cooperation and judicial assistance of the Rome Statute; René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) 6 *Journal of International Criminal Justice* 711.

arrest and surrender of suspects.[219] Cooperation with states and non-states parties is essential for investigating, charging, and enforcing arrests under the Court's jurisdiction. Better encompassing decisions will ensure its longevity; a global presence aimed at deterring mass atrocities and maintaining international peace and security is more desirable.[220] The ICC is dependent on effective cooperation[221] with State Parties on key issues of arrest and surrender of the accused; the lack of enforcement power to detain and arrest suspects weakens the Court's ability.[222]

Another difficulty the Court faces is volatile security situations and the complexity of collecting relevant evidence.[223] Serious crimes committed during armed conflicts and at other times, a result of superior orders and efforts to cover-up responsibilities for the crimes. Pursuing its task, the Court is caught between poles of brutal power politics, law and human rights. Thus, the Court is hampered by adverse political storms, indeed political rebuke. The Darfur situation is an example.[224] Since 2007 it has become particularly noticeable that certain State Parties try to restrict funding for the Court. This is apparent and persistent, often same States make sweeping demands for more outreach for victims, more and more situations and more work referred to the Court.[225]

4.12 Ratification of Aggression, External Complexities and the Court

A challenge ahead, is that all possible means must be exhausted to ensure that the ICC will, after 2017 exercise jurisdiction over the Crime of aggression. A task essentially for State Parties, to ratify, support and make possible, the implementation of the Crime of aggression amendments adopted through a consensus decision, at Kampala in June 2010.[226] Early ratification by as many State Parties as possible is the best protection against possible attempts to reopen the Kampala compromise. However, more efforts are necessary to make

[219] Forms of cooperation are provided for under Article 93 of the Rome Statute; René Blattmann and Kïrsten Bowman, 'Achievements and Problems of the International Criminal Court A View from Within' (2008) 6 *Journal of International Criminal Justice* 711.
[220] Henry M Jackson and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[221] Hans-Peter Kaul & Claus Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court, Principles and Compromises' (1999) 2 *Year Book of International Human Rights Law* 143.
[222] Hans-Peter Kaul, 'The International Criminal Court (Current Challenges and Perspectives)' [2011] *Salzburg Law School on International Criminal Law*.
[223] ibid.
[224] ibid.
[225] ibid.
[226] ibid.

the criminalisation of aggression a reality.[227] The Court should endeavour to do all within her powers to encourage State Parties and non-members alike to ratify the amendments. The Rome Statute recognises the primacy of national prosecutions. It thus reaffirms state sovereignty, especially the sovereign and primary rights of states to exercise criminal jurisdiction.[228] Thus, creates two levels of international criminal jurisdiction which complement each other. The first level is by states with their national criminal law systems, (complementarity principle) over those responsible for international crimes.[229] The second level is by the International Criminal Court, the Court will only act as a last resort in cases where national criminal law systems are unwilling or genuinely unable to carry out the investigation or prosecution.[230]

This complexity needs time to be fully accepted and observed by all concerned to realise the full potentials. Complementarity has created conflicting forces. Hence, a dilemma for the Court, if States discharge their primary obligations to prosecute crimes or genuine national reconciliations,[231] the Court will have reduced cases on the one hand, on the other hand, the Court needs exemplary and successfully handled cases if at all. Why? It is because the international community and State Parties have the legitimate desire to see concrete evidence that the ICC is a meaningful and useful institution. The second major limitation is that the Court is fully dependent on effective cooperation and support of State Parties. The Court has no executing machinery/force of its own; dependent on effective and timely cooperation from State Parties.[232] A design by the founders, which means, the Court is characterised by this structural weakness, to enforce decisions. Also by default that state sovereignty should prevail.[233] A third limitation is the logistics (see above 4.11) problem.[234] Other limitations

[227] ibid.
[228] Preamble paragraph 6 ICCSt states: Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.
[229] Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes; Hans-Peter Kaul, 'The International Criminal Court: Key Features and Current Challenges' in Herbert R Reginbogin and Christoph J M Safferling (ed), 'The Nuremberg Trials: International Criminal Law Since 1945' (Die Nürnberger Prozesse: Völkerstrafrecht seit 1945) 60th Anniversary Internat (De Gruyter; Bilingual edition 2011); *International Criminal Law Since 1945* (2006) 245, 246; Hans-Peter Kaul, The International Criminal Court: Current Challenges and Perspectives (2007) 6 *Washington University Global Studies Law Review* 575.
[230] ICCSt (n 1) Preamble paragraph 10 and Article 17 (1) (a).
[231] ibid.
[232] Jakob Katz Cogan, 'International Criminal Courts and Fair Trials-Difficulties and Prospects' (2002) 27 *Yale Journal of International Law*111,
[233] Hans-Peter Kaul & Claus Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court Principles and Compromises' (1999) *2 Year Book of International Human Rights Law* 143.
[234] This point was emphasised by Chief Prosecutor Moreno-Ocampo in his address to the fourth Assembly of States Parties to the Rome Statute at The Hague (28 November 2005).

and impediments are 'Realpolitik' and States' interests which will continue as obstacles to the effectiveness of the ICC.[235] To be a more credible international court, it is essential that it continues to conducts her activities in a manner purely judicial, objective, and apolitical.[236]

4.13 The Effectiveness of Victims Participation

Victims' participation lacks a formal framework making its application during investigations and trial proceedings difficult. The unprecedented approach to victim participation is fraught with bureaucratic, logistics, and communicative hindrances including: accessibility for victims, inefficiencies processing the applications by the Court, and unrealistic expectations of victim participation. These issues weaken the Court's ability to achieve representative, restorative, and swift justice. Modifications by the Court can address the issues and focus on the fundamental objective of the ICC to deliver justice. The Court extends its reach beyond punitive justice to restorative justice with victim participation mechanisms outlined in the Statute and RPE.[237] Restorative justice, also known as reparative justice, relies on the premise that a victim's ultimate resolve relies on ability to influence the extent of and eventually receive, reparations. It is a dedication to involve victim's personal interests in pursuit of justice by actively participating in the process to influence reparations by offenders.[238] In participating, victims obtain the conceptual rights to an acknowledgement of their harm, incorporation in the judicial process to pursue truth-finding, and access to reparations that consider protection, compensation, restitution, and rehabilitation. While victim participation surfaced in 2006, the first decision on reparations is yet to be fully rendered. 'Victims in cases before the ICC hail from poor backgrounds, weakened economies and poor social safety nets'[239] the delay is harmful to the prospect of restorative justice and challenges the credibility of the Court.

The application process is cumbersome and contributes to trial inefficiencies. In practice, victim participation has not had the effects intended by the ICC. It has been costly, despite

[235] Cherif M Bassiouni, 'The International Criminal Court: *Quo Vadis*?' (2006) 4 *Journal of International Criminal Justice* 421; Kai Ambos, 'Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik' in Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss (ed) *International Prosecution of Human Right Crimes* (Springer ,England 2007) 224.
[236] Hans-Peter Kaul, 'Construction Site for More Justice: The International Criminal Court after Two Years' (2005) 99 *American Journal of International Law* 370; Hans-Peter Kaul, The International Criminal Court: Current Challenges and Perspectives (2007) 6 *Washington University Global Studies Law Review* 575.
[237] ICC's Rules of Procedure and Evidence Rule 85.
[238] Aronchick Liane, 'Question and Answers on Victim Participation at the ICC' (the Hague, 22 February 2013).
[239] ibid.

unavailable resources for reparations needed to give meaning to victim participation.[240] The nature of crimes reviewed at the ICC is the 'most serious crimes of concern to the international community.' These crimes result in massive number of victims, and victim participation aims to extend participation in the trial beyond witness testimony to acknowledge the amount of people affected. Distinct from witness statements, victim participants include those that are either not eligible or do not wish to serve as a witness, the opportunity to submit their testimonies. Technically, this benefits the Court and the victims. The intended benefit to the Court is to facilitate 'truth finding' in a trial. Victim participation is meant to expand the Chamber's perspective of the situation and facilitate a fair verdict. The intended benefit for victims include: facilitating empowerment and disclosure in their judicial participation, awarding restorative justice, enabling healing and rehabilitation and facilitating community reconciliation through reparations.[241]

The definition of a victim was carefully formulated to achieve these aims while also maintaining impartiality. Rule 85 of the RPE identifies victims before the ICC as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.'[242] This natural person must be someone whose 'safety, physical, psychological well-being, dignity and privacy'[243] have been harmed 'individually or collectively' by the crimes which occurred in a situation identified by the ICC.[244] A victim can also include organisations or institutions with humanitarian facets.[245] To be recognised as a victim, one must meet these requirements of victim status upon review of their application.

Victims of alleged crimes are encouraged to submit an application to the Victim Participation and Reparations Section (VPRS) within the Registry with their personal accounts of harm. In the application they can elect to apply as a participant or as a victim seeking reparations. The Registry is required to log all potential applicants before passing the applications on to Chambers, which then decides whether victims will receive victim status to either participate

[240] Heather Nunan, 'Victim Participation in the Judicial Process' in Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[241] SáCouto, Susana, and Katherine Cleary, 'Victims' Participation in the Investigations of the International Criminal Court' (2008) 17 *Transnational Law & Contemporary Problems* 76.
[242] Rule of Procedure and Evidence; Rule 85(3) (a-b).
[243] ICCSt (n 1) Article 68.
[244] Heather Nunan, 'Victim Participation in the Judicial Process' in Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] Jackson School of International Studies Task Force Report University of Washington; ICC Student Network. Issues in Internaitonal Criminal Justice. 2012 (Central Michigan University: ICCSN) Special Volume: The Lubanga Trial: Lessons Learned.
[245] ibid.

or to be considered for reparations. If the victim is admitted as a participant they are also eligible for reparations.[246]

A victim can qualify to participate in two capacities. First, victims can be admitted to a situation under investigation or to a particular case. Victims participating in the trial stage must have to specify the aspect of the proceeding in which they wish to participate. When a victim is admitted in one of the capacities, Chambers refer their approved application back to the Registry, which then assigns legal representatives. In practice, Common Legal Representatives (CLRs) have been the norm. Through their legal representative, participants are allegedly given the 'right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.'[247] Following a trial, victims may 'challenge the admissibility or jurisdiction of a case' in the investigation phase by 'submitting observations to the Court.'[248] These rights seem supremely advantageous in the ability to influence reparations.

However, the reality of victim participation is not as rewarding as alleged, of the four underlying obstacles of victim participation two pertain to limitations of the Court mechanisms and the other two to the nature of crimes pursued by the Court. Other obstacles within the Court include maintaining impartiality in a case despite the limited resources at the ICC. Additional obstacles pertain to the massive number of victims affected and their inaccessibility culturally and geographically. Addressing these obstacles without a formally streamlined framework for the Court has created logistic, bureaucratic, and communicative issues harming the prospect of a fair and impartial trial as well as its credibility. The key issues include: the difficulty for victims in applying, the inefficient evaluation of victim's applications at the Court, and the mismanagement of false expectations in victim participation. These issues are not irreconcilable and thus can be amended with appropriate attention.[249] The Court will hardly have the capacity to recognise the countless number of

[246] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 Situation in the Democratic Republic of the Congo; Legal Representatives of Victims, Closing Brief of the V02 Group of Victims. The Hague: ICC, 1 June 2011.
[247] Heather Nunan, 'Victim Participation in the Judicial Process' in Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington; ICC Student Network. Issues in Internaitonal Criminal Justice. 2012 (Central Michigan University: ICCSN) Special Volume: The Lubanga Trial: Lessons Learned.
[248] SáCouto, Susana, and Katherine Cleary. 'Victim' Participation in the Investigations of the International Criminal Court' (2008) 17 *Transnational Law & Contemporary Problems* 93.
[249] Heather Nunan, 'Victim Participation in the Judicial Process' in Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.

victims of serious crimes.[250] The Lubanga trial alone attracted about 2,228 victim's applications to participate only 129 got admitted as participants,[251] represented by two legal teams.[252] A victim's ability to participate in an ICC proceeding should not be determined by the proficiency in applying, but the current application process does just that. Applications are difficult to access and their requirements for identity and submission are rigorous given the reality of victims' circumstances. Victims of the Court are spread over vast areas of the region under investigation, often in remote areas, making both access and submission a difficult exploit. The application is only available online on the ICC website and at scanty field offices in regions under investigation[253] besides, for an application to be considered it must be sent to the Court in hardcopy.[254] The application process could be frustrating for victims.[255] Rule 89 of the RPE require victims to 'provide an array of personal information to prove their identity, information on their experience of crimes under the jurisdiction of the Court and justify how they suffered harm.'[256]

In Uganda, 'many areas have been…ravaged by conflict; communication and travelling between these areas are difficult.'[257] Also, victims have to apply and undertake these obstacles individually even members of the same family are required to submit separate applications.[258] Considering the obstacles victims of crimes investigated by the ICC face, victim participation leaves more to be desired. Reassessing the bureaucracy and logistics

[250] *The Prosecutor v Thomas Dyilo*, Situation in the Democratic Republic of the Congo *Lubanga Dyilo* Case no. ICC-01/04-01/06.
[251] ibid.
[252] ibid.
[253] Field offices in locations: Kampala, Kinshasa, and Bangui. *See* International Criminal Court 'Victims: ICC - Forms' A Guide for the Participation of Victims in the Proceedings of the Court, The Hague: ICC19. Victims before the International Criminal Court.
[254] ibid.
[255] Regulation 86(2) of the Court stipulates that the applications for participation must contain: the identity and address of the victim and any relevant supporting documentation including proof of self and medical records as well as evidence of the consent of the victim, for the incident, there should be a description of the incident and harm suffered (from a crime within the Court's jurisdiction) and information as to why the personal interests of the victims are affected. The victim must also include the stage of the proceedings desired for participation and information pertaining to their legal representation. See Pre-Trial Chamber I. Decision on the request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor. ICC, 7 December 2007; Situation in the Democratic Republic of the Congo ICC-01/04-417.
[256] The Redress Trust, 'the Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future' (Redress London, October 2012)16.
[257] International Criminal Court; Appeals Chamber Judgement on the Defence against the decisions entitled 'Decision on victims applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II. The Hague: ICC, 23 February 2009. ICC-02/04-01/05 OA2.
[258] International Criminal Court, Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court (The Hague: ICC).

involved could free up the process of victim participation for reparations, making victim participation more meaningful. Also to resolve this dilemma, the Court may frequently elect collective representation for victim participation. Although, collective representation can dilute meaningful Court-Victim relationships to symbolic levels if not properly managed.

At times victims who are successfully admitted to participate are often difficult to access, due to remote locations and some security concerns, creating obstacles in realising their rights in participation. Compromised communication impairs the victim's right to be informed of trial proceedings and public decisions in order to make their relevant submissions.[259] A victim's desire to be a participant in a trial may arise from the desire to have their suffering acknowledged to influence the restoration of their psychological state and their community.[260] Breach in communication could dilute meaningful participation, which compromises restorative justice and contributes to a deflated perception of the Court. Some victims oppose ICC involvement… for fears that prosecutions will prolong bloodshed and that foreign models of retributive justice will not bring reconciliation to their communities.[261] Restorative justice relies on communication with victims to incorporate them in the pursuit of justice in order to adhere to their personal and community rehabilitation. If this communication is polluted with misgivings and fallacious promises, the premise of restorative justice is compromised. Hence, it is unwise of the Court to continue to allow misconceptions to discredit their mission to provide justice.[262]

4.14 The State of Reparations

The Court face challenges when a defendant is declared penniless and unable to pay.[263] There is difficultly establishing how the OTP and the Registry investigate the resources of defendants, public records of such procedures are unavailable.[264] The challenge of making the departments that investigate reparations more effective by reporting their process and

[259]Heather Nunan, 'Victim Participation in the Judicial Process' in Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[260] Burkhardt, Maren, 'Victim Participation before the International Criminal Court' (PhD Thesis Humboldt University, 2010)31-46.
[261] ibid 70-71.
[262] Heather Nunan, 'Victim Participation in the Judicial Process' Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[263] *The Prosecutor v Thomas Lubanga* ICC-01/04-01/06 (14 March 2012).
[264] *The Prosecutor v Thomas Dyilo* (DRC) declared several times during trial of his inability financially and a credible counter source to his claim could not be established.

procedures through public records thereby improving transparency will ensure the effectiveness of the investigation and also prevent flaws within the internal structure of the Registry and the OTP.

The RPE 98 clarifies that 'The Court may order an award for reparations against a convicted person to be deposited with the Trust Fund.[265] The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim.'[266] The role of the TFV[267] is crucial in the ICC's reparations system because it not only accepts the reparations but also allocates it to the victims. Although, the award could potentially be on an individual or collective basis, the TFV allocates reparations mostly through collective awards because it is practically more difficult to distribute reparations to individual victim.[268] In 2012, the ICC ordered its first reparations awards against Thomas Lubanga.[269] However, these should be paid by the TFV, not by Lubanga because of his indigent status. TC-1 found that Lubanga has no asset, and no property identifiable, that can be used for reparations purposes.[270] Lubanga is only able to contribute non-monetary restitution; participation on his part would be through symbolic gestures, such as public or private apology to the victims.[271] The fact is that Lubanga will not contribute any financial asset to compensate the loss by victims, the tasks will be undertaken by the TFV as decided by TC-1. However, although undertaking Court-ordered reparations awards by the TFV are improvements over the previous systems of victim redress, there are still problems that the ICC must consider in regard to its current process.

4.15 Responses to the Court's Requests

Despite the ASP's actions to promote State cooperation, four main problems have emerged:

1) Lack of timeliness in response to the Court's requests,
2) Slow pace of enacting implementing legislation,
3) Erratic cooperation in enforcing arrests, and

[265] ICCSt (n 1) Article 79.
[266] ICC Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000) Rule 98 (2).
[267] ICCSt (n 1) Article 79.
[268] International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000). Rule98 (2)(3).
[269] Reparations awards decision case against Thomas Lubanga; *The Prosecutor v Thomas Lubanga* ICC-01/04-01/06 (14 March 2012).
[270] Trial Chamber I. International Criminal Court, 'Situation in the Democratic Republic of the Congo In the Case of the Prosecutor v. Thomas Lubanga Dyilo.' ICC-01/04-01/06-2904. (2012) 88.
[271] Trial Chamber I. International Criminal Court, Situation in the Democratic Republic of the Congo in the case of *the Prosecutor v Thomas Lubanga Dyilo*. ICC-01/04-01/06-2904 (2012) 88.

4) Lack of funding relating to the UNSC situation referrals.

These problems constitute major hindrances to the Court's work; the ASP must prioritise steps to address them.[272] The Court makes a range of requests to States for assistance in investigating, prosecuting, arresting, sentencing, tracing, freezing of assets, witness relocation, and many more. An examination of the ICC reports on cooperation from 2009 to 2011 reveals that while cooperation with the Court was 'generally forthcoming,' one trend of concern to the Court was the 'considerable number of cooperation requests' to which states did not adequately respond.[273] The Court states that: the failure of 'states' to cooperate can compromise its ability to carry out its mandate and that unanswered requests generate additional costs to human resource.[274] Responses common to States that fail to fulfil cooperation requests is that they lack relevant procedures in their domestic laws (implementing legislation) to complete such requests.[275] Nonetheless, the Court accentuates that States lack of implementing legislation 'does not absolve them to be fully cooperative, an obligation to the Court under the Statute.'[276] Besides, the implementing legislation, the ASP never holds States accountable for not fulfilling the Court's requests in a timely manner. Generally, there are no consequences for failing to respond to and or execute the Court's requests. Under Article 87(7) of the Statute, the Court can refer an instance of non-cooperation to the Assembly of States Parties.[277] However, the 2009 report[278] stated that the Court had not chosen to exercise that power in any of the cases in which States failed to comply with a request.[279] Only in 2011did the Court take actions against Chad and Malawi for failing to arrest Al-Bashir during his visits to those countries.[280]

Implementing legislation refers to national legislation that integrates the Rome Statute into National jurisdiction for the fulfilment of State obligations requested under the Statute.[281]

[272] Lummy Lin, 'The ASP and State Cooperation' Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[273] ICC-ASP, Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009.
[274] ICC-ASP, Report of the Court on cooperation, ICC-ASP/10/40, December 21, 2011.
[275] ICC-ASP, Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009.
[276] ICC-ASP, Report of the Court on cooperation, ICC-ASP/10/40, December 21, 2011; See ICCSt Article 86 General obligation to cooperate.
[277] ICCSt (n 1).
[278] ICC-ASP, Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009.
[279] ibid.
[280] ICC-ASP, Report of the Bureau on non-cooperation, ICC-ASP/11/29, 1 November 2012.
[281] In an exclusive monist state, international law does not need to be translated into national law it is incorporated and have effects automatically in national or domestic laws. The act of ratifying an international treaty immediately incorporates the law into national law; and customary international law is treated as part of

Article 88 obliges States to enact implementing legislations.[282] Article 86 is specific on State obligations to cooperate. State Parties must cooperate with the Court on a range of matters, including but not limited to: the arrest and surrender of suspects, execution of searches, seizures, transport of witnesses, suspects, sentenced persons, providing requested records, documents, protection of victims, tracing, freezing assets and properties including producing of evidence.[283] The wide range of responsibilities serves as a reminder of the extent to which the Court relies on State cooperation to succeed in its mission.[284] However, the implementation of Article 88[285] by 'State Parties' has been slow to occur, 16 years plus after the creation of the Statute, about half of Party States have not met one of the most critical Statute obligations. In 2014, about 65 State Parties out of the 123 members have enacted some form of implementing legislation or the other.[286]

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national law as well. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. A judge can declare a national rule invalid if it contradicts international rules, in its most pure form, monism dictates that national law that contradicts international law is null and void, even if it predates international law. Dualists emphasise the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. If a state accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. But one cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to dualists, national judges never apply international law, only international law that has been translated into national law. However, monism and dualism describe the two different theories of the relationship between international law and national law an many states, are partly monist and partly dualist in their actual application of international law in their national systems.

[282] ICCSt (n 1).

[283] ibid; part 9, ICC-ASP, Report of the Bureau on cooperation, ICC-ASP/8/44, 15 November 2009; ICCSt Article 89 on Surrender of persons to the Court.

[284] Lummy Lin, 'The ASP and State Cooperation' Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.

[285] ICCSt (n 1) Article 88, availability of procedures under national law.

[286] United Nations Treaty Series vol 2187 p 3; depositary notifications; State Parties to the Rome Statute of the ICC are sovereign, have ratified or acceded to the treaty that established the Court; As of April 2014, Signatories: 139 Parties: 122 states are States Parties to the Statute of the Court, including all of South America, nearly all of Europe, most of Oceania and more than half the countries in Africa. A further 31 countries, including Russia, have signed but not ratified the Rome Statute Currently, 65 countries have enacted legislation containing either complementarity or cooperation provisions, or both, into their domestic law. 35 countries have some form of advanced draft implementing legislation. CN5771998; Treaties-8 of 10 November 19981 and CN6041999 Treaties -18 of 12 July 1999 [procès-verbaux of rectification of the original of the Statute (Arabic, Chinese, English, French, Russian and Spanish authentic texts)]; CN10751999 Treaties -28 of 30 November 1999 [procès-verbal of rectification of the original text of the Statute (French and Spanish authentic texts)]; CN2662000 Treaties -8 of 8 May 2000 [procès-verbal of rectification of the original text of the Statute (French and Spanish authentic texts)]; C.N.17.2001. Treaties -1 of 17 January 2001 [procès-verbal of rectification of the Statute (authentic French, Russian and Spanish texts)]; C.N.765.2001. Treaties -18 of 20 September 2001 (Proposals for corrections to the original text of the Statute (Spanish authentic text)] and C.N.1439.2001 Treaties -28 of 16 January 2002 (Procès-verbal); CN7132009. Treaties -4 of 29 October 2009 (Proposal of amendment by Norway to the Statute); C.N.723.2009. Treaties 5 of 29 October 2009 (Proposal of amendments by the Netherlands to the Statute); CN7252009 Treaties -6 of 29 October 2009 (Proposal of amendment by Mexico to the Statute); CN7272009 Treaties -7 of 29 October 2009 (Proposal of amendment by Liechtenstein to the Statute); CN7332009 Treaties -8 of 29 October 2009 (Proposal of amendment by Belgium to the Statute);

Additionally 35 State Parties have draft legislation that is awaiting passage.[287] However, some State Parties that have enacted implementing legislation; adopted the Statute definition of crimes, but have not developed procedures for cooperation. When that is taken into account, not all State Parties have implemented legislation on cooperation with the Court.[288] The lack of implementing legislation poses a barrier to full cooperation with the Court.[289] In the absence of a more rigorous demand for States to prioritise implementing legislation, there are few incentives for states to speed up the process. Just as with cooperation with Court requests, it is necessary for the ASP to establish accountability mechanisms in this area. The mechanism could potentially combine regular reporting requirements and deadlines for various stages of the drafting and legislation passage process.

Unaccomplished arrest warrants are troubling;[290] this is due to erratic cooperation by States. Despite the fact that France, Belgium, the DRC, and Côte d'Ivoire have arrested and surrendered suspects to the ICC, but Sudan, and some other African states have declined to enforce arrest warrants in some situations such as: Sudan (Darfur) and Kenya for various political reasons.[291] It is imperative that the ASP does not allow States to shield perpetrators from prosecution. Whilst the ASP has responded to States' failure to execute arrest warrants by adopting procedures on non-cooperation, the experience so far suggests limited efficacy of the procedures, which are mainly aimed at fostering dialogue between the non-cooperative States and the Bureau.[292] The Bureau in 2012 took these steps with Chad and Malawi after both allowed Al-Bashir to visit their territories. Malawi was willing to engage with the Bureau and ultimately chose not to allow Al-Bashir enter into its territory again without being

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CN7372009 Treaties -9 of 29 October 2009 (Proposal of amendments by Trinidad and Tobago to the Statute); CN8512009 Treaties -10 of 30 November 2009 (Proposal of amendment by South Africa to the Statute); CN10262013 Treaties -XVIII10 of 14 March 2014 (Proposal of amendments by Kenya to the Statute).

[287] A Universal Court with Global Support – Ratification and Implementation – Implementation of the Rome Statute; Coalition on the International Criminal Court < www.iccnow.org> accessed 3rd July 2014.

[288] ibid.

[289] Lummy Lin, 'The ASP and State Cooperation' Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.

[290] The outstanding warrants are: Joseph Kony, Okot Odhiambo, Dominic Ongwen, and Vincent Otti in the Uganda situation; Sylvestre Mudacumura in the DRC situation; Ahmad Harun, Ali Kushayb, Abdel Rahim Hussein and Omar Al Bashir in the Darfur situation. They have been outstanding since 2005 for the Uganda suspects, since 2007 for Ahmad Harun and Ali Kushayb, since March 2009 in the case of Omar Al-Bashir, and since 2012 for Abdel Rahin Hussein and Sylvestre Mudacumura; Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.

[291] Human Rights Watch. 'Human Rights Watch Memorandum for the Eleventh Session of the International Criminal Court Assembly of States Parties'; (New York, 2012) 23.

[292] ICC-ASP, Report of the Bureau on potential Assembly procedures relating to non- cooperation, ICC-ASP/10/37, 30 November 2011.

arrested, which resulted in the relocation of the 2010 African Union Summit to Ethiopia.[293] In contrast, Chad reaffirmed its position with the AU[294] and that its actions in not arresting Al-Bashir were consistent with international law and the Statute,[295] and also the researcher is in favour of this position of non-compliance.

The mixed results that the Bureau encountered indicate that the procedures on non-cooperation need to be further developed and strengthened, particularly to emphasise the role of diplomatic pressure. While Malawi eventually reversed its position after its interaction with the Bureau, it is likely that this decision was also influenced by the fact that the US had frozen $350 million of Malawi's developmental aid fund.[296] The US foreign aid agency Millennium Challenge Corporation specifically highlighted Al-Bashir's visit as one of the concerns that led to the suspension of funds.[297]

4.16 States and The Immunity Challenge Before The Court

The key question about immunity before the ICC is: to what extent does immunity arise in the context of the Court's proceedings?[298] The question divides into two, first does an accused have immunity from prosecution before the ICC? Secondly, does the accused, separate from the ICC proceedings, have immunity from National authorities acting on the

[293] ICC-ASP, Report of the Bureau on Non-Cooperation, ICC-ASP/11/29 1 November 2012.

[294] The various African Union (AU) decisions on non-cooperation are contained in e.g. AU Assembly Decision on the Meeting of States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec 245(XIII), 3 July 2009, x 10, AU Decision on the Progress Report of the Commission on the Implementation of AU Decision on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, Assembly/AU/Dec.296(XV), 27 July 2010, x 5 and AU Assembly Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/ Dec 397(XVIII), 30 January 2012, xx 6 and 8. For ICC ASP decisions on cooperation see e.g. ICC Resolution on Cooperation, ICC-ASP/10/Res.2, 20 December 2011 and ICC Resolution on the Strengthening of the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res 5, 21 December 2011, x 6. See also ICC Kampala Declaration, Declaration RC/ Decl1, 1 June 2010, x 7 and generally the Kampala Declaration on Cooperation, Declaration RC/Decl28 June 2010.

[295] ICC-ASP, Report of the Bureau on Non-Cooperation, ICC-ASP/11/29, 1 November 2012. See also, Article 98 of the Rome Statute states that the Court cannot force nations to "act inconsistently with its obligations under international law" implying that the international agreements between nations would relevant to Parties' obligations to the Court. Article 98 of the Rome Statute was not initially created as a loophole in the jurisdiction of the Court. In fact, "the article's wording explicitly requires the existence of a 'sending state' and "treaties between countries; see also, Case Concerning the Arrest Warrant of 11 April 2000 *(Democratic Republic of the Congo v Belgium) [2002] ICJ 1.*

[296] Gabe José low, 'Malawi Ready to Arrest Sudan's Bashir if He Comes for Summit,' *Voice of America,* (US 5 June 2012).

[297] MCC Board Approves Zambia Contact, Suspends Compact with Malawi, Millennium Challenge Corporation press release, March 23, 2013 < www.mcc.gov > accessed 3rd July 2014.

[298] Dapo Akande reviewed the general parameters of the customary public international law governing head of state, government, and foreign ministers immunity, including its application to international crimes; Akande D, 'State Cooperation and Immunities The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges [2012] Universiteit Leiden Grotius Centre for International Legal Studies.

request of the ICC? Customary international law should be the Court's approach on this issue.[299] The ICC finds no immunity before international tribunals and no immunity if National authorities are acting at the request of the Court. This broad approach is weak Professor Akande argues. He noticed that the customary law approach by the Court deals with *ratione materiae* jurisdiction and not *ratione personae* jurisdiction. Also the customary law examples cited by the court are more of situations where States are (ICC) treaty bound, rather than Non-State Parties to the ICC. Akande favours an approach that removes immunity before the ICC and within National systems of states that have become parties to the Rome Statute. However, in the case of UN Security Council referrals for situations involving Non-State parties, he argues that those States can be seen as bound in the same manner as a State Party.[300] The Malawi decision,[301] issued a day before the Chad decision, is the first detailed decision regarding the immunity of Al-Bashir by the Court. The Pre-Trial Chamber held:

> 'That customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, Article 98(1) of the Statute does not apply.'[302]

The Chamber therefore, held that Malawi and Chad by failing to arrest and surrender Al-Bashir failed to comply with their obligations to cooperate with the ICC.[303] Moreover, the Chamber held that it has 'sole authority' to decide whether immunities are applicable in a

[299] ICCSt (n 1) Article 21 'Applicable law'.
[300] Dapo Akande, 'State Cooperation and Immunities The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges [2012] *Universiteit Leiden Grotius Centre for International Legal Studies*; Dire Tladi, 'The ICC Decisions on Chad and Malawi On Cooperation, Immunities, and Article 98*'* (2013) 11 *Journal of International Criminal Justice* 199.
[301] Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court With Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011; Pre-Trial Chamber I, 13 December 2011.
[302] ibid para 43.
[303] ICCSt (n 1) Article 86.

particular case[304] and that by failing to bring the issue of immunity to the ICC for determination there had been a further breach of the obligation to cooperate.[305]

The result reached by the Pre-Trial Chamber that Al-Bashir is not immune from arrest is debateable; the reasoning and approach of the Court causes more to be desired and has faced criticism from academics like Schabas, Akande, Dire Tladi and others. Stating that as a matter of international law National authorities could not depart from the immunity which customary international law grants Heads of States from arrest by other Nations the researcher is again in support of this notion.

4.17 External Influences On The International Criminal Court

A further phenomenon; a challenging reality which can affect the Court's position and make its work the subject of international debate or controversy [as we currently have] concerns the temptation for some States wanting to instrumentalise the Court for their political purpose and interests.[306] 'As a former German Ambassador; a Judge of the ICC [late] I am neither blind nor naïve in this regard.'[307] Already, the so-called self-referrals of some African State Parties like Uganda and the DRC[308] have led to comments that leaders of those States used the ICC against political opponents. But as a legal and a judicial institution governed by the Statute we have to apply its Articles and there is no doubt that we have State Party referrals under Article 13(a) ICCSt; there is also no doubt that terrible mass crimes have been committed in Uganda and the DRC[309] which the ICC had to investigate and prosecute.[310] It is a fact that the referral of crimes committed in Darfur/Sudan through Security Council resolution 1593 in 2005 and the subsequent ICC activities including the arrest warrant against President Al-Bashir led to considerable international debate. A further noteworthy case is the

[304] Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court With Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011; Decision rendue en application de l'article 87-7 de le Statut de Rome concernant le refus de la Republique du Tchad d'acce¤der aux demandes de cooperation deliverers par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2011; para 11.
[305] Dapo Akande, 'State Cooperation and Immunities the Law and Practice of the International Criminal Court Achievements, Impact and Challenges [2012] *Universiteit Leiden Grotius Centre for International Legal Studies.*
[306] Hans-Peter Kaul, 'The International Criminal Court (Current Challenges and Perspectives)' [2011] *Salzburg Law School on International Criminal Law.*
[307] ibid.
[308] ibid.
[309] *The Prosecutor v Thomas Lubanga* ICC-01/04-01/06 (14 March 2012).
[310] Hans-Peter Kaul, 'The International Criminal Court (Current Challenges and Perspectives)' [2011] *Salzburg Law School on International Criminal Law.*

referral of the Libyan situation through SC Resolution 1970 in March 2011. 'The Security Council's decision demonstrates that the ICC is indeed an international reality.'[311] At this juncture the researcher ponders on the SC's in-decision regarding Syria if truly in the words of Judge Kaul that the: 'SC decision demonstrates clearly…' the intention to protect humanity or a tool in the hands of the high and mighty. There are also other, less positive elements and circumstances which have to be considered such as: first, the total financial burden of the Libya investigation was on the ICC and not on the UN this affected seriously the Courts budgetary planning for 2011/2012.[312] Second, Nationals of Non-States Parties, for example US nationals, are exempted from ICC Jurisdiction, with exactly the same provisions in the Statute. Lastly, the Court, its Presidency was not consulted or informed as a courtesy measure before the referral.[313]

It is worthy of note that whatever powerful States or the SC decide with regard to the ICC should not be held against the Court, in such situations the Court is helpless; the 'Security Council' continues to be the masters of the game. We know this from experience, lack of support or political moves by States which make the role of the ICC questionable or controversial may lead to misunderstandings or criticisms to which the Court, as a purely judicial, neutral and non-political institution, cannot really respond to.[314] Hence, the ICC has been labelled a tool of powerful nations in its selection of situations to investigate. The Court, however, maintains that its choice of cases is based primarily on a situation's ability to meet the requirements for investigations. First on Jurisdiction, whether the situation occurs in a member state (if not, the Court can only investigate the situation following a UNSC referral) and involves crimes that fall within the Court's mandate. Second, admissibility whether the government is unable or unwilling to prosecute offenders in contrast to a country calling for national prosecutions via the complementarity principle and whether crimes committed meet the threshold of gravity. Lastly, in the interests of justice, the Court must belief that an investigation would promote justice in the situation.[315] Nonetheless, Countries such as Palestine, Colombia, and Syria, have been cited as situations protected from investigation by powerful nations better known as non-accountability regions or accountability free zones.

[311] ibid.
[312] ibid.
[313] ibid.
[314] ibid.
[315] ICCSt (n 1).

The Court's failure to investigate situations involving States with ties to powerful UNSC member, (a comprehensive discussion of this issue is examined in the next chapter on jurisprudence of the ICC) coupled with its continued focus on Africa, fostering the belief of many that the ICC is subject to political influence.[316] The Court's decision to open more investigations into African situations reveals the tendency to overlook situations involving 'allies' with UNSC members. Unease about the ICC's political nature grows stronger as situations warranting investigation continue to go unchecked by the Court, and its failure to address such concerns has only served to enhance the distrust and frustration of some States.

4.18 Conclusion

This chapter analyses the Court in her attempt to prosecute under Article 5 ICCSt, its jurisdiction *ratione materiae* by examining the Court's prosecutional strategies and difficulties through its internal and external challenges. The chapter establishes that the success of the OTP is relatively a direct measure of the Courts overall success; without it the ICC cannot achieve its mandate or prove itself as a credible and unbiased institution. The OTP therefore cannot serve as a successful organ of the ICC until it resolves a number of problems within its operation. While some of these problems are concrete and structural, many pressing issues have to do with the policy, leadership, and motivation within the Office. Both the tangible and intangible problems within the OTP must be resolved to create an environment in which it can operate effectively. Judges in both the Pre-Trial and Trial Chambers accuse the OTP of sloppy work, in some cases claiming that it had little or no factual basis for its allegations. This is largely a reflection of poor leadership and structural defects within the Office, as such effectiveness must be enhanced such as continuity amongst investigative teams is important rather than rotating investigators between conflicts; the size of teams should be planned based on the scope of the conflict and remain consistent throughout the duration of the investigation.[317] The ICC's success will be defined mostly by its trial record and strongly, focused investigations are required to yield results. The aim should be to increase the likelihood of charges being confirmed in PTCs by producing better and substantial evidence.

[316] Du Plessis, Max. 'The International Criminal Court that Africa wants' [2010] *Institute for Security Studies August* 33-50.
[317] Henry M Jackson and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] Jackson School of International Studies Task Force Report University of Washington.

The difficult task on the part of accomplishing justice by the Court has been broadly evaluated mindful of the fact that success within the Courts operation will contribute a milestone to the total overall dispensation of justice. However, States parties must draw appropriate conclusions from the fact that the Court has no executive powers, no police, no armed forces, limited financial resource and other executive mechanisms. State cooperation is essential to the Court's success in delivering justice. Consequently, State Parties and the Court must in a foreseeable future develop a new system of best practices and effective cooperation.[318] The ICC can only be as strong as the States parties make it to be. In the next chapter the Jurisprudence of the Court will be considered to establish the culture of the Court since its inauguration.

[318] Hans-Peter Kaul, 'Construction Site for More Justice: The International Criminal Court after Two Years' (2005) 99 *American Journal of International Law* 370.

Chapter Five

The Jurisprudence of the International Criminal Court

... Attempts to use foreign models of judicial organisations and procedures may lead to frustration and may thus be a misuse of the comparative method...

Otto Kahn-Freund [1]

5.1 Preamble

This chapter examines the jurisprudence of the International Criminal Court (the Court/ICC)[2] and relevant jurisprudence of the *ad hoc* tribunals: the International Criminal Tribunal for Yugoslavia (ICTY),[3] the International Criminal Tribunal for Rwanda (ICTR)[4] and the Special Court for Sierra Leone (SCSL).[5] Examining the situations and cases under the jurisdiction of the ICC will be the main focus, and the purpose of the chapter, is to comprehend the challenges confronting the Court and in establishing the culture of the Court prosecuting under Article 5 of the Rome Statute (the Statute).[6] Crime against humanity (CAH)[7] is often charged in all situations and one of the bases for the Court's *'ratione materiae'* jurisdiction.

The chapter also critiques the jurisprudence of the Court with the hope of moving towards a standardised theory of CAH, that not only respects State sovereignty but also within the mandate of the Court to prevent and punish 'unimaginable atrocities that profoundly touch the conscience of humanity; devoid of unnecessary external influences to prosecute.' In all, of the 8 situations investigated by the Court, 22 cases are under prosecution out of numerous communications received by the Office of the Prosecutor (OTP). The chapter accomplishes by stimulating discussions and analyses of the Court's case laws in relation to other criminal tribunals.

[1] Otto Kahn-Freund 'On Uses and Misuses of Comparative Law' (1974) 37 the Modern Law Review 1.
[2] 2187 UNTS 3 37 ILM 999 (1998) (ICCSt).
[3] UN Doc S/RES/827 (1993) 32 ILM 1203 (1993) (ICTYSt).
[4] UN Doc S/RES/955 (1994) 33 ILM 1598 (1994) (ICTRSt).
[5] 2178 UNTS 138; UN Doc S/2002/246 (SCSL).
[6] ICCSt (n 2).
[7] ICCSt (n 2) Article 7.

5.2 Jurisprudence on Immunity before International Tribunals

The case of Malawi's failure to arrest *Al-Bashir*, a Head of a State not party to the ICC, despite the arrest warrant by the ICC,[8] and Malawi's argument of *Al-Bashir's* immunity under customary international law,[9] and also, that it did not arrest President *Al-Bashir* being a member of the African Union (AU); it had aligned itself with the position of the AU, calling on its members not to cooperate with the ICC in respect to the *Al-Bashir case*.[10] Consequently, in the arrest warrant decisions on *Al-Bashir*[11] and Gaddafi,[12] the Pre-Trial

[8] ICC-02/05-01/09, 'Decision on the Prosecution's Request for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir' in which the Chamber held that it was satisfied that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under Article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for war crimes and crimes against humanity and that his arrest appears to be necessary under Article 58(l) (b) of the Rome Statute 4 March 2009.

[9] Customary law allows immunity for heads of state and government and stipulates that a head of state has immunity, which includes personal inviolability, special protection for his or her dignity, immunity from criminal and civil jurisdiction, and from arrest and/or prosecution in a foreign state on charges concerning all crimes, including international crimes. Under international customary law, acting heads of State, heads of government and foreign affairs ministers enjoy total immunity *ratione personae* from foreign criminal prosecution, be it for acts performed privately or officially, and indistinctively of whether those acts have been performed before or during their term of office. Arrest Warrant of 11 April 2000 (Democratic Republic of *Congo v Belgium*), Judgment, ICJ Reports 2002, paras 51-61 especially paras. 54-55. See also the Resolution adopted by the Institut de droit international during the Vancouver session (1999), Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Rapporteur J Verhoeven);See Vienna Convention on Diplomatic Relations (1961); Article 31 para1; New York Convention on Special Missions (1969) Article 31 para 1; M Wood, 'The Immunity of Official Visitors' [2012] *Max Planck Yearbook of United Nations Law* 35-98; *Immunity Ratione Materiae* All 'representatives of the State acting in that capacity' enjoy immunity ratione materiae (also called 'official acts immunity') for the acts so performed, even if they have acted *ultra vires*. 'Representatives' of States include of course the triad referred to above and diplomats. However, in contrast with what is required for triggering immunity ratione personae, the concept of 'representatives of the State' for the purpose of immunity ratione materiae is not limited to persons specifically embodying or personifying it. Rather, that concept encompasses all State organs within the meaning of Article 4 of the International Law Commission Articles on State responsibility, together with "all the natural persons who are authorized to represent the State in all its manifestations" to use the International Law Commission comments on the UN 2004 Convention; 'Pierre d'Argent, Immunity of State Officials and Obligation to Prosecute' Proceedings of the Joint conference of the French and German Societies for International Law, Martinus Nijhoff, 2013.

[10] Assembly of Heads of States, African Union (AU) various decisions on non-cooperation are contained in e.g. AU Assembly Decision on the Meeting of States Parties to the Rome Statute of the International Criminal Court; Assembly/AU/Dec 245(XIII) 3 July 2009 10; AU Decision on the Progress Report of the Commission on the Implementation of AU Decision on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, Assembly/AU/Dec 296(XV) 27 July 2010 5; AU Assembly Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/ Dec 397(XVIII) 30 January 2012 6 and 8 for ICC ASP decisions on cooperation; ICC Resolution on Cooperation, ICC-ASP/10/Res.2, 20 December 2011 and ICC Resolution on the Strengthening of the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res 5, 21 December 201 6; ICC Kampala Declaration, Declaration RC/ Decl1 1 June 2010 7 and generally the Kampala Declaration on Cooperation, Declaration RC/Decl 2, 8 June 2010.

[11] ICC-02/05-01/09, "Decision on the Prosecution's Request for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" in which the Chamber held that it was satisfied that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for war crimes and crimes against humanity and that his arrest appears to be necessary under article 58(l)(b) of the Rome Statute 4 March 2009. Also see, Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court

Chamber referred to Article 27 of the Statute which provides (1) that official capacity as Head of State or Government shall not exempt a person from criminal responsibility under the statute and (2) that immunities which may attach to the official capacity of a person under national or international law shall not bar the Court from exercising jurisdiction. However, referring to Article 98(1),[13] which states that:

> The Court may not proceed with a request for surrender or assistance which would require 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, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

The Chamber accepts academic literature and suggests that, acceptance of Article 27(2) ICCSt, implies waiver of immunities for the purposes of Article 98(1) ICCSt with respect to proceedings conducted by the Court. However, the critical issue is: what is the position of the Head of a State that is not party to the Rome Statute? And therefore has not accepted Article 27 ICCSt. The chamber held that: international law does not afford immunity to Heads of States in respect of proceedings before international courts. In its view, this means that Heads of States not party to the Rome Statute are not immune from the jurisdiction of the ICC. Yet, the Pre-Trial Chamber went on to say that all national authorities arresting and surrendering the Head of State to an international tribunal would not act inconsistently with their obligations under international law.[14] Thus Article 98(1) was not even engaged.

The Pre-Trial Chamber in reaching its decision makes reference to the provision of the Statutes of the Nuremberg tribunal, the Tokyo Tribunal, the ICTY and the ICTR which all say that the official position of the accused shall not relieve him from criminal responsibility. Customary international law however establishes that Heads of states are immune from prosecution for acts conducted while in office giving possibility of immunity from the

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With Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011; Decision rendue en application de l'article 87-7 de le Statut de Rome concernant le refus de la Republique du Tchad d'acceder aux demandes de cooperation deliverers par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2011.

[12] ICC-01/11-13 27-06-2011, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi.

[13] ICCSt (n 2).

[14] Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333; Dapo Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong' EJIL Talk <www.ejiltalk.org/> accessed 3 July 2014.

jurisdiction of international tribunals.[15] Saying that official capacity does not exclude criminal responsibility is not necessarily saying that, that person may not be immune from the jurisdiction of particular tribunals,[16] of course, no one today asserts that official capacity in itself excludes criminal responsibility.[17] Secondly, the Nuremberg tribunal, the Tokyo Tribunal and the ICTR/ ICTY instruments in question are construed as removing immunity and binding on the relevant States. States arguments for immunity of their officials are subject to the legal instrument which arguably removed such immunity.[18] The precedents referred to by the Pre-Trial Chamber do not establish that the Head of a State not party to the instruments establishing an international tribunal will not be immune from the jurisdiction of that tribunal. Moreover, the International Court of Justice (ICJ) decision in the *Arrest Warrant case* does not say this either.[19] The ICJ only stated that foreign ministers may be subject to criminal proceeding in certain international courts, where they have jurisdiction.[20] The only precedent that makes the point the Pre-Trial Chamber makes, is the decision of the SCSL[21] in the Charles Taylor case. But the logic of that decision is just as flawed as that of the ICC's Pre-Trial Chamber.[22] That the ICTY in *Prosecutor v Blaškić* (Objection to issue of *Subpoenae duces tecum*, 1997) recognised that immunity does not vanish because a tribunal is international, as did Judge *Shahabuddeen* in *Prosecutor v Krstic* in his dissenting opinion. This also appears to be the position adopted in this study.

The Pre-Trial Chamber in citing the practice for the rule, fails to mention the practice of States Parties to the Statute, some States have national legislation, implementing the ICC Statute, confirming the distinction between the immunity of State Parties to the Statute and the immunities of non-party States. Recognising that the former waived their immunities via Article 27 but the latter have not.[23] The argument for a lack of immunity in international tribunals is that the international law immunity of foreign Heads of States from national authorities is necessary to prevent national interference in the ability of a foreign State to

[15] Customary law allows immunity for heads of state and government and stipulates that a head of state has immunity, which includes personal inviolability, special protection for his or her dignity, immunity from criminal and civil jurisdiction, and from arrest and/or prosecution in a foreign state on charges concerning all crimes, including international crimes. Under international customary law, acting heads of State, heads of government and foreign affairs ministers enjoy total immunity *ratione personae.*
[16] Dapo Akande (n 14).
[17] ibid.
[18] ibid.
[19] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Reports (2002).
[20] ibid.
[21] SCSL (n 5).
[22] Dapo Akande (n 14).
[23] ibid.

engage in international action but that this danger does not arise with international courts since they are independent of States and act impartially.[24] This argument is adopted by the Pre-Trial Chamber, which cites Antonio Cassese on this point.[25] This is quite an odd argument to make given that international courts are often created by States. The basic distinction being made between international and national courts fails to stand up to scrutiny as it would appear that what a State cannot do individually, it can do by agreement with some other States. It is a known fact that immunity *ratione personae*[26] are not removed because of allegations of international crimes.[27] If the theory put forward by the Pre-Trial Chamber is right the reason for it is not the nature of the crime but that of the tribunal being international in nature.

The Pre-Trial Chamber's decision tends to ignore Article 98, the Chamber further states: 'that the unavailability of immunities in respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.'[28] Is the intention to make Article 98 redundant by the Pre-Trial Chamber? This would be contrary to the principles of treaty interpretation.[29]

5.3 Immunity, Security Council Referrals and the International Criminal Court

Under Security Council referrals, immunity plausibly could be explained by the Pre-Trial Chamber that referral of situations by the UN Security Council has the consequence of States being bound by the Statute under Article 27. The effect is that the States concerned would be regarded being bound as a State party to the Rome Statute.[30] Taking this route would have built on the Pre-Trial Chamber's decision in the Al-Bashir Arrest Warrant situation where it stated that (para 45) by referring the Darfur situation to the Court, pursuant to Article 13(b) of

[24] ibid.
[25] ICC-02/05-01/09, 12 December 2011; 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 Hassan Ahmad Al Bashir; para 34.
[26] Under international customary law, acting heads of State, heads of government and foreign affairs ministers enjoy total immunity *ratione personae.*
[27] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Reports (2002).
[28] ICC-02/05-01/09, 12 December 2011, 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 Hassan Ahmad Al Bashir; para 44.
[29] Article 31 Vienna Convention and Article 32 of the Vienna Convention on the Law of Treaties allows recourse to supplementary means to determine the meaning of a provision where the normal rules of interpretation would lead an absurd or unreasonable result.
[30] Dapo Akande (n 14).

the Statute,[31] the UNSC has accepted that the investigation into the said situation, as well as any prosecution arising there from, will take place in accordance with the Statute, the Elements of Crimes and the Rule of Procedure as a whole, such that the Security Council's referral makes relevant Article 27 of the Statute and,[32] Sudan shall be bound by that decision.[33] The Chamber at para 46 claims:[34]

> '... that when cooperating with this Court and therefore acting on its behalf, State Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the Crimes within its jurisdiction.'

However, it should be noted that the entire international community has not entrusted jurisdiction to the Court, less than two thirds of the States of the world have done so. The other one third cannot simply be ignored.[35] Also, Article 103 UN Charter[36] states that members' obligations under the UN Charter override their obligations under any other treaty. Thus, countries cannot use other treaties such as the North Atlantic Treaty (NATO)[37] to override their UN Charter obligations.[38] However, not all academics share this opinion, *Dire Tladi* for instance had this to say: 'I do not share this opinion, while I do not share Akande's assessment of the relationship between Article 98(1) and Article 27, which a *priori* excludes officials of non-states parties from being the object of a cooperation of arrest, to arrest and surrender except in situations of Security Council referrals as well as his assessment that a Security Council referral effectively turns a non-state party into a state party,' I do accept that on both counts his views are plausible.[39]

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[31] ICC-02/05-01/09, 12 December 2011, 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 Hassan Ahmad Al Bashir.
[32] Dapo Akande (n 14).
[33] ibid.
[34] ICC-02/05-01/09, 12 December 2011, 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 Hassan Ahmad Al-Bashir.
[35] Dapo Akande (n 14).
[36] 1 UNTS XVI Charter of the United Nations, 24 October 1945.
[37] The North Atlantic Treaty, signed in Washington, DC on 4 April 1949, is the treaty establishing the North Atlantic Treaty Organization (NATO).
[38] Dapo Akande, (n 14).
[39] Dire Tladi, 'Cases Before International Courts and Tribunals the ICC Decisions on Chad and Malawi on Cooperation, Immunities, and Article 98' (2013) 11 Journal of International Criminal Justice 199; Paula Gaeta, 'Does President Al-Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315; T M Dralle; 'The Legal Nature of Security Council Referrals to the ICC and Muammar Gaddafi's Immunity from Arrest' <http://tilman-dralle.de/pdf/Gaddafi_Immunity 2011pdf> accessed 14 May 2014; C

In the famous *Arrest Warrant case*, the ICJ held: 'immunity would not be available before 'certain international criminal courts, where they have jurisdiction.'[40] By implication, the ICJ is saying that immunity would remain before 'certain international criminal courts.' The Pre-Trial Chamber's statement is much more absolute.[41] Then the Pre-Trial Chamber turns to the post-second world war tribunals. The citations do not refer to the issue of Head of state immunity but rather to the defence of official capacity.[42] There is a distinction. This can be seen in the Rome Statute itself, where Article 27(1) deals with official capacity; Article 27(2) deals with immunity. The immunity of Heads of States results from customary international law. They cannot be deprived of it because other States so decide, whether they do this by their domestic law or under the canopy of a treaty. It is precisely for that reason that Article 27(2) was included in the Statute. In the absence of Article 27(2), even States Parties would be able to invoke immunity.[43]

5.4 Article 5 Jurisprudence of the International Criminal Court

The Jurisprudence of the ICC over crimes within its jurisdiction leaves more to be desired. The ICC Pre-Trial Chamber (PTC) opines divergent views on the correct interpretation of Article 7 of the Statute. In spite of the fact that the Crime should be committed pursuant to a 'State or Organisational policy,' some views critically entangle customary international law approach to the Crime; others are more succinct with open-ended interpretation, a few proffer unconventional reading of Article 7 and some unduly restrictive interpreting the text.[44] While the Statute encourages judges to construe definitions of crimes 'strictly,'[45] with any doubt accruing to the benefit of the accused,[46] the conflict regarding proper scope of application of Article 7 ICCSt is evident in the dissenting and majority opinions in the Pre-Trial Chamber

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Kreb, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in Bergsmo and Ling (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher, 2012) 223-265; D Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?' in Bergsmo and Ling (eds) *States Sovereignty and international Criminal Law* 2012 (Torkel Opsahl Academic E Publisher Beijing) 54-74.

[40] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) ICJ Reports (2002).

[41] William A Schabas, 'Obama, Medvedev and Hu Jintao may be prosecuted by International Criminal Court, Pre-Trial Chamber Concludes' <http://humanrightsdoctorate.blogspot.co.uk> accessed 3 July 2014.

[42] ibid.

[43] ibid.

[44] The post election violence in Kenya.

[45] ICCSt (n 2) Article 22(2).

[46] Leila N Sadat, 'Crimes against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334.

II's decision authorising the ICC Prosecutor to open investigation into the post-election violence in Kenya.[47]

The dissent in the Kenya case by the Court's former second Vice- President, Judge *Peter Hans- Kaul* [late] attracts positive scholarly attention.[48] Copious scholars have implicitly or explicitly aligned themselves with the dissenting judgment,[49] referring positively to the focus of the dissent on the 'historic context of the adoption of CAH'[50] and its 'careful reasoning' and 'methodological transparency,'[51] is an important contribution to the understanding of CAH.[52] The dissent[53] raises concerns about the capacity of the Court to absorb cases sent to it and the challenges of the Prosecutor's overall strategy. The technical requirements of the Court's substantive law as a means to protect the Court's workload or correct a perception of

[47] ICC-01/09, the Prosecutor requests for authorisation from the Pre-Trial Chamber to proceed with an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008, pursuant to Article 15(3) of the Rome Statute 26 November 2009. See also, ICC-01/09, 31 March 2010. Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya Pre-Trial Chamber II of the International Criminal Court, to which the situation in the Republic of Kenya has been assigned, issues the present decision pursuant to article 15(4) of the Rome Statute on the "Request for authorisation of an investigation pursuant to Article 15" submitted by the Prosecutor on 26 November 2009.

[48] Claus Kress, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855; Charles C Jalloh, 'Situation in the Republic of Kenya' (2011) 105 *American Journal of International Law* 540; William A Schabas, 'Prosecuting Dr Strangelove, Goldfinger, 'The Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 *Leiden Journal of International Law* 847; Darryl Robinson, 'Essence of Crimes Against Humanity Raised by Challenges at *ICC' European Journal of International Law:* Talk, <http://www.ejiltalk.org> accessed 3 July 2014.

[49] Leila N Sadat (n 46).

[50] Claus Kress, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855; Charles C Jalloh, 'Situation in the Republic of Kenya' (2011) 105 *American Journal of International Law* 540; William A Schabas, 'Prosecuting Dr Strangelove, Goldfinger, 'The Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 *Leiden Journal of International La* 847; Darryl Robinson, 'Essence of Crimes Against Humanity Raised by Challenges at ICC' EJIL Talk <http://www.ejiltalk.org> accessed 3 July 2014; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute Oxford Commentaries on International Law* (Oxford University Press, Oxford 2010) 137,87.

[51] Claus Kress, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 862.

[52] Leila N Sadat (n 46) 334.

[53] ICC-01/09-01/11, 15 March 2011; *Prosecutor v William Samoei Ruto et al*. dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" paragraph 2 of the decent reads: 2. I am unable to accept the decision of the Majority and the analysis that underpins it. I continue to believe that the ICC lacks *jurisdiction ratione materiae* in the situation in the Republic of Kenya, including in the present case. I am not satisfied that there are reasonable grounds to believe that the crimes alleged, which occurred during the violence that took place between 30 December 2007 and the end of January 2008 in Uasin Gishu and Nandi Districts, were committed pursuant to the policy of an organisation within the meaning of Article 7(2) (a) of the Statute; thus, I am not satisfied that the crimes alleged constitute crimes against humanity pursuant to article 7 of the Statute.

prosecutorial overreaching are necessary. Judge Kaul partly relies on the Nuremberg precedent to underscore his conclusion that only States or quasi-State like organisations following criminal policies should be tried by the Court.[54]Adding a voice to the dissent is Darryl Robinson who illuminated on the 'policy element' underlying CAH as defined by the Statute. He stresses that the debate over the 'policy element' goes to the heart of what these crimes are about and focuses discussion on the decision issued by Pre-Trial Chamber II in March 2010, authorising an investigation into the situation in Kenya.[55] He noted that the Kenya situation raised some questions on the nature of the entities that would meet the threshold of an 'organisation' under the Rome Statute. He also distinguishes the Chamber's two approach to policy element required for proving CAH, which is the 'glue' that connects individual crimes together as part of a 'widespread or systematic attack'.[56]

He explains that, in the Kenya decision, the majority (Judge *Trendafilova* and Judge *Tarfusser*) adopted a broad definition of the term 'organisation' based on the 'capacity' to direct CAH. This approach means that the mere existence of an organisation that has the capabilities to direct such crimes could be enough to distinguish them from 'ordinary' crimes. Judge Kaul, however, argued in his dissent for a more stringent standard of 'state-like organisations' as a requirement of Article 7(2) (a) of the Rome Statute.[57]

5.5 Jurisprudence of the International Criminal Court v *Ad Hoc* Tribunal's

In *Prosecutor v Kupreškić,*[58] the prosecution withdrew charges under Article 2 ICTY statute from an indictment (on grave breaches)[59] and substituted it with CAH charges,[60] arguing that the change became necessitated due to newly acquired evidence and better understanding of the underlying criminal conduct. The Prosecution further pointed out that while Article 2

[54] Leila N Sadat (n 46).
[55] ICC-01/09, 31 March 2010. Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya Pre-Trial Chamber II of the International Criminal Court, to which the situation in the Republic of Kenya has been assigned, issues the present decision pursuant to article 15(4) of the Rome Statute on the "Request for authorisation of an investigation pursuant to Article 15" (the "Prosecutor's Request") submitted by the Prosecutor on 26 November 2009.
[56] Leila N Sadat (n 46).
[57] Darryl Robinson, 'Three Concepts of Crimes Against Humanity The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' (26 – 27 September 2012) *Peace Palace, Universiteit Leiden, Grotius Centre for International Legal Studies. The Hague, The Netherlands*; 'Michael Newton, "Charging War Crimes: Policy and Prognosis". The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' (26 – 27 September 2012) *Peace Palace, Universiteit Leiden, Grotius Centre for International Legal Studies. The Hague, The Netherlands.* Newton stresses that: 'it is not viable to take the Western template of organised military and apply it, for example, to northern Uganda.'
[58] *Prosecutor v Kupreškić et al* (IT-95-16) 'Lašva Valley' case.
[59] The Geneva conventions of 1949.
[60] *Prosecutor v Kupreškić et al*, Case No IT-95-16 Indictment (10 November 1995).

allegations would require proof of 'international character' of the armed conflict in question, CAH charges would not, hence, a more expeditious trial without prejudice to the defendants, the Trial Chamber agreed and accepted the amended indictment.[61]

An examination of this jurisprudence underscores important procedural differences between the practice at the *ad hoc* tribunals and before the ICC, namely, the absence of an extensive 'vetting' of the substance of a case by the judiciary prior to trial.[62] Although, indictments are confirmed by a Judge of the ICTY (and the same is true at the ICTR), the assessment by the confirming judge is largely limited to whether or not '*a prima facie* case exists,'[63] which occurs 'where the material facts pleaded in the indictment constitute a credible case which would (if not contradicted by the accused) be a sufficient basis of the charge.'[64] At the ICTY/ICTR, arrest warrants follow the confirmation of the indictment; then arresting of the accused, when transferred to the Court, the accused is formally charged based upon the confirmed indictment. Prosecutors may formulate an indictment with multiple and cumulative charges assuming that the 'Articles of the Statute referred to are designed to protect different values,' and that each 'Article requires proof of a legal element not required by the others.'[65] They may also charge in the alternative, and need not choose among different heads of responsibility, or different theories of the case, if they can establish a *prima facie* case supporting each allegation. The practice is quite streamlined compared to the process at the ICC, where there is no 'indictment' but, following the issuance of the arrest warrant, and sometimes following Article 15 (*proprio motu*) authorisation decision; confirmation hearings are held by the Court. The ICC confirmation decisions to date involve a much more searching review of the case than the ICTY pre-trial proceedings.[66]

Furthermore, an overview of the ICC case law on modes of liability by Van Sliedregt[67] is that the ICC distances itself from the ICTY jurisprudence on the theory of joint criminal

[61] Leila N Sadat (n 46).
[62] ibid.
[63] ICTY Statute Article 19; Alex Whiting, 'The ICTY as a Laboratory of International Criminal Procedure' in Bert Zwart, Alexander Zahar & Göran Sluiter (eds), *The Legacy Of The International Criminal Tribunal for The Former Yugoslavia* (Oxford University Press, Oxford 2011)83.
[64] Vladimir Tolchilovsky, *Jurisprudence of The International Criminal Courts: Procedure and Evidence* (Brill Nijhoff Leiden 2008) 62, citing Prosecutor v Milošović, Case No IT-99-37-I; Decision on Review of Indictment and Application for Consequential Orders.
[65] ibid.
[66] Leila N Sadat (n 46).
[67] Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, Oxford 2012) 139; Elies van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?' (2009)12 *New Criminal Law Review: An International and Interdisciplinary Journal* 420,432.

enterprise (JCE), a theory much criticised. Article 25(3) of the Rome Statute suggests a different mode of liability that recognises the criminal 'mastermind' as a principal perpetrator. However, the theoretical basis for the concept of 'co-perpetration' is different from the one underlying JCE. Van Sliedregt noted two approaches that can be used in the interpretation of Article 25(3): the normative 'control over the act' approach and the naturalistic approach.[68] She criticised the fact that the normative approach applied to Article 25(3) (a) has been taken to apply to the whole of Article 25(3) and stresses that such an interpretation did not reflect the *travaux préparatoires* of the Rome Statute. She argues that expressive justice requires that liability be branded in a way that reflects the gravity and nature of the Crime, and thus emphasised the importance of maintaining a distinction between principal and accessory liability. As it is important to communicate to the victims and the international community who was the mastermind of the crimes, she expresses her hope that the Court takes a textual approach to Article 25(3).[69]

5.6 Jurisprudence of the ICC over Self Referrals

In accepting Uganda's 'self-referral', the Prosecutor notified the Ugandan authorities that it would interpret the scope of the referral 'consistently with the Rome Statute,' and analyse the Northern Uganda crimes 'by whoever committed it.'[70] After investigations, the Prosecutor applied for arrest warrants for five Lord Resistant Army (LRA) suspects, including Joseph Kony, charging them with war crimes and CAH.[71]

The ICC later joined the case against Katanga[72] and Chui[73] in the DRC; [74] tried by Trial Chamber II.[75] The Pre-Trial Chamber collectively confirmed six charges in the *Katanga* case,

[68] Leila N Sadat (n 46); Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, Oxford 2012)130,145.
[69] Elies van Sliedregt, 'Modes of Liability' 'The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' *Peace Palace, Universiteit Leiden, Grotius Centre for International Legal Studies.* 26 – 27 September 2012.
[70] Letter from Luis Moreno Ocampo, Chief Prosecutor, to President Philippe Kirsch, dated 17 June 2004, no charges have been brought against any government officials, although allegations of war crimes and torture have been made against Ugandan government officials; Human Rights Watch, 'State of Pain' Torture in Uganda (March 2004) (alleging cases of torture and arbitrary detention); Payam Akhaven, 'The Lord's Resistance Army Case: Uganda's Submission of the first State Referral to the International Criminal Court' (2005) 99 *American Journal of International Law* 403, 403; International Crisis Group, Building a Comprehensive Peace Strategy for Northern Uganda, Africa Briefing No 27, 23 June 2005; some observers of the Rome negotiations expressed surprise as the ICC's initial cases became self-referrals as it has not been widely discussed during the Rome Conference.
[71] ibid.
[72] The Situation in the Democratic Republic of the Congo, Case No ICC-01/04-01/07, Warrant of Arrest for Germain Katanga issued on 2 July 2007 (2 July 2007); Democratic Republic of the Congo; *Case The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, ICC.*

which was the first major decision of the ICC, applying Article 7 of the Statute,[76] based on the elements of CAH, the decision in *Katanga* relied on the *ad hoc* tribunal's jurisprudence, but diverged in three particulars. First, the Pre-Trial Chamber seemed to cumulate all elements of 'widespread', 'systematic' and 'organisational policy,' holding:

> 'In the context of a widespread attack, the requirement of an organisational policy pursuant to Article 7(2) (a) of the Statute ensures that the attack even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources.'[77]

The Pre-Trial Chamber's opinion is that the attack must be 'thoroughly organised,' widespread and systematic.[78] The argument that if a leader wishes to terrorise a population into submission by engaging in large-scale but seemingly random acts of violence that followed no discernible pattern, those acts should be characterisable as CAH if sufficiently widespread and carried out pursuant to a policy. The 1991 International Law Commission (ILC) *Draft Code of Crimes*, cited by the Pre-Trial Chamber to support its analysis of 'state or organisational policy,' is clear that 'either one of these aspects (systematic or widespread)

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[73] ibid.
[74] ibid.
[75] Leila N Sadat (n 46); *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, ICC;* (26 September 2008) Pre-Trial Chamber I sent the case to trial, confirming all but three counts in the arrest warrants. The Pre-Trial Chamber unanimously declined to confirm two charges: inhuman treatment and outrages upon personal dignity as war crimes and by majority declined to confirm the charge of other inhumane acts as a crime against humanity as improperly cumulated with the (approved) murder charges para 461-64. The majority concluded that, as a matter of law, 'the crime against humanity of murder, . . . even in its attempted form, . . . cannot be charged simultaneously under article 7(1) (k) of the Statute as other inhumane Acts para 461; Judge Ušacka dissented, opining that in her view, the Prosecution had presented sufficient evidence of intentional acts of bodily injury to civilians that should have been presented to the Trial Chamber para 36 (dissenting opinion of Judge Ušacka).
[76] ibid; The *Katanga* confirmation decision is interesting for a number of reasons notably in its rejection of the kinds of liability theories prevalent at the *ad hoc* tribunals as well as the idea of cumulative charging – at a very early stage of the case before either the prosecution or defence has preferred its evidence. This feature of ICC Pre-trial practice could be protective of the accused, who will have fewer charges to respond to and a more narrow scope of criminal responsibility to worry about. However, it requires the prosecution to attempt to determine (at quite an early stage) which charges and theories of liability will likely be accepted by the Court. Presumably this Pre- Trial vetting should result in more efficient trials, although thus far, that does not seem to have been the case. Lubanga went forward on a very narrow set of charges, but nevertheless took approximately 31 months from confirmation of the charges until the end of the trial.
[77] ibid.
[78] This formulation was most recently reiterated by PTC III in the decision pursuant to Article 15 authorising investigation in Côte d'Ivoire. Situation in Côte d'Ivoire, Case No ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute of the Authorisation of an Investigation into the Situation in Cote d'Ivoire (3 October 2011) para 43.

in any of the acts enumerated in the draft article is enough for the offence to have taken place,'[79] for the meaning of 'policy,' a view of the majority in the Kenya case,[80] the Chamber wrote:

> ...A policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy these criterion...[81]

Additionally, the DRC case proceeded beyond the arrest warrant phase filed against *Callixte Mbarushimana*, charged with war crimes, CAH and persecution. On 16 December 2011, the majority in Pre-Trial Chamber I, with presiding Judge *Monageng* dissenting, declined to confirm the charges against him.[82] Admittedly, the case against the accused was unusual – the Prosecution alleged that he formed part of a common plan that had for its essential (criminal) purpose ordering the *Forces Démocratiques pour la libération du Rwanda* (FDLR) to create a humanitarian crisis in the DRC by committing atrocities against civilians in order to further the political goals of the FDLR. The Prosecution did not accuse him of ordering the atrocities directly, but rather, that he allegedly furthered the criminal campaign by orchestrating a press offensive to hide the FDLR's activities from the watchful eyes of the international community, thereby enabling the FDLR to continue and conceal its activities. The Pre-Trial

[79] International Law Commission, *1991 Draft Code of Crimes Against the Peace and Security of Mankind*, Article 21.

[80] ICC-01/09 (31 March 2010) Situation in the Republic of Kenya Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya.

[81] International Law Commission, 1991 Draft Code of Crimes *Against the Peace and Security of Mankind*, Article 21; The Chamber cites in support of this proposition language in the commentary to the 1991 *Draft Code of Crimes* to the effect that the organisation can be 'private individuals with *de facto* power or organised in criminal gangs or groups,' 1991 Draft Code of Crimes, Commentary to Article 21 para 5, *cited in Katanga Confirmation decision,* Although the use of ICTR and ICTY jurisprudence is perfectly appropriate in many cases, here those tribunals, initially suggested that CAH required a policy element, but eventually reversed that position. Thus, *Prosecutor v Semanza* Case No ICTR-97-20-A *Judgment* (May 20, 2005) para 269 held that 'although the existence of a plan or policy may be useful to establish that an attack was directed against a civilian population and that it was widespread and systematic, it is not an independent legal element. The ICC does not cite this case but rather *Akayesu*, decided quite some time earlier, for the proposition that there must have been some preconceived plan or policy, even if not formally adopted. *Prosecutor v Akayesu, Case No ICTR 96-4-T, Judgment (Sept. 2, 1998) para 580*. It seems that this authority is only of limited persuasive value given its own rejection by the ICTR in subsequent cases, such as *Semanza*; the same is true at the ICTY. In the Kenya confirmation decisions, PTC II addressed this seeming anomaly.

[82] *Prosecutor v Callixte Mbarushimana*, Case No ICC-01/04-01/10 *Decision on the Confirmation of Charges* (16/12/ 2011) ICC-01/04-01/10 (1 March 2012); Pre-Trial Chamber 1 decision on the Prosecution's Application for Leave to Appeal the Decision on the confirmation of charges.

Chamber I found substantial grounds to believe that the FDLR had intentionally committed terrible atrocities upon civilians in the *Kivu* province of the DRC,[83] but then retreated from the logical implication of that conclusion: 'that these attacks implied the existence of a 'State or organisational policy' to attack the civilian population of the region,[84] from the facts set forth by the Pre-Trial Chamber – that the FDLR had a policy of attacking civilians. Judge *Monageng* argued in her dissent,[85] that although the case against Mbarushimana is 'not a conventional one,' it would seem to present 'triable issues' deserving more rigorous fact finding that only a Trial Chamber can provide.[86] The Appeals Chamber disagreed, and later confirmed the majority's decision not to confirm the charges, finding that the Pre-Trial Chamber had applied the appropriate legal and evidentiary standards to the case.[87]

Other situations before the ICC is the 'self-referral' cases involving the (CAR) Central African Republic.[88] *Jean- Pierre Bemba Gombo,* was charged and brought to trial (*Bemba),* is a Congolese national accused by the Prosecutor to have led the forces of the *Mouvement de Libération du Congo* (MLC) in supporting CAR President Ange-Félix Patassé against rebel forces commanded by *François Bozizé*. The arrest warrant for *Bemba* indicted him for war crimes and CAH. The Pre-Trial Chamber II issued a decision confirming some but not all charges,[89] due either to cumulative or lacking in evidentiary support.[90]

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[83] *Prosecutor v Callixte Mbarushimana,* Case No ICC-01/04-01/10, *Decision on the Confirmation of Charges* (16 December 2011) para 145, 151.
[84] ibid para 263, 265.
[85] ibid; Dissent of Presiding Judge Monageng para 20.
[86] ibid para 134.
[87] *Prosecutor v Callixte Mbarushimana,* Case No ICC-01/04-01/10, Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I of (16 December 2011) entitled *'Decision on the Confirmation of Charges'*, (May 30, 2012) para 41-46.
[88] The situation in Côte d'Ivoire resembles the self-referral cases, but the ground for referral was actually the ICC Prosecutor's *proprio motu* powers.
[89] *Prosecutor v Jean-Pierre Bemba Gombo* Case No ICC-01/05-01/08, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of Prosecutor Against Jean-Pierre Bemba-Gombo* (June 15, 2009) paras 72, 205. Some observers have suggested that the arrest warrant decision supports a more limited view of the 'policy' element by the Court; Gerhard Werle, *Principles of International Criminal Law* (2nd edn, Asser Press US 2009) 302 *citing Prosecutor v Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08; *Arrest Warrant Case* para 33; the existence of a State or organisational policy is an element from which the systematic nature of an attack may be inferred.
[90] Ibid; The Pre-Trial Chamber retained the murder and rape charges as crimes against humanity, but declined to confirm charges of torture as a cumulative charge that was 'subsumed' by the count of rape; also the Pre-Trial Chamber confirmed three of the five war crimes counts (murder, rape and pillaging), but declined to confirm charges of torture as a war crime on the grounds that the evidence of specific purpose was lacking para 291. The Pre-Trial Chamber also declined to confirm the crime of outrages upon personal dignity, again on the basis that this count constituted 'cumulative charging' because the 'essence of the violation of the law underlying these facts is fully encompassed in the count of rape, para 310. This finding of the Pre-Trial Chamber is arguable. Many of the acts identified did involve rape, but others were associated with but not necessarily constitutive of the crime of rape and represented an effort on the part of the Prosecutor to capture not only the rapes but the

This represents a significant departure from the practice at the *ad hoc* tribunals.[91] The Pre-Trial Chamber also examined the contextual elements of CAH, following *Katanga* and arguably narrowed the meaning of 'civilian population' however, in its finding that 'according to well-established principle of international humanitarian law, civilian population comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants.'[92] The holding omits any discussion of (or citation to) the *Martić* case,[93] and particularly its holding regarding the status of individuals who are *hors combat.*[94]

5.7 The Court's Jurisprudence over Some Situations

Sudan/Darfur

on 18 September 2004, the Security Council established a Commission of Inquiry to investigate violations of international humanitarian and human rights laws to determine whether or not acts of genocide had occurred in Sudan/Darfur and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.'[95] The Commission's report concluded that the Government of Sudan and the *Janjaweed* militias operating in Darfur[96] were responsible for serious violations of international humanitarian and human rights law such as 'indiscriminate attacks, killing of civilians, torture, enforced disappearances, destruction of villages, rape; other forms of sexual violence, pillaging and forced displacement.'[97] The Commission found these acts conducted on a widespread and systematic basis, and could therefore constitute CAH, but concluded that the Government of Sudan had not 'pursued a policy of genocide,'[98] and recommended that the Security Council refer the Darfur situation to the ICC,[99] given that Sudan is not a party to the Rome Statute

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degradation and public humiliation accompanying them, which affected not only those raped, but those required to watch or participate in the rapes.

[91] ibid, of interest is the Chamber's searching review of the prosecution's evidence in terms of the individual criminal responsibility of Bemba for the crimes alleged to have been committed by MLC troops. The Chamber found that Bemba could not be charged as a co-perpetrator under article 25(3)(a), but instead could only be charged under article 28(a) with command responsibility as a military commander who had effective authority and control or the MLC troops alleged to have committed the crimes in question para 446.

[92] ibid para 78.

[93] *Prosecutor v Milan Martić,* Case No ICTY-IT-95-11-A *Judgment* (8 October 2008) para 297*; Prosecutor v Tadić,* Case No IT-94-1-T, Opinion and Judgment (7 May 1997).

[94] ibid para 297, 306.

[95] Report of the International Commission of Inquiry on Darfur to the Secretary-General, p 2 S/2005/60 (1/02/ 2005).

[96] The Janjaweed are described in the Report at para 98-39.

[97] Report of the International Commission of Inquiry on Darfur para 3.

[98] ibid para 4; the issue of genocide is addressed in para 489-522 of the Darfur Commission's Report.

[99] Report of the International Commission of Inquiry on Darfur para 5.

otherwise, the Sudanese defendants could not be brought before the Court.[100] The UNSCR 1593 in 2005 referred the situation in Darfur, dating back to 1 July 2002, to the ICC Prosecutor.[101] The Resolution was adopted by a vote of 11 in favour,[102] none against, and four abstentions, the United States, China, Algeria, and Brazil.[103]

Whereas Sudan is not a State Party to the ICC, the Court argues that the resolution is binding on all UN member States including Sudan.[104] At this juncture the researcher notes Dire Tladi, Paula Gaeta, Dapo Akande, William Schabas *et al* for a contrary opinion on this issue.[105] Under the ICC Statute, the ICC was authorised, but not required, to accept the case.[106] The OTP opened an investigation and issued arrest warrants for six individuals. The first to be charged is the State Minister for Humanitarian Affairs *Ahmad Muhammad Harun* and an alleged Janjaweed leader *Ali Muhammad Ali Abd-Al-Rahman* (Ali Kushayb), with war crimes and CAH.[107] The charging pattern is similar to that exhibited in the earlier three 'self-referral' cases, with CAH used independently of war crimes for elements of social harm such as Persecution, and to provide an alternative theory of liability for many crimes such as murder, rape and inhumane treatment. The war crime counts, as in the earlier cases attempt to capture

[100] SC Res 1593, para 1 (31 March 2005).

[101] 'Security Council Refers Situation in Darfur, Sudan, to the Prosecutor of ICC,' SC/8351; 'Secretary-General welcomes adoption of Security Council Resolution referring situation in Darfur, Sudan to ICC Prosecutor,' 31 March 2005, SG/SM/9797- AFR/1132.

[102] Under the United Nations Charter, the Security Council is primarily responsibility for the maintenance of international peace and security. It has 15 Members of which 5 are permanent with 'veto power' each Member has one vote. Under the Charter, all Member States are obligated to comply with Council decisions; that the charter shall prevail in conflict of obligations by members.

[103] UN Security Council Resolution 1593 (2005) 31 March 2005; The SC had previously in September 2004, established an International Commission of Inquiry on Darfur by Resolution 1564, maintaining that the Sudanese government had not met its obligations under previous Resolutions. S/RES/1564 (2004) 18 September 2004.

[104] ibid.

[105] Dire Tladi, 'Cases Before International Courts and Tribunals the ICC Decisions on Chad and Malawi On Cooperation, Immunities, and Article 98' *Journal of International Criminal Justice* (2013) 199-221. Paula Gaeta, 'Does President Al-Bashir Enjoy Immunity from Arrest?' 7 *Journal of International Criminal Justice* (2009)315-332; T M Dralle, 'The Legal Nature of Security Council Referrals to the ICC and Muammar Gaddafi's Immunity from Arrest' <http://tilman-dralle.de/pdf/Gaddafi_ 2011pdf> accessed 14 May 2014; C. Kreb, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in Bergsmo and Ling (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher, 2012) 223-265; D Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?' in Bergsmo and Ling (eds) State Sovereignty and International Criminal Law (Torkel Opsahl Academic EPublisher, 2012) 54,74.

[106] Frederic L Kirgis, 'UN Commission's Report on Violations of International Humanitarian Law in Darfur: Security Council Referral to the International Criminal Court' [2005] *American Society of International Law* Insight Addendum.

[107] Some of the count charges of 'murder of civilians' such as counts 2, 3, 4, 5, 11, 12, 40 and 41 and others allege 'murder of men' (counts 22-30); *Prosecutor v Harun and Kushayb*, Case No ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (27 April 2007); Prosecutor v Harun and Kushayb, Case No. ICC 02/05/01/07, Warrant of Arrest for Ali Kushayb (27 April 2007).

other elements of the attack such as property destruction (including food stores, mosques) and pillaging, as well as attacks on the civilian population.[108]The third and perhaps most controversial warrant targeted Sudanese President *Omar Hassan Ahmad Al-Bashir* and included counts of war crimes, CAH and genocide. The OTP initiated investigation in June 2005. The Sudanese government also created its own special courts for Darfur in an effort to stave off the ICC's jurisdiction, however, the Court's efforts were widely criticised as unacceptable.[109]

The Pre-Trial Chamber I issued a first warrant on 4 March 2009 for seven counts of war crimes and CAH.[110] After a successful prosecutorial appeal, the Pre-Trial Chamber subsequently found that there were reasonable grounds to believe that '*Omar Al-Bashir* is criminally responsible . . . for charges of genocide.'[111] Although, the Genocide charges largely track the CAH counts, a finding of genocide by the Court could be important in terms of public opinion and even State responsibility under the genocide convention. President *Al-Bashir* challenged the legality of the warrant against him. The African Union reiterated its opposition to the ICC's practice of issuing arrest warrants against AU members states Heads of State,[112] raising the spectre of continued heated debates about the appropriateness and

[108] In January 2005, the Commission reported that it had compiled a confidential list of potential war crimes suspects and 'strongly recommend' that the SC refer the situation to the ICC[108], following the Council's referral, the ICC Prosecutor received the document archive of the Commission of Inquiry and the Commission's sealed list of individuals suspected of committing serious abuses in Darfur, though this list is not binding on the selection of suspects; Similarly on 17 February 2014 – A grim array of human rights abuses, driven by policies established at the highest level of State, have been and continue to be committed in the Democratic People's Republic of Korea (DPRK), according to a United Nations-mandated report released, which also calls for urgent action to address the rights situation in the country, including referral to the International Criminal Court (ICC) but still awaiting a decision; similarly, report of the Independent International Commission of Inquiry on the Syrian Arab Republic, This report covers the period 15 January to 15 May 2013; A/HRC/23/58. The Office of the Prosecutor initiated its own investigation in June 2005. The Sudanese government also created its own special courts for Darfur in an apparent effort to stave off the ICC's jurisdiction however the court's efforts were widely criticized as unacceptable. Human Rights Watch, 'Lack of Conviction: The Special Criminal Court on the Events in Darfur' (June 2006); UN News, 'Sudan's Special Court On Darfur Crimes Not Satisfactory, UN Genocide Expert Says,' (16 December 2005); *Sudan Tribune*, 'Govt Fires Darfur War Crimes Prosecutor Amid Talk of 'Transitional Justice, 18 October 2010.

[109] Human Rights Watch, 'Lack of Conviction: The Special Criminal Court on the Events in Darfur,' June 2006; UN News, 'Sudan's Special Court on Darfur Crimes Not Satisfactory, UN Genocide Expert Says,' 16 December 2005; *Sudan Tribune*, 'Govt Fires Darfur War Crimes Prosecutor Amid Talk of 'Transitional Justice,' 18 October 2010.

[110] *Prosecutor v Omar Hassan Ahmad al Bashir,* Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009) para 249.

[111] *Prosecutor v Omar Hassan Ahmad Al Bashir,* Case No ICC-02/05-01/09, Second Decision on the Prosecution's application for a Warrant of Arrest (12 July 2010) para 43.

[112] The various African Union (AU) decisions on non-cooperation are contained in AU Assembly Decision on the Meeting of States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec 245(XIII), 3 July 2009, x 10, AU Decision on the Progress Report of the Commission on the Implementation of AU Decision on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, Assembly/AU/Dec 296(XV), 27 July 2010, x 5 and AU Assembly Decision on the Progress Report of the

effectiveness of the ICC's intervention in Africa.[113] Nonetheless, the ICC prosecutor Fatou Bensouda in December 2014 said the Court was halting investigations in order to shift resources to other urgent cases, and lambasted the UNSC for failing to push for Al-Bashir's arrest.

The Post-Election Violence in Kenya

In March 2010, the Court initiated an investigation into the 2007, early 2008 post-election violence in Kenya[114] via the Prosecutor's *proprio motu powers.*[115] Conflict ensued following an election in which Kenyans accused *Mwai Kibaki* of stealing the election mandate from the then 'ruling president *Raila Odinga*. Hence, tensions between the ethnic *Kikuyu* supporters of *Kibaki* and the ethnic *Luo* and *Kalenjin* supporters of *Odinga* resulted in an estimated 1,000 deaths and displacement of over 400,000 people.[116] Kenyan authorities arguably failed to thoroughly investigate the conflict or try the offenders prompting the Court to intervene. The Kenyan government claims that Kenyan courts are willing and able to prosecute offenders, in attempts to invoke its rights to complementarity or for a *hybrid* African Court intervention instead of the ICC on the matter; made multiple requests for the UNSC to defer the investigation based on Article 16 ICCSt,[117] fearing the disruption of the upcoming March 2013 elections and could weaken recently forged ethnic bridges.[118] The request to try cases

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Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/ Dec 397(XVIII), 30 January 2012, xx 6 and 8. For ICC ASP decisions on cooperation see e.g. ICC Resolution on Cooperation, ICC-ASP/10/Res 2, 20 December 2011 and ICC Resolution on the Strengthening of the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res 5, 21 December 2011, x 6; See also, ICC Kampala Declaration, Declaration RC/ Decl1, 1 June 2010, x 7 and generally the Kampala Declaration on Cooperation, Declaration RC/Decl 2, 8 June 2010.

[113] African Union, On the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the alleged failure by the republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of Sudan (9 January 2012) the fourth case in the Sudan situation involved three individuals accused of attacks on African Union Peacekeepers. They received summonses to appear and did so; because all three cases involve only war crimes, they add little to this Article, although it is interesting to note that one of the cases was dismissed by Pre-Trial Chamber I. *Prosecutor v Bahar* Idriss Abu Garda, Decision on the Confirmation of the Charges (8 February 2010). On 23 April 2010, Pre-Trial Chamber I issued a decision rejecting the Prosecutor's application to appeal the decision. The other two are currently awaiting trial.

[114] Situation in the Republic of Kenya, Case No ICC-01/09, Request for authorisation of an investigation pursuant to Article 15 (26 November 2009).

[115] ICCST (n 2) Articles 13 (c) & 15 (1); ICC: Judges Approve Kenyan Investigation.

[116] Human Rights Watch, World Report 2013: Kenya,' 25 Feb, 2013; Henry M Jackson and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] Jackson School of International Studies Task Force Report University of Washington.

[117] ICCSt (n 2) Article 16 Deferral of investigation or prosecution.

[118] Kenya's government asks the UN Security Council to halt the trials of President Uhuru Kenyatta and his deputy at the ICC; also a draft resolution seeking the deferral of investigations in Kenya was submitted by Rwanda, a Security Council member to the United Nations Security Council for considerations. However, the

nationally was denied and Kenya unable to prove effective prosecution of those accused.[119] The UNSC refuses to defer the investigation.[120] Kenyan officials and the AU have increasingly been uncooperative with ICC enterprise leading discontents amongst AU Member States wary of the Court's presence in Africa.[121]

The Waki Commission, an international commission of enquiry had initially investigated the violence, [122] and handed in its report to the Court.[123] The decision of 31 March 2010 where the Pre-Trial Chamber II articulated its view as to the legal requirements for the 'contextual elements' of CAH, including the 'civilian population' requirement, the 'state or organisational policy' requirement, and the 'widespread or systematic' nature of the attack required and concluded that the relevant evidentiary and legal standard was whether there was a 'reasonable basis to proceed' under Articles 15(3) & 53 ICCSt (initiation of an investigation)[124] the majority concluded that in evaluating the available information provided by the Prosecutor, the Chamber is satisfied that there exists a reasonable justification to belief that a crime falling within the jurisdiction of the Court has, is being committed in Kenya.[125] However, Judge Hans-Peter Kaul suggests that all requirements and contextual elements must meet the standards fully.[126] In his opinion, the contextual elements of CAH stated in the Statute had not been satisfied, on the notion of 'State or organisational policy,' so did not authorise the Prosecutor to proceed. The Pre-Trial Chamber II followed prior ICC decisions on the contextual elements of CAH, reiterating that the 'attack on the civilian population

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names of key suspects involved in violence after the 2007 election were handed over to the ICC by Kofi Annan, who brokered a power-sharing deal. He did so after Kenyan politicians presumably failed to set up a tribunal promised to try those accused of instigating the violence. Available at <www.bbc.co.uk/news/world-africa> accessed 16/05/2014.

[119] ibid, Professor Manisuli Ssenyonjo, 'Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya's Serving Senior State Officials' (2014)1 State Practice and International Law Journal 17; 'Kenya: Local Judicial Mechanism Should Complement ICC Cases.' Human Rights Watch, <www.hrw.org> accessed 4 July 2014.

[120] ibid; Mwangi Kimenyi, 'ICC process and its likely aftermath: Kenya is in a pathetic state of denial <www.hrw.org> accessed 4 July 2014.

[121] Julie Butters, 'External Factors Affecting Situation Selection: Political Influence' in Henry M Jackson and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] Jackson *School of International Studies Task Force Report* University of Washington.

[122]The Waki Commission list of names in the hands of ICC Prosecutor; Situation in the Republic of Kenya, Case No ICC-01/09, Request for authorisation of an investigation pursuant to Article 15 (26 November 2009). <http://ww.icccpi.Int/menus/icc/situations> accessed 4 July 2014.

[123] ibid; The Prosecutor received the information on 16 July 2009, following meetings with the Kenyan government and failed efforts to establish a specially constituted tribunal to conduct proceedings in Kenya.

[124] ICCSt (n 2); Rule 48 of the Rules of Procedure and Evidence provides that in determining whether there is a reasonable basis to proceed with an investigation under article 15(3), the Prosecutor shall consider the factors set out in Article 53, paragraph 1 (a) to (c).

[125] Situation in the Republic of Kenya, Case No ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya (31 March 2010) para 35.

[126] ibid.

requirement, is not restricted to a 'military' attack, but could be a 'campaign or operation carried out against the civilian population.'[127] It also followed the *Bemba case*[128] by suggesting that the potential civilian victims of a crime under Article 7 of the Statute are groups distinguished by nationality, ethnicity, or other distinguishing features. This formulation is objectionable because it potentially imports a discriminating intent and therefore should be treated as persecution within the limits of the Rome Statute. However, on 5 December 2014, the Prosecutor withdrew charges against Mr. Kenyatta, but the case against William Samoei Ruto and others still continues.

Jurisprudence over the Situation in Côte d'Ivoire

On 18 April 2003, Côte d'Ivoire a non-State Party to the ICC, lodged a declaration with the Court's registrar under Article 12(3) of the Statute accepting the jurisdiction of the Court for crimes committed in its territory since 19 September 2002. This declaration was signed by the Foreign Minister under the former Côte d'Ivoire's President, Laurent Gbagbo, and confirmed by its current President, *Alassane Ouattara* on 14 December 2010.[129] The Prosecutor subsequently applied to Pre-Trial Chamber III for permission to open an investigation pursuant to Article 15 of the Statute. In describing the situation in Côte d'Ivoire, the Pre-Trial Chamber noted that, since a coup attempt in 2002, which resulted in the *de facto* partition of the country into a northern zone controlled by the armed opposition (the Forces *Nouvelles*) and a southern zone controlled by President Gbagbo, the country existed in a situation of 'no peace, no war,' or 'intermittent civil war.'[130] This situation persisted with loss of life and the commission of 'atrocities attributable to the two sides, including extra-judicial killings, massacres, enforced disappearances, and numerous incidents of torture.'[131] The situation worsened with the presidential elections held first on 31 October 2010, and subsequently on 28 November 2010. On 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorisation to open investigations proprio motu into the situation in Côte d'Ivoire.

[127] ibid.
[128] *The Prosecutor v Jean-Pierre Bemba Gombo;* ICC-01/05 -01/08.
[129] Situation in the Republic of Kenya, Case No ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya (31 March 2010) para 35.
[130] Situation in Côte d'Ivoire, Case No. ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute of the Authorization of an Investigation into the Situation in Cote d'Ivoire, (Oct. 3, 2011) para181.
[131] ibid para 182, citing Human Rights Watch, 'My Heart is Cut,' Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire, Vol 19 No 11A (August 2007) ICC-02/11-3-Anx4, 26.

In deciding whether to authorise the investigation,[132] the Pre-Trial Chamber relied on prior case laws, relating to CAH, the prosecution submitted that a reasonable basis exits to believe that not only pro-Gbagbo, but also pro-Ouattara forces may have committed CAH. The Pre-Trial Chamber accepted the Prosecutor's assertions as to the attack by *pro-Gbagbo* forces, finding that it was committed pursuant to a state policy,[133] widespread and systematic.[134] Having addressed the contextual elements with respect to the pro-Gbagbo forces, it found a reasonable basis to believe that murder,[135] acts of rape,[136] arbitrary arrest and detention,[137] enforced disappearances, torture and other inhumane acts had been committed during the period of post-election violence from 28 November 2010 onwards.[138]

The Pre-Trial Chamber then turned to the acts of violence alleged to have been committed by *pro-Ouattara* forces. Referencing Judge Kaul's dissent in the Kenya situation, it noted that 'there is disagreement within the jurisprudence of the Court on the criteria required for a group to constitute an organisation for purposes of Article 7.' It finessed the difficulty by concluding that the *pro-Ouattara* forces in this case would qualify in the eyes of both the majority and the dissent as an organised armed group in a party to a non-international armed conflict.[139] It also agreed that the attack was widespread or systematic and involved murder, rape, imprisonment and other severe deprivations of physical liberty.[140] War crimes allegedly committed by both sides, the Pre-Trial Chamber concluded that armed conflict not of international character existed in Côte d'Ivoire from 25 February 2011 to 6 May 2011,[141] a shorter period than that of CAH offenses. Though, the declaration of Cote d'Ivoire took effect from 19 September 2003, the Chamber limited the temporal scope of the inquiry considerably.[142] On 23 November 2011, a warrant of arrest was issued for *Laurent Koudou*

[132] ICCSt (n 2) Article 15(3)-(4).
[133] Situation in Cote d'Ivoire, Case No. ICC-02/11 para 51; ICCSt (n 2)Article 7(1)
[134] ibid para 62.
[135] ibid para 67.
[136] ibid para 72.
[137] ibid para 76.
[138] ibid para 82, 86.
[139] ibid para 99.
[140] ibid para 103-14.
[141] ibid para 127.
[142] The Chamber relied upon earlier cases to find first, that generally speaking, only crimes committed prior to the date the Prosecutor files the request for authorisation may be considered, but second, nonetheless crimes committed after that time may be investigated if they, 'at least in a same attacks (crimes against humanity) or the same conflict (war crimes) ibid para 177-79. *Judge Silvia Fernandez de Gurmendi* took issue both with the 'overall approach' to the Article 15 analysis of the majority as well as with the temporal scope of the authorised investigation. Situation in the Republic of Côte d'Ivoire, Case No ICC-02/11, Dissent of Judge Silvia *Fernandez de Gurmendi*, (3 October 2011) para 9.

Gbagbo;[143] turned over to the ICC on 30th November 2011, and became the first Head of State to be taken into custody by the Court.

The Prosecutor had *proprio motu*[144] opened investigation into the violence.[145] The Presidential election was intended to unify the country after having been divided by ethnic tension since the 2002 civil war. However, *Laurent Gbagbo*, the sitting president, did not accept the election result in favour of the President elect *Alassane Ouattara*. The conflict lasted until April 2011 upon intervention favourable to *Ouattara*. It claimed an estimated 3,000 lives and left 500,000 people displaced[146] The Ivorian government accepted and allowed the Court's *ad hoc* jurisdiction.[147] The investigation[148] again drew criticisms from the AU, within the Ivorian government, and Ivorian citizens for failure to equally indict members of the two sides in the conflict.[149] The Court issued arrest warrants for only *Laurent Gbagbo* and his wife *Simone Gbagbo*. Thus, Ivoirians feel the Court is naming followers of *Gbagbo* 'enemies' of the state and followers of *Ouattara* 'friends,' despite a feeling amongst many that neither party was entirely guilty or innocent during the conflict.

In response, the OTP maintains it is utilising a 'sequencing' policy in the investigation,[150] indicting suspects of one group before moving on to investigate members of the other group, the course is disrupting, rather than maintaining, peace. Indeed, *Guillaume Soro, Gbagbo's* former Prime Minister and a member of Ivory Coast National Assembly, stated: 'it was precisely, not to be accused of victor's justice that the Ivorian government brought in the ICC…Yet, the ICC, issued only a few arrest warrants, all against the Gbagbo allies[151] such a tactic, *Soro* stipulated, could further fuel political tension and lessen the Court's ability to effectively investigate the situation or obtain cooperation from Ivorian citizens.' The Court,

[143] Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11; Warrant Of Arrest For Laurent Koudou Gbagbo No ICC-02/11. 1/9. 23 November 2011. ICC-02/11-26-US-Exp 23-11-2011 1/9 FB PT.
[144] ICCSt (n 2) Article15 (1).
[145] Gregory Stanton, 'Ivory Coast' Genocide Watch; Julie Butters, 'External Factors Affecting Situation Selection: Political Influence' in Henry M Jackson and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[146] ibid.
[147] Ivory Coast did not ratify the Rome Statute until 15 February 2013, however it filed a declaration pursuant to Article 12 of the Statute to recognise the jurisdiction of the Court on 14 December 2010 in order to allow the Court to investigate acts committed since 2004, "Côte d'Ivoire ratifies the Rome Statute," ICC – CPI, 18 February 2013.
[148] *The Prosecutor v Laurent Gbagbo* ICC-02/11-01/11(2013).
[149] Matt Wells, 'What Will the ICC's Legacy Be in Côte d'Ivoire?,' Human Rights Watch < www.hrw.org> accessed 4 July 2014.
[150] *The Prosecutor v Laurent Gbagbo* ICC-02/11-01/11(2013).
[151] Matt Wells, 'What Will the ICC's Legacy Be in Côte d'Ivoire?,' Human Rights Watch < www.hrw.org> accessed 4 July 2014.

despite such criticism, is yet to alter its investigative strategy, which has allowed Ivorian frustration towards the Court fester and grow.

Jurisprudence over the Libyan Situation

On 26 February 2011, the SC adopted Resolution 1970, referring the Situation in Libya to the Court based on the provisions in the Statute,[152] necessitated by Libya not being a State Party to the ICC.[153] The Prosecutor submitted a request to Pre-Trial Chamber I for warrants of arrest against *Muammar Gaddafi*, *Saif Al Islam Gaddafi* and *Abdullah Al Sanousi* for (murder and persecution) CAH.[154] No armed conflict had existed, and no allegations of genocide had been made, CAH became the only charges that could be levied against the accused. An investigation was opened by the OTP into the situation in Libya,[155] following the Libyan uprising[156] that resulted in an estimated 11,500 casualties. Initially, the regime, led by Colonel Muammar Gaddafi, attempted to quell the rebellion through the use of unlawful arrests, indiscriminate attacks on civilians, gang rape, and summary executions; the rebels attempted to overthrow the government through similar tactics.[157] Consequently, the UNSC approved Resolution 1973 to establish a no-fly zone over Libya and authorised all necessary measures, short of foreign occupation, to end the conflict.[158] UN Member States began to assist the rebels through aerial assaults; the North Atlantic Treaty Organization (NATO) took over military operations and carried out thousands of air strikes on the Government stronghold of Benghazi until October 2011. In August, opposition forces, the National Transitional Council (NTC), gained control of most of the country and announced the liberation of Libya. Issued arrest warrants to date[159] remain unexecuted.[160] It did not initially

[152] ICCSt (n 2) Article 13 (b).
[153] SC Res 1970 (26 February 2011); Unlike Resolution 1593 referring the Darfur situation, which was adopted by a vote of eleven to zero with four abstentions (Algeria, Brazil, China, and the United States) SC/8351 (31 March 2005) the vote on Resolution 1970 was unanimous; SC Res 1970 (26 February 2011); The Resolution itself provided that 'widespread and systematic attacks taking place in the Libyan Arab Jamahiriya against the civilian population amounts to crimes against humanity,' and referred the situation in Libya since 15 February 2011 to the Court para 4.
[154] ICC-01/11, 16 May 2011, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senusi.
[155] ibid.
[156] UNSC Resolution 1970, New York: 26 February 2011.
[157] World Report 2012: Libya *Human Rights Watch* 18 Feb 2013 < www.hrw.org> accessed 4th July 2014.
[158] United Nations Security Council, Resolution 1970, New York: 26 February 2011.
[159] The Libyan Arab Jamahiriya, Case No. ICC-01/11, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (27 June 2011).
[160] Libya challenges the admissibility of the case against Saif Al Islam Gaddafi, claiming national investigation and prosecution; ICC Prosecutor Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011)

raise same questions of 'policy' as did the Article 15 decision in the Kenya case – however some criticism of the Prosecutor's action based on an alleged lack of 'gravity' of the harm echo the concern of Judge Kaul in the Kenyan situation about trivialising the notion of CAH through its overuse.[161] Currently, only two of the three accused are in the custody of the Libyan authorities, while *Muammar Gaddafi* is confirmed deceased and the case against him closed.[162]

The Court's investigation into the Libyan conflict has drawn criticism from the international community, consequently, the AU and the NTC, has been uncooperative with the Court. The NTC claims that the investigation violates Libyan State sovereignty and refuses to transfer Abdullah Al-Senussi and Saif Al-Islam Gaddafi, indicted suspects, to The Hague for trials, insisting on trying the Gaddafi(s) in Libya.[163] Additionally, some sections of the International Community claim that the NATO airstrikes violates international law and resulted in the death of innocent civilians; the Court is yet to thoroughly investigate this allegation.[164] Investigations have been hindered by criticisms.[165] There is proof that during the capture of Muammar and Saif Gaddafi, the NTC tortured them,[166] a violation of international law, and the speculation that the NTC is responsible for Muammar's death.[167] Additionally, In January 2013, Gaddafi appeared in court faced with security charges claiming he was unlawfully communicating with the ICC.[168] The Court's failure to stop the trial or apprehend Gaddafi also highlighted its inability to compel compliance from members.[169] In order to gain greater legitimacy and authority, the Court must increase its capacity to compel cooperation with investigations and compliance with Court orders from member states.

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[161] Kenyan's Authorisation Decisions; Dissent of Judge Hans-Peter Kaul para 55 (Situation in the Republic of Kenya No ICC-01/09-19: Decision on the Authorisation of an Investigation; 31March 2010, the first ever decision authorising a prosecutorial proprio motu investigation, the Pre-Trial Chamber of the International Criminal Court (ICC) granted the ICC Prosecutor permission to investigate the violence after Kenya's December 2007 Presidential elections under Article 15 of the Rome Statute of the International Criminal Court.

[162] Saif Al-Islam Gaddafi is held in Libya and Abdullah Al-Sanousi is being held in detention; whilst Muammar Gaddafi's death is confirmed by the ICC; *The Prosecutor v Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No ICC-01/11, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, ICC-01/11-01/11-28 (22 November 2011).

[163] Richard Greene, 'Libya granted more time on Gaddafi question' *CNN*, 10 January 2012. <www.cnn.com/world/africa/libya-gadhafi-icc> accessed 17/05/2014.

[164] UNSC Resolution 1970 New York: 26 February 2011.

[165] UN Security Council: Press Libya on ICC Cooperation Impunity, Human Rights Watch 6 November 2012. < www.hrw.org> accessed 4th July 2014.

[166] Video of Gaddafi's Last Moments Emerges: Tortured Colonel Begged For Mercy, All Voices, 22 October 2012, < www.allvoices.com/ > accessed 4th July 2014.

[167] Saif al-Islam Gaddafi appears in Libya court; < www.bbc.co.uk/news/uk> accessed 4th July 2014.

[168] ICC lawyers slam Libya over Gaddafi son; < www.bbc.co.uk/news/uk> accessed 4th July 2014.

[169] Thomas Franck, 'The Power of Legitimacy Among Nations' (OUP Oxford 1990).

The Court's Jurisprudence over Mali

The Court opened an investigation into the situation in Mali in 2013,[170] after a self-referral in 2012.[171] Conflicts began in January 2012 following Muslim extremists' seizure of Northern Mali and subsequent implementation of a harsh interpretation of Sharia law resulting in thousands of deaths and human rights violations by both Malian government forces and the extremists as the two groups struggle for dominance. The entrance of French and Nigerian forces in December 2012 stopped rebel forces from gaining greater territorial control of the country, however they are yet to be completely defeated and foreign militaries are reluctant to relinquish control to the weak Malian government, fearing another militant surge by the rebels,[172] due to the Malian government's inability to subdue or investigate the conflict, the Court formally launched an investigation. Compared to such earlier investigations, the Court faces little criticism in Mali, given the self-referral nature, however the Court's decision to open another investigation into an African situation reinforces the AU claims that the Court is targeting Africa. (As at the time of writing, the conflict in Mali is still ongoing).[173]

The issuance of arrest warrant for President *Al-Bashir*, created tensions between the AU and the ICC and has continuously grown.[174] The AU's major criticisms of the ICC has been reinforced by the Court's actions not opening investigation into other situation outside of Africa but opened investigations into States that did not desire intervention (Kenya and Libya) and indicted another sitting (Muammar Gaddafi) Head of State perceived by the AU and the International community to hold diplomatic immunity.[175] As a result, the AU

[170] The OTP on 18 July 2012 confirmed receipt of a referral of the situation in Mali by the country's interim Minister of Justice, following the 13 July 2012 self referral letter, the government of Mali alleges that gross human rights violations and war crimes have been committed in the country, especially in the northern region. The alleged crimes include the summary executions of soldiers, rape of women and young girls, killing of civilians, the recruitment of child soldiers, torture, pillaging, enforced disappearances, and the destruction of property (including government buildings, humanitarian installations, religious establishments and gravesites). The prosecutor indicated that her office would conduct preliminary investigations into the alleged international crimes in accordance with the Rome Statute of the ICC; Mali: ICC investigation of conflict crimes a key step towards justice. Mali has referred 'the situation in Mali since January 2012' to the International Criminal Court, in accordance with article 14 of the Rome Statute. The fourth such 'self-referral' by a State Like other 'self-referrals', the States in question asks the Court to prosecute rebel groups rather than themselves. <http://humanrightsdoctorate> accessed 4 July 2014.

[171] ibid.

[172] Mali News, *The New York Times* < www.nytimes.com> accessed 4th July 2014.

[173] January 2014 saw Malian president step down from power. The crisis surrounding this is still ongoing (as at April 2014).

[174] Manisule Ssenyojo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders' (2013) 13 *International Criminal Law Review* 385.

[175] 'Libya, ICC-CPI, 27 June 2011.

increasingly opposes the ICC intervention and has attempted to impede investigations through actions that have delegitimised the authority of the Court.[176]

Available information at the time of the OTP's initial report on Mali indicated 'a reasonable basis to believe that war crimes have been committed in Mali since January 2012' The crimes include murder, mutilation, torture, rape, pillaging, passing of sentences and carrying out executions without due process.[177] Cruel treatment and intentionally directing attacks on protected objects. Places of the alleged commission of crimes include the regions of *Gao*, *Timbuktu* and *Kidal* (North of Mali). The OTP attributes alleged crimes to various militias; commits to a fair investigation of the groups involved in the situation in Mali. The Prosecutor Bensouda stated in a press release on 28 January 2013 that her Office 'is aware of reports that Malian forces may have committed abuses' and reminded all parties to the conflict, of the ICC's 'jurisdiction over serious crimes committed within the territory of Mali, from January 2012 onwards.' The OTP reaffirms commitment to justice on all sides of the conflict stating that 'All those alleged to be responsible for serious crimes in Mali must be held accountable.' That investigation adheres to this apparent commitment and brings charges against those most responsible, irrespective of their political inclination. To maintain political neutrality during investigations and charge those most responsible for the crimes in Mali, the OTP must charge crimes that represent the range and gravity of criminality and not tempted to bring narrow charges,[178] for example for the destruction of cultural property. Although, attaining a conviction this way appears to be a success for the Court, the implications for the victims of crimes that go unaddressed means incomplete justice.[179]

Given the scale and volume of situations under the ICC investigation, it is appropriate for the OTP to be selective and focused on investigations and charges. However, to fully serve justice in a fair and inclusive manner, the OTP must ensure that the charges are reflective of the range of criminality in every situation, and that individuals most responsible for these crimes are indicted. Following this policy and ignoring external pressures to secure quick

[176] Manisule Ssenyojo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders' (2013) 13 International Criminal Law Review 385.
[177] GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967) International Covenant on Civil and Political Rights (ICCPR); Adopted 16 December 1966 (New York, USA); Entry into force 23 March 1976.
[178] *The Prosecutor v Thomas Lubanga Dyilo.* ICC-01/04-01/06 (judgment Sentence) 14 March 2012.
[179] Laila N Sadat, 'Crimes against Humanity in the Modern Age' (2013) 107 American Journal of International Law 334.

convictions or cooperate with state governments will enhance perceptions of the Court's impartiality, credibility and relevance to the pursuit of international criminal justice.

The Court's Jurisprudence over Palestine

In April 2012, the OTP officially refused to investigate atrocities committed in Palestine as a result of the Israel/Palestine conflict.[180] The OTP based the decision on the indeterminate nature of Palestinian statehood at the time. The United Nations General Assembly (UNGA) did not recognise Palestine as a State and, therefore, (not minding its original jurisprudence on the all-encompassing 'State like theory') it was ineligible for investigation.[181] Many international organisations and others questioned this reasoning, as the situation in Palestine seems to meet the requirements for an ICC investigation despite issues of statehood.[182] Over 130 governments recognise Palestine as a State,[183] it holds 'non-member observer entity' status at the UN (upgraded to 'non-member observer state' status following the November 2012 vote),[184] 'non-member observer' status at the ICC, and considers itself to be a state

[180] Office of the Prosecutor, 'Situation in Palestine'; On 22 January 2009, pursuant to Article 12(3) of the Rome Statute, Ali Khashan acting as Minister of Justice of the Government of Palestine lodged a declaration accepting the exercise of jurisdiction by the International Criminal Court for "acts committed on the territory of Palestine since 1 July 2002.In accordance with Article 15 of the Rome Statute, the Office of the Prosecutor initiated a preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation. The Office ensured a process giving all concerned opportunity to present their arguments. The Arab League's Independent Fact Finding Committee on Gaza presented its report during the opportunity to present its views extensively, in oral and written form.

[181] ibid, The OTP obligation is to examine issues related to its jurisdiction: first whether the declaration accepting the exercise of jurisdiction by the Court meets statutory requirements; and second whether crimes within the Court's jurisdiction have been committed. Given that the ICC is a court of last resort, the Office also has to consider whether there are national proceedings in relation to alleged crimes, relating to the admissibility of the cases potentially arising from the situation. The Office received over 400 communications on crimes allegedly committed in Palestine. The Office has been informed that Palestine has been recognised as a State in bilateral relations however the current status granted to Palestine by the United Nations General Assembly is that of "observer", not as a "Non-member State". The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine, it informs the current legal status of Palestine for the interpretation and application of Article 12 <www.icc-cpi.int/NR/rdonlyres/pdf> accessed 4th July 2014.

[182] The issue of Palestinian statehood has often been debated amongst state leaders and scholars throughout the international community, as Palestine's ability to declare itself a state short of international recognition has been questioned. In November 2012, only seven months after the Court refused to investigate the situation in Palestine, however, the UN, effectively ending any debate in regard to Palestine's legal statehood, declared Palestine a state. As this development occurred after the ICC officially refused to investigate the situation in Palestine on the basis of statehood, it cannot be held in consideration when analysing the Court's decision not to investigate the situation in Palestine, however the development signals the majority of the international community's tendency to view Palestine as a legal state.

[183] Office of the Prosecutor, 'Situation in Palestine.' International Criminal Court (2012) 1-2.

[184] Following the Nov 2012 UN vote that upgraded Palestine from 'non-member observer entity' to 'non-member observer state,' Palestine may ask the Court to reopen its preliminary investigation of the conflict. The likelihood of this request is contested amongst scholars who question whether Palestinian leaders will be willing

since the 1980s.[185] Additionally, it accepted *ad hoc* jurisdiction of the Court and admits itself to be incapable of prosecuting offenders, consequently the situation in Palestine, arguably, falls under the jurisdiction of the Court.[186] Furthermore, in regard to gravity, researchers estimate that there have been over 40,000 casualties of the conflict since 2002.[187] This figure greatly outnumbers that of several situations currently under investigation by the ICC,[188] thus the situation meets the gravity threshold.

An ICC investigation into the Israel/Palestine conflict would force both countries to take responsibility for the actions of their citizens, the investigation would promote justice. The Court's refusal to investigate the situation in Palestine despite its perceived ability to meet the requirements for investigation indicates that the Court's actions were motivated by factors other than admissibility. Academics, such as Professor John Dugard a former Special Rapporteur for the UN Commission on Human Rights and the International Law Commission, cite United States (US) opposition to the investigation as the Court's reason for refusing to investigate.[189] The US opposed numerous attempts to hold Israel accountable for its illegal actions said Professor Cherif Bassiouni[190] and voted against passing a UN resolution granting Palestine statehood in November 2012.[191] In this regard, the Court has been reluctant to investigate the situation in Palestine out of fear of US discontent rather than inadmissibility. Again on 30 December 2014, falling short of the required number of yes votes from the United Nations Security Council members which failed to adopt a draft resolution that would have affirmed the need to reach within 12 months a peaceful solution to the situation in the Middle East and would have paved the way to a Palestinian state with East Jerusalem as its capital if the majority on the UNSC grants Palestine full UN membership.

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to risk ICC prosecution of Palestinian citizens as the result of an official investigation; Bronner, Ethan, and Christine Hauser, 'General Assembly Grants Palestine Upgraded Status in UN,' *The New York Times* (New York 29 November 2012).

[185] ibid.

[186] OTP, 'Situation in Palestine,' International Criminal Court (2012):1-2.

[187] The Arab-Israeli Conflict: Total Casualties (1920-2012) < news.bbc.co.uk/2/shared/spl/hi/middle_east> accessed 4th July 2014.

[188] The Kenyan situation is estimated to have claimed 1,000 lives, and the situation in Libya is estimated to have claimed 11,000 lives < news.bbc.co.uk> accessed 4th July 2014.

[189] John Dugard, 'International Law: A South African Perspective,' (4th ed, Juta Academic SA 2013) 27.

[190] Cherif M Bassiouni, 'Perspectives on International Criminal Law' (2012) 24 International Criminal Law Network.

[191] Ethan Bronner, and Christine Hauser, 'General Assembly Grants Palestine Upgraded Status in U.N,' The *New York Times*, 29 November 2012.

As of writing, the Israel/Palestine conflict is still ragging with death toll well over 2000[192] and numerous properties destroyed.[193]

In 2014 alone, more than 1,400 Palestinians have been killed in the ongoing hostilities. According to the UN, the majority of those killed have been Palestinian civilians, including at least 252 children. Three civilians and 61 Israeli soldiers have also been killed by indiscriminate rockets or mortars fired from Gaza, There is mounting evidence that war crimes have been committed by all parties. Over several decades, Amnesty International has collected compelling evidence of war crimes and other crimes under international law committed by Israel, Hamas and Palestinian armed groups, but perpetrators on both sides continue to enjoy impunity, leading ongoing injustice for victims of war crimes and crimes against humanity said Salil Shetty, Amnesty International's Secretary General and that 'an International Criminal Court investigation is crucial to end the pervasive culture of impunity. All sides must push for the Court to investigate such crimes in order to halt the vicious cycle of violations and injustice once and for all. An open letter to the UN Security Council recently published by Amnesty International, urges its members to take immediate steps to refer the situation in Israel and the Occupied Palestinian Territories to the Prosecutor of the ICC, among other actions, including imposing a comprehensive arms embargo, to address the crisis.[194]

The UN Security Council has repeatedly failed to take effective action to respond to violations in Israel and the Occupied Palestinian Territories or hold perpetrators accountable, in large part because of opposition from the USA, which has repeatedly vetoed resolutions critical of Israel. On some occasions the USA has been the sole voice against all other members of the Council. The UN Security Council must not stand by yet again and bear witness to mounting atrocities. It must seize this moment to act decisively for justice, said Salil Shetty. The Palestinian Authority has been consistently pressured by the USA, Israel, Canada, the UK and other EU Member States not to take steps to grant the ICC jurisdiction; such pressure has included threats to withdraw financial assistance on which the Palestinian authority depends on.[195]

[192] Israel/ Hamas Gaza bombing; <www.bbc.co.uk> accessed 9th August 2014.
[193] Israel and Occupied Palestinian Territories: The International Criminal Court must investigate war crimes < http://www.amnesty.org/> accessed 10th August 2014.
[194] ibid.
[195] ibid.

However, Palestinians have formally joined the International Criminal Court on 1 April 2015, and became the newest State Party to the International Criminal Court treaty a key step towards being able to pursue Israelis for alleged war crimes. The Palestinians accepted the ICC's jurisdiction from 13 June 2014, shortly before the 50-day Gaza Conflict. 16 January 2015, the Prosecutor of the International Criminal Court (ICC), Mrs. Fatou Bensouda, opened a preliminary examination into the situation in Palestine. The Prosecutor's decision follows the Government of Palestine's accession to the Rome Statute on 2 January 2015 and its declaration of 1 January 2015, lodged under article 12(3) of the Rome Statute – the Court's founding treaty – accepting the jurisdiction of the ICC over alleged crimes committed 'in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.' Upon receipt of a referral or a valid declaration made pursuant to article 12(3) of the Statute, the Prosecutor, in accordance with Regulation 25(1) (c) of the Regulations of the Office of the Prosecutor, and as a matter of policy and practice, opens a preliminary examination of the situation at hand. Accordingly, the Prosecutor has opened a preliminary examination into the situation in Palestine. The Office will conduct its analysis in full independence and impartiality. But the big question yet to be answered is: does the United Nations formally recognise it as a State?[196]

The Court's Jurisprudence over Colombia

The situation in Colombia has been under review by the ICC since 2005[197] armed conflict in the State claims lives and homes of citizens.[198] The conflict, according to the Colombian prosecutor's office, has resulted in deaths, displacements, disappearances and torture of over 75,000 people since 2005,[199] despite measures taken by Colombian authorities, the violent nature of the conflict is sombre. The ICC claims it has not opened investigation into the conflict because the Colombian court system is attempting to fulfil the requirements of complementarity through implementation of a new law, The Justice and Peace Law (JPL), to

[196] ICC-OTP-20150116-PR1083; The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine; <http://www.bbc.co.uk/news/world-middle-east-32144186> accessed 3 April 2015.
[197] Kai Ambos, and others, 'The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?' [2011] Institute for Criminal Law and Justice Department of Foreign and International Law 10.
[198] ibid.
[199] Engstrom P, Cantor, D; O'Brien, E, 'In the Shadow of the ICC: Colombia and International Criminal Justice,' [2011] Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London 40.

punish members of the warring groups. The JPL, however, is thought by many to be inadequate in its punishment of criminals.[200] A report issued by the Institute for Criminal Law and Justice in 2010 cited many shortcomings of the JPL and insinuated that it would be in the best interests of Colombia if the ICC intervenes.[201] The Court, nonetheless, has failed to open an investigation. African countries, including Kenya, Sudan, and Libya attempted to invoke their rights to complementarity through Article 17 of the Rome Statute in order to exclude ICC investigations in their Nations their requests were staved off by the ICC.[202]

In each case, the Court evaluates the national judicial system to be inadequate and insists on trying offenders at The Hague. In the case of Colombia, however, the OTP has given the national judicial system authority to prosecute offenders despite criticism by the international community that Colombia is incapable of adequately trying the accused and that its JPL is simply being used as a shielding mechanism for the most serious offenders.[203] The JPL offers 'pseudo amnesty' to the para-militaries high command by issuing minimal sentences rather than severe sentences, for crimes often committed by the high command, such as rape, murder, and kidnapping. It also allows for the US to extradite para-military commanders,[204] detrimental to Colombian courts to convict local perpetrators due to inadequately proving the guilt of Colombian nationals, and difficult for Colombian authorities to gain access to extradited detainees.[205] Moreover, as those extradited are often high-level offenders, it is difficult for Colombian prosecutors to try them for crimes committed in Colombia.[206] Additionally, the Colombian judiciary does not have the means to effectively prosecute those who have violated international law nonetheless the Court is yet to revoke Colombia's privilege to try cases internally.

[200] Kai Ambos, and others, 'The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?' [2011] Institute for Criminal Law and Justice Department of Foreign and International Law 10.
[201] ibid.
[202] 'Sudan's Omar al-Bashir not welcome for Malawi's Banda'; Malawi's new President Joyce Banda has said she does not want Sudan's President Omar al-Bashir, accused of war crimes, to attend a summit there, 4 May 2012, < http://www.bbc.co.uk/news/world-africa > accessed 4th July 2014.
[203] Kai Ambos, and others, 'The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?' [2011] Institute for Criminal Law and Justice Department of Foreign and International Law 10.
[204] ibid.
[205] ibid.
[206] ibid.

The ICC's failure to issue a formal investigation into the situation in Colombia has often been questioned by parties who feel that the Colombian judicial system has failed to satisfy the requirements of complementarity. Numerous groups, including an ICC roundtable discussion group, have outlined various challenges the Colombian judicial system has failed to overcome and its apparent unwillingness to prosecute crimes that would implicate the State as a guilty party.[207] Also, current extradition policies with the US are detrimental to achieving justice in Colombia. Thus, abundant information is available why the Court should open an investigation. Its failure to do so exemplifies other factors at play. The US involvement in the Colombian situation may play a role in the Court's decision as the US has a strong relationship with the Colombian government,[208] depends on Colombia as an important source of energy and an integral economic and geopolitical gateway to South America, and has nearly 1,400 civilian or military officials stationed in Colombia at any given time,[209] as such, the US is vested in maintaining the *status quo* in Colombia in order to sustain the current Colombia-US relation.

If the ICC investigates the Colombian situation, there could be a regime change, disruptive to current US-Colombia relations and the US's access to Colombian resources. Additionally, US civilian and military officials in Columbia would be vulnerable to ICC prosecution. Thus, the US ostensibly opposes an official investigation into the Colombian situation in favour of continuing the *status quo*. The ICC's failure to investigate the situation in Colombia despite evidence of its inability to fulfil the requirements of complementarity indicates that its decision is based on factors which appear heavily influenced by the US interests.

The Court's Jurisprudence over Syria

Attempts to overthrow the ruling Syrian regime began by opposition factions in 2011; still ongoing in 2014, an estimation of over 70,000 human lives have been lost, with human rights violations by the government and opposition forces in the country.[210] The Syrian conflict

[207] ibid.
[208] James Brittain, 'US Strategic Interests in Latin America: the Militarisation of Columbia,' [2009] Centre for Research on Globalization < http://www.globalresearch.ca/> accessed 5 July 2014.
[209] June Beittel, United States Congressional Research Service, Colombia: Background, U.S. Relations, and Congressional Interest, 28 November 2012, RL32250 <http://www.refworld.org> accessed 5 July 2014.
[210] The Syrian civil war in its third year, nearly one-third of the population of 22 million inside Syria needs humanitarian help, and 1.4 million have fled their homeland altogether. Of about 500,000 seeking shelter in Jordan, about 55 percent are under 18. Their troubles and challenges years out of school, trauma from having witnessed the killing of relatives, sexual abuse mirror those of their peers struggling to survive in tents and hideaways in Turkey, Iraq, Lebanon and Syria's own shattered communities.

meets the gravity threshold; has claimed more lives than some conflicts under official investigation by the Court. Moreover, the National government is unwilling to investigate and prosecute the crimes committed and still being committed. Government forces continue to commit atrocities.[211] The only criterion for investigation that has not been met by the situation in Syria is that of *jurisdiction ratione loci*, because Syria is not a Party State of the Court and has not accepted the *ad hoc* jurisdiction from the Court, the Court must attain UNSC approval to investigate. International organisations have asked the UNSC to refer the situation to the ICC for investigations,[212] but it failed to do so and the Court unable to open investigations in Syria.

The failure has occurred because Russia and China, being permanent members of the UNSC with veto powers, have strong alliances with Syria,[213] and have repeatedly vetoed movements to refer the Syrian situation to the ICC, quashed other initiatives to persuade the UNSC on the Syrian situation, calling them 'ill-timed' and counterproductive.[214] Nonetheless, various groups and organisations, including the Human Rights Watch, the UN, Arab League, and European Union Foreign Affairs Council, continue to attempt to manipulate the situation in Syria by appealing to the UNSC and implementing bilateral sanctions against Syria.[215] Still, the ICC has the greatest capacity to hold all parties responsible for their actions, but unable to, due to the supervening circumstances.

The Court's Jurisprudence over the Central African Republic

The government of the Central African Republic (CAR) referred the situation in the Country to the ICC (in December 2004) under Article 14,[216] being a State Party to the Statute, the

<http://www.nytimes.com/2013/05/09/world/middleeast/syrian-refugees> accessed 5 July 2014.

[211] Organisations in support of the movement to refer the situation in Syria to the ICC include the UN, and the League of Arab States; 'Security Council must act now to address Syria crisis, UN-Arab League envoy stresses. *United Nations News Centre*, US 29 January 2013.

[212] ibid.

[213] ibid.

[214] Michelle Nichols, 'Syria says ICC call hinders search for end to conflict, Reuters' 25 January 2013, UNSC Resolution 1970 New York: 26 February 2011 <http://www.reuters.com/article/us-syria-crisis-un> accessed 5 July 2014.

[215] United Nations General Assembly, Human Rights Council, Report of the independent international commission of inquiry on the Syrian Arab Republic, Twenty-Second Session, 5 February 2013 (Geneva, Switzerland: 2013).

[216] ICCSt (n 2) self referrals; Articles 13(a) and 14 referral of a situation by a State Party.

crimes are within the Jurisdiction of the Court and committed on CAR territory. The OTP opened an investigation in May 2007.[217]

The Trial Chamber III on 22 November 2010 commenced trial (Prosecutor v *Jean-Pierre Bemba Gombo)* for two charges of CAH and three charges of war crimes. On 20 November 2013, a warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido was issued by the ICC for offences against the administration of justice allegedly committed in connection with the case of *The Prosecutor v Jean-Pierre Bemba Gombo.*[218] On 25 November 2013, *Fidèle Babala Wandu and Aimé Kilolo Musamba* got transferred to the ICC Detention centre. On 27 November 2013, *Aimé Kilolo Musamba and Fidèle Babala Wandu,* made their initial appearance before the ICC. *Jean-Pierre Bemba Gombo* appeared with them as well, following his arrest, Jean-Jacques Mangenda Kabongo was transferred to the ICC detention centre on 4 December 2013 and made his first appearance before the Court on 5 December 2013. *Narcisse Arido* will be surrendered to the Court upon completion of the relevant national judicial proceedings in France.[219]Mr. *Bemba* is allegedly criminally responsible, as military commander under Article 28 and accused of two counts of CAH charges: murder (Article 7(1) (a) of the Statute) and rape (Article 7(1)(g) of the Statute); Three counts of war

[217] Prosecution application for a warrant of arrest 9 May 2008; Warrant of arrest issued by Pre-Trial Chamber III: under seal on 23 May 2008, unsealed on 24 May 2008, arrest by Belgian authorities 24 May 2008, initial appearance before Pre-Trial Chamber III 4 July 2008, Confirmation of charges hearing From 12 to 15 January 2009, decision on the Confirmation of charges 15 June 2009, commencement of trial 22 November 2010.

[218] ICC-CPI-20101118-MA80; Commencement of the trial in the case *The Prosecutor v Jean-Pierre Bemba Gombo,* 22 November 2010, Situation is the Central African Republic Case: Bemba is allegedly criminally responsible, as a person effectively acting as military commander within the meaning of Article 28(a) of the Rome Statute, for two crimes against humanity (murder and rape) and three war crimes (murder, rape and pillaging) allegedly committed in the territory of the Central African Republic during the period from 26 October, 2002 to 15 March, 2003.After his arrest by the Belgian authorities in accordance with a warrant of arrest issued by the Pre-Trial Chamber of the ICC, he was transferred to the Court on 3 July, 2008. He is currently being detained at the ICC; *ICC-CPI-20131124-PR962*. On 23 and 24 November 2013, the authorities of the Netherlands, France, Belgium and the Democratic Republic of the Congo (DRC) acting pursuant to a warrant of arrest issued by Judge Cuno Tarfusser, the Single Judge of the Pre-Trial Chamber II of the ICC, arrested four persons suspected of offences against the administration of justice "Article 70" allegedly committed in connection with the case of *The Prosecutor v Jean-Pierre Bemba Gombo,* (a breach of Article 69) The warrant of arrest in respect of the same charges also served on Jean-Pierre Bemba at the ICC's detention centre, where he has been detained since 3 July 2008; On 20 November 2013, *Judge Tarfusser* issued a warrant of arrest for Jean-Pierre Bemba Gombo, his Lead Counsel Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo (a member of Mr Bemba's defence team and case manager), Fidèle Babala Wandu (a member of the DRC Parliament and Deputy Secretary General of the Mouvement pour la Libération du Congo), and Narcisse Arido (a Defence witness); Judge Cuno Tarfusser found that there are reasonable grounds to believe that these persons are criminally responsible for the commission of offences against the administration of justice (Article 70 of the Rome Statute) by corruptly influencing witnesses before the ICC and presenting evidence that they knew to be false or forged. The suspects, it is alleged, were part of a network for the purposes of presenting false or forged documents and bribing certain persons to give false testimony in the case against Mr Bemba.

[219] ICC-01/05-01/13, *The Prosecutor v Jean-Pierre Bemba Gombo,* Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido.

crime charges: murder (Article 8(2)(c)(i) of the Statute); rape (Article 8(2)(e)(vi) of the Statute); and pillaging (Article 8(2)(e)(v) of the Statute),[220] the trial continues at the Court.

However, on 30 May 2014, the ICC Prosecutor received another referral from the Central African authorities regarding crimes allegedly committed on CAR territory since 1 August 2012; on 24 September 2014, following an independent and comprehensive preliminary examination, the Office of the Prosecutor announced the opening of open a second investigation in the Central African Republic (CAR) with respect to crimes allegedly committed since 2012, the situation is assigned to Pre-Trial Chamber II.

Situation on a Registered Vessel of the Union of the Comoros

The Presidency at the ICC on 5 July 2013 assigned 'the Situation on registered vessels of the Union of the Comoros, the 'Hellenic Republic and the Kingdom of Cambodia' to Pre-Trial Chamber I.[221] This is a procedural matter only, and is not the beginning of an investigation. On 14 May 2013, the OTP received a referral from the Union of the Comoros, 'with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip.'[222] The referral makes reference to seven vessels that were allegedly attacked and requests the Prosecutor to investigate the event, specifically on 'one of the passenger vessels of the humanitarian aid *flotilla* bound for Gaza on 31 May 2010, in which nine victims were killed on board and dozens seriously injured, a consequence of the attacks by the Israel Defence Forces… in international waters.' According to the referral, the vessel was within the territorial jurisdiction of the Comoros, while two other vessels allegedly attacked are within the territorial jurisdiction of Greece and Cambodia respectively. [223] The referral makes reference to Article 12(2) (a) of the Statute, which allows the ICC to exercise its jurisdiction over crimes committed on board a vessel, if the State of registration of that vessel is a State Party to the ICC. Comoros, Greece and Cambodia are all State Parties to the Rome Statute.[224]

[220] ibid.
[221] ICC-01/13; Situation on Registered Vessels of the Union of the Comoros; the Hellenic Republic and the Kingdom of Cambodia.
[222] ibid.
[223] ibid.
[224] ibid.

5.8 Gender Crimes and the International Criminal Court's Jurisprudence

Gender crimes have been an issue at international courts since the Nuremberg trials, although it had no place in the Charter of the International Military Tribunal (IMT) despite 'extensive evidence' of sexual violence.[225] The ICTR/ICTY changed the attitude; provided a template for the ICC for successful conviction of perpetrators of gender crimes. The ICTR convicted *Jean-Paul Akayesu* in 1998, the Mayor of the *Taba* commune in Rwanda,[226] accused of various charges of genocide and CAH, including rape and outrages upon personal dignity, the case of *Akayesu* is the first to recognise rape 'as an instrument of Genocide and a CAH.'[227] The *Akayesu* case highlights gender crimes and sexual violence as priority(s) for international criminal justice. However, subsequent cases revealed that investigations of gender crimes could be problematic. In *the Prosecutor v Musema and Kajelijeli*[228] involving charges of rape and murder, the ICTR did not procure convictions because the evidence was inadequate to convict 'beyond reasonable doubt'.[229]

The ICTY prioritised gender crimes than did the ICTR, due to the fact that 'the UN resolution establishing the ICTY specifically referenced sexual violence against Muslim women, the resolution creating the ICTR made no mention of the topic.'[230] The ICTY since 1995 charged more than seventy individuals with crimes of sexual violence; convicted about thirty up till 2011.[231] The Tribunal decided on cases of sexual violence against men, such as those of *Dŭsko Tadíc*.[232] Given the ICTY's success in gender crimes investigations, it becomes possible for the ICC to investigate gender crimes better with priority? The ICTY's strategic approach to investigations makes sure that the evidence is comprehensive, using forensic evidence, investigating crime scenes, and interviewing other witnesses.[233] Without proper training of investigators, the ICC will be unable to collect evidence needed to bring a proper

[225] Kelly D Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2012) 21*Berkeley Journal of International Law* 301.
[226] *Prosecutor v Jean-Paul Akayesu*, ICTR-96- 4-T, Judgement, 2 September 1998.
[227] ibid.
[228] *The Prosecutor v Musema and Kajelijeli;* ICTR-98-44A-T.
[229] Rebecca L Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory,' (2006) 29 *Harvard Journal of Law and Gender* 205.
[230] Rebecca L Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory,' (2006) 29 *Harvard Journal of Law and Gender* 204.
[231] *The prosecutor v Duško Tadić*, first-ever trial for sexual violence against men; UN-ICTY.
[232] ibid.
[233] Erin Gallagher, an Interview with ICTY Investigator, 16 February 2013;
< http://physiciansforhumanrights.org/ > Accessed 5 July 2014.

case against a perpetrator,[234] while the OTP's charging record for crimes of sexual violence has improved, much work remains to be done.

The Statute defines gender crimes in Article 7(1)(g) and Article (8)(2)(b)(xxii) as CAH and war crimes respectively including 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.'[235] Gender crimes may also be charged as genocide with acts such as 'imposing measures intended to prevent births within the group.'[236] However, gender crimes have not been a priority during investigations at the ICC to date. Legitimacy and effectiveness of the ICC could be improved prosecuting the crime.[237] Currently, charges for gender-based crimes have been brought in about seven situations; in 11 of the 16 cases.[238] Despite their prevalence, convictions on gender crime charges by the Court have not been achieved, making investigations of gender crimes a major issue to the ICC.[239] Women in the DRC situation admitted to being held as sexual slaves whom captors refer to as 'food;' makes it difficult for them to return to their normal lives following the anguish they experienced.[240] Female victims of gender crimes are considered impure a result of cultural stereotypes associated with sex, making the crime destructive to their lives.[241] Sexual violence does leave

[234] Of the three cases concluded so far, two cases with judgment convictions have been rendered, one without gender crimes charges, another with lesser crime convictions the third is an acquitted of all charges including rape and sexual slavery.
[235] ICCSt (n 2) Article 7(1) (g), Article 8(2) (b) (xxii).
[236] ibid Article 6(d).
[237] Madison Miller, 'Investigating Gender Crimes' in Henry M Jackson and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[238] ICC cases; Uganda, *Prosecutor v Kony*; DRC *Prosecutor v Katanga & Ngudjolo*; *Prosecutor v Ntaganda*, *Prosecutor v Mbarushimana*; *Prosecutor v Mudacumura*; CAR; *Prosecutor v Bemba*; Sudan; *Prosecutor v al-Bashir*, *Prosecutor v Harun & Kashayb*, *Prosecutor v Hussein*; Kenya; *Prosecutor v Muthaura &Kenyatta*; Ivory Coast, *Prosecutor v Gbagbo*; International Criminal Court; Women's Initiatives for Gender Justice, Gender Report Card 2012, The Hague, 2012, 7,103; On 05 June 2014, the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, announced the publication of the Office of the Prosecutor's (OTP) Policy Paper on Sexual and Gender-Based Crimes, the first ever produced by an international court or tribunal. The Policy Paper expresses clearly that sexual violence and gender-based crimes in conflict will neither be tolerated nor ignored at the ICC; but these offences are already well spelt out in the Statute the researcher reiterated.
[239] Human Rights Watch, 'The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo, New York: Human Rights Watch, 2002' 23-63. Victims experience rape, genital cutting and mutilation, enforced pregnancy, beating, kidnapping, forced labour and sexual slavery, < www.hrw.org > accessed 5 July 2014.
[240] Annie Lennox, UNIFEM, 'Women on the Frontline- Democratic Republic of Congo,' (United Nations Development Fund for Women 2009) Many victims often face severe stigmatisation when returning to their society. In some cases, husbands treat their wives poorly because they are more concerned with reputation and honour than the well-being of their wives and the protection of their families. Consequently, wives are forced to leave their homes after what they have already faced. Efforts should be made that victims are not forced to endure more pain than what they had already suffered during the conflict.
[241] Kelly D Askin. 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law:

severe impact on males as well. In the DRC, men also came forward as victims of sexual violence; the crime includes genital violence, enforced nudity, enforced sterilization, enforced masturbation, and rape, or forced rape of other victims.[242]

The post-election conflict in Kenya also brought to light gender crimes against men. Other acts reported are genital amputation and forced circumcision.[243] Many go unreported due to the trauma caused by such crimes and societal stigma attached.[244] Crimes against men in particular become a weapon against the community. By showing the men - leaders of the community - in a vulnerable position, unable to protect their communities; therefore the perpetrators have control,[245] further example of improper investigations came to light with the acquittal of *Mathieu Ngudjolo Chui*, a leader from the Front for National Integration (FNI) from the Ituri region of the DRC. *Ngudjolo* was acquitted[246] on 18 December 2012 of various charges of war crimes and CAH including 'raping of women and girls, torture, and the forced recruitment of children."[247] The reason for his acquittal was not that the judges perceived *Ngudjolo* to be innocent but that the Prosecutor could not prove 'without a reasonable doubt' that he was involved in the attack.[248]

The ICC has since shown some positive changes such as, in the case of a former officer of the FPLC, *Bosco Ntaganda* from the Ituri region. In 2006, the original arrest warrant was issued, and *Ntaganda* was charged for the conscription of child soldiers, similar to Lubanga's without a charge for gender offence.[249] However, in July 2012, the OTP submitted a second application charging *Ntaganda* with further crimes committed in the Ituri district including

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Extraordinary Advances, Enduring Obstacles,' (2012) 21 Berkeley Journal of International Law 298.

[242] Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18 *European Journal of International Law* 263.

[243] *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11 (23 January 2012); International Criminal Court- Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute Situation in the Republic of Kenya Case.

[244] ibid.

[245] Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict,' (2007) 18 *European Journal of International Law* 263.

[246] *The Prosecutor v Mathieu Ngudjolo Chui*, ICC Trial Chamber II acquits Mathieu Ngudjolo Chui on 18th December 2012, Trial Chamber II (ICC) acquitted of the charges of war crimes and crimes against humanityICC-CPI-20121218-PR865; Situation in the Democratic Republic of Congo, The decision was taken unanimously by the Chamber.

[247] ibid.

[248] Human Rights Watch, "ICC: Congolese Rebel Leader Acquitted in Court's Second Case, Prosecutor Should Step up Investigations in DR Congo Cases" (2012).

[249] International Criminal Court-Pre-Trial Chamber I, Warrant of Arrest: Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda (ICC-01/04-02/06) 4, 7 August 2006.

murder and gender offences.[250] Similarly, the case of *Jean-Pierre Bemba Gombo* from the situation in the CAR, described as 'the first case before the ICC to be focused nearly exclusively on sex crimes.'[251] Considering that *Bemba* is the former vice president of the DRC, 'the charges are against highest level perpetrators before the ICC.'[252] A successful prosecution and conviction in this case would demonstrate a positive approach to combating gender crimes.

5.9 Transitional Justice Jurisprudence and the International Criminal Court

The Assembly of States Parties (ASP) established the Trust Fund for Victims (TFV) at its third plenary meeting in 2002, in accordance with Article 79 of the Statute an improvement over the problems experienced by the *ad hoc* tribunals.[253] TFV is to provide assistance for victims of crimes within the Court's jurisdiction.[254] The ASP is required to manage the activities and projects implemented by the Fund subject to the decision (Article 79(3)) taken by the Court.[255] The ASP designed the Trust Fund Regulations to govern the conduct of the Fund, adopted at its fourth session in 2005.[256] The ASP established a Board of Directors to

[250] ICC-01/04-02/06 (22 August 2006 1st); ICC-01/04-02/06-2(13 July 2012 second arrest warrant) *The Prosecutor v Bosco Ntaganda*. The ICC issued two warrants of arrest for Bosco Ntaganda, as the former alleged Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo [Patriotic Forces for the Liberation of Congo] (FPLC), Mr Ntaganda is suspected of thirteen counts of war crimes (murder and attempted murder of civilians, attacks against a civilian population, rape of civilians, rape of UPC/FPLC child soldiers, sexual slavery of civilians, sexual slavery [contained in the 2nd charge only] of UPC/FPLC child soldiers, pillaging, displacement of civilians, conscription of children under the age of 15, enlistment of children under the age of 15, use of children under the age of 15 to participate actively in hostilities, attacks against protected objects, and destruction of property) and five counts of crimes against humanity (murder and attempted murder of civilians, rape of civilians, sexual slavery of civilians, persecution on ethnic grounds, and forcible transfer of population) allegedly committed in Ituri, Democratic Republic of the Congo (DRC) between 1 September 2002 and the end of September 2003.

[251] Kelly Askin, "International Criminal Court Takes on Gender Crimes," Open Society Foundations (2010). <www.opensocietyfoundations.org/voices/international-criminal-court-takes-gender-crimes> accessed 18 May/2014.

[252] ibid; See also Madison Miller, Investigating Gender Crimes in "The International Criminal Court, Confronting Challenges on the path to justice" Jackson School of International Studies Task Force Report 2013".

[253] A chapter on reparations proceedings (Rules 94 to 97) and an elaboration on the two mandates of the Trust Fund (Rule 98). Rule 98 (1-4) specifies the Trust Fund's mandate with regard to reparations awarded by the Court against a convicted person. Rule 98 (5) specifies the Trust Fund's mandate with regard to the use of "other resources" for the benefit of victims, subject to the provisions of Article 79 of the Rome Statute.

[254] ICC-ASP/1/Res.6: Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. Through this resolution, the first ASP in September 2002 reiterated the will to establish a Trust Fund for Victims. The Assembly of States Parties defined contributions to the TFV and established the five-member Board of Directors.

[255] International Criminal Court-Assembly of States Parties, first session establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, ICC-ASP/1/Res 6, paragraph 7 of the annex, 9 September 2002.

[256] International Criminal Court-Assembly of States Parties, Fourth session. Regulations of the Trust Fund for Victims, ICC-ASP/4/Res 3, 3 December 2005.

directly manage the Fund; to facilitate the substantial work done by the Board; a Secretariat was established at its sixth plenary meeting.[257] The commitment of the Court to transitional justice for victims is regarded as a plus for international criminal justice. Transitional justice provides a way for a community to transit from a period of mass violence to stability by rebuilding its society, community and addressing redress for victims. To achieve this aim, mechanisms integrated into the Rome Statute secure essential rights to victims of mass atrocity, unlike previous (ICTY/ICTR) *ad hoc* tribunals. According to Article 75[258] one of the mechanisms is to distribute reparations awards to victims to rebuild their lives after mass violence.

The TFV a key mechanism has two principal mandates: (1) implementing court-ordered reparations awards and, (2) using voluntary contributions from various sources to provide general assistance to victims.[259] Whereas legal mechanisms of the Court may be broadly inadequate to the Victims, the TFV promotes transitional justice by restoring the lives of victims through the implementation of reparation awards and collective assistance projects. The OTP and the Registry investigate a defendant's resources through asset-tracing, when allocating reparations awards and promoting transitional justice. The TFV has been instrumental in helping victims rebuild their lives. After the Court orders reparations awards against a defendant, the TFV cooperates with the Court in allocating reparations. When a defendant is declared indigent, the responsibility to pay for restitution/reparations falls on the TFV.[260] General assistance projects benefit those victims who do not qualify for Court-ordered reparations by offering transitional support to rebuild their lives. To maintain adequate funding for both mandates, the TFV must capitalise on key fundraising methods such as lobbying for earmarked and multi-annual donations.[261]

The shortcomings of the *ad hoc* courts are attributed to their design as a punitive mechanism and therefore did not focus on victim redress. These shortcomings include limited mandates

[257] ICC-ASP/3/Res.7 (PDF): Establishment of the Secretariat of the Trust Fund for Victims. The third ASP, held in September 2004 in The Hague, decided to establish a Secretariat "to provide such assistance as is necessary for the proper functioning of the Board of Directors in carrying out its tasks". The resolution also 'calls upon governments, international organizations, individuals, corporations and other entities to contribute voluntarily to the Fund.'
[258] ICCSt (n 2).
[259] Leila N Sadat (n 46)
[260] Katerina Henshaw and Eunbi Cho, 'Transitional Justice for the Future,' in Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.
[261] ibid.

for reparations awards, the lack of enforcement by the national courts responsible to bringing compensation claims under Rule 106 of the Rules of Procedure and Evidence (RPE) of the ICTR/ICTY which states that, 'pursuant to relevant national legislation, a victim claiming, may bring an action in a national court or other competent body to obtain compensation.'[262] The lack of outreach to help victims obtain reparations limited such opportunities.[263]

The RPE of the ICTR/ICTY mandated 'the return of any property and proceeds acquired by criminal conduct…to their rightful owners.' Consequently, the provisions limited restitution to the return of stolen property but did not handle physical and mental injuries of the victims.[264] In contrast, the ICC includes all aspects of restitution, compensation, and rehabilitation when awarding reparations; restitution alone does not constitute full and complete recovery for the victims. The Registry working with the TFV allocates these awards to victims who have applied and qualified under Rule 85 of the RPE.[265] Victims that fit into this definition may request individual or collective compensation by completing an application. The application is then filed with the Registry and the Court may award the victims individually or collectively. Article 75 of the Rome Statute defines victims' reparations.[266] Lastly, rehabilitation includes 'medical and psychological care as well as legal and social services.'[267]

[262] UN Doc ITR/3/REV1 (1995) Rule 106 (B) ICTR Rules of Procedure and Evidence.

[263] Katerina Henshaw and Eunbi Cho 'Transitional Justice for The Future' in Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington.

[264] Lasco Chanté, 'Repairing the Irreparable: Current and Future Approaches to Reparations' (2003) *10 Human Rights Brief* 19.

[265] ICC, Rules of Procedure and Evidence UN Doc PCNICC/2000/1/Add 1 (2000) Rule 98(1)(2) Rule 85: a victim is defined as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court' and includes organisations or institutions that have sustained direct harm to any of their property.

[266] UN General Assembly; Rome Statute of the International Criminal Court (amended 2010) (1998) ICCSt Article 75(1); Restitution, compensation and rehabilitation for victims; The purpose of restitution is to restore victims to their original individual and property rights before victimisation occurred; Compensation means the financial reimbursement for losses, both pecuniary and non-pecuniary; ICC-ASP/1/Res.6: Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. Through this resolution, the first ASP in September 2002 reiterated the will to establish a Trust Fund for Victims. The Assembly of States Parties defined contributions to the TFV and established the five-member Board of Directors.

[267] Wemmers Jo-Anne, 'Reparation and the International Criminal Court: Meeting the Needs of Victims' Report of the Workshop Organised by the Research Group Victimology and Restorative Justice, International Centre for Comparative Criminology, University of Montreal 28 January 2006.

5.10 Jurisprudence Over the definition of the Crimes Against Humanity

The discussion of the 'Policy' element by the majority and Judge Kaul's dissent opinion contributes significantly to the Court's early jurisprudence to the definition of CAH. The Kenyan situation presented a different scenario from other situations before the Court. Kenya held closely contested national elections on 27 December, 2007, pitting incumbent President *Mwai Kibaki* of the Party of National Unity (PNU) against the main opposition candidate *Raila Odinga* of the Orange Democratic Movement (ODM). On 30 December, 2007, Kenya's Electoral Commission declared, President *Kibaki* as re-elected, this triggered a series of 'violent demonstrations and targeted attacks in several locations within Kenya.'[268] The violence resulted in about 1,220 'reported killings of civilians, more than 900 acts of rape and other forms of sexual violence, the internal displacement of 350,000 persons, and 3,561 reported acts causing serious injury.'[269] Violence took place in six out of eight regions of the country,[270] brutal as described in the prosecution's application, in waves and targeted specific groups, 'tribes perceived as political opponents.'[271] Groups associated with the ODM and the PNU initiated the attacks and counter attacks against opponents, and evidence of massacres and torture committed by the police.[272] During the initial phase of the violence, attacks appeared largely to target PNU supporters; subsequent attacks were directed at ethnic groups perceived affiliated to the ODM; police attacks appeared to be directed towards ethnic communities perceived opposed to their own ethnic affiliation, or against gang members.[273]

Although, the majority of the Pre-trial chamber noted that the 'Policy requirement' was eventually abandoned by the *ad hoc* tribunals, but nonetheless 'deemed it useful and appropriate to consider the definition of the concept in earlier cases.'[274] Relying on this jurisprudence and the work of the ILC, the majority gave Article 7[275] a reading that appears to be supported by referencing the Trial Chamber's opinion in the *Blaškić* case before the ICTY, the majority noted that the plan or policy to commit an attack may be inferred from the commission of a series of events and listed possible contributory factors, including, but not

[268] Situation in the Republic of Kenya, Case No ICC-01/09, Request for authorisation of an investigation pursuant to ICCSt (n 2) Article 15 (26 November 2009) para 4.
[269] ibid para 56.
[270] ibid.
[271] ibid para 74.
[272] Ibid para 104-106.
[273] ibid para 114; there is little information on police attacks and their organisation in the opinion or the Prosecutor's request for authorisation. The evidence adduced thus far suggests that the police attacks severely worsened the scope and gravity of the violence and aggravated the attacks by rival groups.
[274] ibid para 86.
[275] ICCSt (n 2).

limited to, the establishment of military structures, the mobilisation of armed forces, the general content of a political program, alterations to the ethnic composition of populations, and discriminatory measures directed against particular groups.[276] Claiming to follow the text of Article 7,[277] the majority also read 'State' and 'organisational' disjunctively, a view claimed to be supported by texts in Arabic, French, Russian and Spanish languages;[278] led the majority to conclude that 'the formal nature of a group and the level of its organisation should not be the defining criterion.'[279] Instead, 'a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values.'[280] Thus, not only that the organisation should be 'State-like,' but that the policy need not have been conceived at the highest level of the State, meaning that 'regional or local organs of the State could satisfy the requirement of a State policy.'[281]

Judge *Kaul* disagreed, arguing that the juxtaposition of the notion 'State' and 'organisation' in Article 7(2) (a) of the Statute indicate that even though the constitutive elements of statehood need not be established those 'organisations' should partake of some characteristics of a State,[282] including a hierarchical structure with power over its members.[283] Finding that there was no 'organisation' satisfying these criteria in the Kenyan situation, he concluded:

> ...Local politicians, civic candidates or aspirants, councillors and business people meeting and allegedly financing the violence do not form an 'organisation' with a certain degree of hierarchical structure acting over a prolonged period of time. . . . Local politicians using criminal gangs for their own purposes [the question is: can this ever

[276] Situation in the Republic of Kenya, Article 15 Decision para 87; citing *Prosecutor v Blaškić*, Case No ICTY-95-14-T Judgment (3 March 2000).
[277] ICCSt (n 2).
[278] Situation in the Republic of Kenya, Article 15 Decision, para 90; citing *Prosecutor v Blaškić*, Case No ICTY-95-14-T Judgment 90 (3 March 2000) para 90 ICTR Statute Articles 2-4.
[279] Situation in the Republic of Kenya; ICCSt (n 2) Article 15 Decision, para 90.
[280] ibid para 90; the Chamber used similar language from M Di Filippo, and writings of other scholars, that purely private criminal organisations could satisfy the 'organisational policy' requirement; M Di Filippo, 'Terrorist crimes and international cooperation: critical remarks on the definition and inclusion of terrorism in the category of international crimes' (2008)19 *European Journal International Law* 533; Although, others have criticized the majority's reliance on this particular Article, the same view is expressed by many other commentators; the Triffterer commentary on Article 7, and the International Law Commission take the same position; Gerhard Werle, *Principles of International Criminal Law* (3rd, US, Cambridge University Press, Asser Press; 2009) 301-5; Cryer R, Friman H, Robinson D and Wilmshurst E, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press, Cambridge 2014)229,62; Robinson defining Crimes Against Humanity at the Rome Conference; Laila N Sadat, 'The Application of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again' (1994) 32 *Columbia Journal of transitional law* 289.
[281] ibid Kenya para 89.
[282] ibid (Situation in the Republic of Kenya) Dissent of Judge Hans-Peter Kaul para 52.
[283] ibid.

> happen in an erudite society? The researcher does not believe it will] is an indicator of a partnership of convenience for a passing occasion rather than an 'organisation' established for a common purpose over a prolonged period of time. Further, opportunistic violence and acts of individuals[284] . . . equally does not allude to an 'organisation' characterised by structure and membership.[285]

The evidence cited suggests 'chaos, anarchy, a collapse of State authority and failure of law enforcement agencies,' but not a CAH. He rejected the use of ICTY case law by the ICC without distinguishing and endeavoured to link CAH in Article 7 to the Nuremberg historical experience.[286] His opinion evinces not 'marginalising' or 'downgrading' the notion of CAH,[287] and implies that the majority's view may 'infringe upon State sovereignty,' 'broadening the scope of ICC intervention almost indefinitely,' and 'turning the ICC . . . into a hopelessly overstretched, inefficient international court, with related risks for its standing and credibility.'[288]

[284] This is the reality in several countries of the developing block, where law and order is an issue. Often times a simple protest is embarked upon by citizen to wade-off *oppression* such as election rigging or imposition of candidates on a particular community or locality under the disguise of democracy. The only way to express discontent usually is civil protests; often than not these protests are actually hijacked my miscreants in the society (*error-humans* created due to the *system failure of governance*) created by the state over a long period. The miscreants see it as an opportunity to lash back on the society, not just on the government responsible for their situation. Hence, this hijack results in deaths. Not only that these societies are usually heavily divided along some lines such as ethnicity, religions and others. During such demonstrations causalities resulting from one divide leads to retaliation from that divide, at this point the *'subject matter'* of the crises would have disappeared. The issue now is that the divide with higher causality is being regarded the weaker and should expect to suffer some more in future crises except the 'assumed weaker divide' can cause more havoc, more casualty on the other groups, then they will earn their respect against future crises not to be toyed with. It is in the opinion of the researcher that this is the culprit the genesis of the crises in Kenya and arguably what happened in Darfur leading to the report and conclusion of the United Nations Monitoring team in Darfur concluding in its report that there was no Genocide in Darfur, Sudan. Not because there was no killing to constitute Genocide, but because there was no established 'organisational or state policy with intent' directed towards a particular group to be linked to the killings that took place that would have established Genocide. Furthermore, the recent Boko Haram crises abducting young girls in Nigeria which have attracted the attention of the international community is no doubt a crime against humanity with a well structured Organiasation and their attacks widespread and systemic, but this structure cannot and will not enjoy the attention of the ICC because they are not state-like but political or religious and unfortunately Nigeria is unable or on willing to take them on.

[285] Situation in the Republic of Kenya; Dissent of Judge Hans-Peter Kaul para 82.

[286] The dissent interprets Article 21 of the ICCSt (on applicable law) more narrowly than the majority, particularly as regards the use of case law from other tribunals, as judicial decisions may be accorded subsidiary value in ascertaining rules of customary international law as seen in the Statute of the ICJ Article 38(1)(d). The ICC has often looked to the jurisprudence of the ICTY, such as in the Lubanga confirmation decision regarding the definition of international armed conflict, paras 205-211 in adopting the overall control test.

[287] Dissent of Judge Hans-Peter Kaul, para 9; Leila N Sadat, 'Crimes against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334.

[288] ibid.

The majority and dissenting opinions offer very different views of the ICC's mandate. The majority focused principally upon the gravity of the harm, the brutality of the violence, its widespread and systematic nature and the preliminary stage of the proceedings. Given the complete absence of real guidance on this question, the majority looked to the resolution of similar questions before other international criminal tribunals and the work of the ILC on the question of non-State actors and CAH. The guiding principle of the majority was faithfulness to the ICC's mandate to 'protect human values.'[289] Judge Kaul's approach suggests a textual and historical exegesis could provide an appropriate test said Leila Sadat. Several experts welcome Judge Kaul's rigorous approach, whilst criticising the majority for adopting a broad definition of 'organisation' that will require extensive case by case analysis.[290] Although, Judge Kaul's opinion is suggested to ignore the work of the ILC (which had prepared the original draft of the ICC's Statute as well as the Draft Code of Crimes) and does not account for a substantial body of work suggesting that a policy element may be one way to distinguish between ordinary and international crimes and thereby confer international jurisdiction.[291]

Undeniably, jurisdiction can be conferred either because particular interests of the international community have been injured (*l'ordre public international*), because of the scale of the harm or because the problem is one incapable of solution by individual states.[292] Indeed, Article 7 of the Rome Statute is quite different from Article 6(c) of the IMT Statute.[293] Judge Kaul's picture of 'chaos, anarchy; and a collapse of State authority' is exactly the kind of situation in which victims of atrocity crimes might require international intervention in the guise of the ICC, and is precisely the kind of situation which the framers of the Statute would not wish to exclude as CAH if possible and where no national

[289] ibid.
[290] Leila N Sadat, Claus Kress, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855; Charles C Jalloh, 'Situation in the Republic of Kenya' (2011) 105 *American Journal of International Law* 540; William A Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 *Leiden Journal of International Law* 847; Darryl Robinson, 'Essence of Crimes Against Humanity Raised by Challenges at ICC' EJIL Talk; <http://www.ejiltalk.org> accessed 6 July 2014.
[291] Leila N Sadat (n 46).
[292] Leila N Sadat, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again' (1994) 32 Columbia Journal of Transnational Law 289; Antonio Cassese, Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, OUP Oxford 2013) 84-105; 'crimes of this category are characterised either by their seriousness and their savagery . . . or by their magnitude, or by the fact that they were part of a system designed to spread terror, or a link in a deliberately-pursued policy against certain groups.
[293] Leila N Sadat (n 46).

jurisdiction acts.[294] In recognition of this, Judge Kaul reinvigorated his understanding on two additional pillars referring to Article 22[295] the caution to construe definitions of crimes 'strictly,' with any benefit of the doubt accruing to the accused, and reference to the principles of interpretation found in the Vienna Convention on the Law of Treaties (VCLOT).[296] VCLOT advocates 'ordinary meaning should be given to the terms of the treaty in their context and in the light of the Treaty's object and purpose. [297] What is not clear is how the text of Article 7(2) (a) itself can resolve the issue of what 'state or organisational' means. Indeed, footnotes 52-53 of the dissent note that scholars do not agree upon the meaning, but concludes that the juxtaposition of the words 'State' and 'organisation' in the same line indicates that organisations that may author CAH must 'partake of some characteristics of a State.'[298]

Ultimately, given the absence of a clear answer from the text, VCLOT instructs us to examine 'the preparatory work of the treaty and the circumstances of its conclusion.'[299] As noted the policy element was added to the definition of Article 7 as an afterthought, intended to avoid the possibility of random or isolated acts coming within the jurisdiction of the ICC. The second argument accentuates a very difficult problem of interpretation with respect to the Rome Statute more generally. As the constitution of an international organisation, a broadly purposive and teleological approach to the Statute's provisions is necessary and appropriate.[300] Embedded within the constitution of the ICC is a criminal code, the provisions

[294] War crimes jurisdiction would likely not attach in the absence of armed conflict; It has been observed that many French lawyers retain the Nuremberg approach to CAH, and continue to relate to the WWII precedent; Remarks of Maître Alain *Jakubowicz, Débats sur les crimes contre l'humanité,* Commission Franco-Américain, Paris, 13 May 2011. The French perspective comes from the decision of the French courts to include a 'common plan' as an element of CAH, following Article 6(c) of the Nuremberg Charter.

[295] ICCSt (n 2).

[296] Vienna Convention on the Law of Treaties, 23 May 1969, UN, Treaty Series, vol 1155, p 331, entered into force on 27 January 1980.

[297] ibid Article 31; Leila N Sadat (n 46).

[298] Dissent of Judge Hans-Peter Kaul para 51(n 328).

[299] Vienna Convention Article 32; The ICJ often confirm this rule of interpretation on Territorial Dispute *Libyan Arab Jamahiriya/Chad Judgment*, 1994 ICJ paras 21, 22,41 'As a, supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion'; Maritime Delimitation and Territorial Questions *Qatar v Bahrain*, Jurisdiction and Admissibility, Judgment, 1995 ICJ 6,18-19 *quoting Libya/Chad*; Oil Platforms; *Islamic Republic of Iran v United States of America*, Preliminary Objections, Judgment, 1996 ICJ 806,814-15 considering treaty signing and ratification circumstances in construing a clause as aspirational, rather than binding; further explanations of various methods of treaty interpretation are in Cases Concerning *Kasikili/Sedudu Island (Botswana/Namibia),* 1999 ICJ 1045; Leila N Sadat (n 46).

[300] ibid; In 1986, Sir Gerald Fitzmaurice wrote 'The teleological approach' is a method of interpretation more especially connected with the general multilateral convention of the 'normative' type…it is particularly with reference to this type of convention that doubts have been felt as to the validity, or even practicability, of interpretation by that traditional method of ascertaining the intentions of the parties.' Gerald Fitzmaurice, *The*

of which must be interpreted with deference to the principle of legality in particular cases before the Court, and in accordance with Article 22's admonition not to create crimes by analogy. Article 22, however, sheds little light on the interpretative question before the ICC in this case, for the question raised is not about the rights of a particular accused or set of accused to a fair trial, but more generally, what the framers meant by the word 'organisation' in Article 7(2)(a) of the Statute. That question, given its fundamental jurisdictional importance to the understanding of CAH in the Rome Statute, is a question that only an examination of the Statute's object, purpose and context (as well as *travaux préparatoires* and the decisions of other tribunals as aids to interpretation) can resolve, and a teleological approach to the question appears both necessary and appropriate.

Finally, neither the dissent nor the majority explicitly addressed in the Kenya case, the relationship of Article 7 of the Rome Statute to customary international law. The dissent does suggest that the ICC ignores in this circumstance the jurisprudence of the *ad hoc* Tribunals in interpreting Article 7.[301] Yet those Tribunals expressly based their authority and jurisprudence on CAH as customary international law. When Article 7 was codified, the question of the 'policy' element had not been settled by the ICTY/ICTR, and its inclusion was therefore not inconsistent with the work of those tribunals, particularly if its inclusion was meant to exclude random and isolated acts from the ambit of Article 7.[302] Although, the limiting language in the *chapeaux* of each of the three crimes states that the provisions are 'for the purpose of this Statute,'[303] because the Statute applies to nationals of non-State parties through the possibility of referral by the Security Council, having such provisions in the Statute and interpreted consistently with customary international law could be deeply advantageous. Undoubtedly, one of the primary challenges posed by the accused in the

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Law and Procedure of the International Court of Justice (Cambridge University Press, Cambridge 1993) 341; Malcolm Shaw, states a more flexible approach of interpretation would be justified; Malcolm Shaw, *International Law* (6th edn, Cambridge University Press, Cambridge 2008)849-890; Shaw goes on to note the teleological interpretation of the European Convention on Human Rights: a 'purpose-oriented method of interpretation was adopted.'; Jose E Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences,' (2003) 38 *Texas International Law Journal* 405 'There is also little doubt…that some of the new dispute settlers the ICC, ICTY and ICTR are engaging in forms of constitutional discourse, including teleological interpretations of the treaties that they are charged with applying this approach.'; Leila N Sadat, and Carden R S, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 391.

[301] The dissent of Judge Kaul apparently reads Article 21 of the Court's Statute (on applicable law) more narrowly than the majority, regarding the use of case law from other tribunals; as judicial decisions may be accorded subsidiary value in ascertaining rules of customary international law; the International Court of Justice, Article 38(1)(d) the ICC had looked to the jurisprudence of the ICTY in the Lubanga confirmation decision regarding the definition of international armed conflict, for example para 205-211 adopting the overall control test.

[302] ICCSt (n 2).

[303] ICCSt (n 2) Articles 6, 7(1) and 8(1).

Sudanese and Libyan situations is to the political legitimacy (and universal application) of the substantive norms in the Statute. Moreover, in spite of the provisions of Article 10 of the Statute,[304] Article 7 is increasingly seen by international and national courts and tribunals, including the ICTY, the European Court of Human Rights, the Inter-American Court of Human Rights, US federal courts and the UK House of Lords, as embodying customary international law of CAH.[305]

The ICC Statute cannot be viewed in isolation from the work of the *ad hoc* tribunals. It is true that the Rome Statute does not reference the Statutes and jurisprudence of the *ad hoc* tribunals, unlike the Statute of the Special Court for Sierra Leone.[306] However, Article 21[307] explicitly permits the Court to apply customary international law to fill gaps in the Statute and the Elements of Crimes.[308] Given the absence of definitional provisions in the text of Article 7 and the Elements of CAH accompanying Article 7 ICCSt, it is apparent that customary international law must provide a residual basis for the interpretation and application of CAH at the ICC. Indeed, it has become increasingly evident that whether or not the Rome Statute definition was intended to represent a codification of customary international law (and there are arguments in both directions), it has become accepted as such, and must be read in light of other ostensibly customary definitions of CAH found in the jurisprudence of the *ad hoc* international criminal tribunals.[309]

[304] Article 10 provides that 'Nothing in this part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statue.' For an analysis of Article 10's application; Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law* (Brill, Nijhoff Leiden 2002)146-148.

[305] *Korberly v Hungary* [GC] 2008 ECtHR App no 9174/02, (19 September 2008) Judge Loucaides dissenting 'one may take the recent Rome Statute of the International Criminal Court . . . as declaratory of the definition in international law of this crime.'; IACtHR, *Goiburú et al*, Judgment on Merits, Reparations and Costs Judgment of 22 September 2006 Series C No 153 para 82; cited approvingly in *Narciso González Medina et al v Domincan Republic*, Case 11,324 (2010) para 104 confirming the status of forced disappearances as a crime against humanity due to its inclusion in Article 7 of the Rome Statute; *Sarei v Rio Tinto*, PLC, 671 F 3d 736, 767 (9th Cir 2011) citing Article 7, along with the ICTY and ICTR, as 'customary international law, primarily defined through the international criminal tribunals at Nuremberg and elsewhere'; *Wiwa v Royal Dutch Petroleum Co*, 626 F Supp 2d 377, 384 (SDNY 2009) examining the Rome Statute of the International Criminal Court, decisions of international tribunals interpreting Customary international law, as well as reports and commentary issued by the United Nations, to determine that CAH is a norm that is 'customary, obligatory, and well defined in international jurisprudence.'; *R v Evans and others, ex parte Pinochet Ugarte*; *R v Bartle and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No 3), [1999] UKHL 17, [2000] 1 AC 147 citing Article 7 as evidence of charges against Pinochet being CAH.

[306] SCSL Statute, Articles 15 paras 1, 3,19, 20.

[307] ICCSt (n 2).

[308] ibid Article 21(2).

[309] Leila N Sadat (n 46).

Yet the need for the Court to rely on customary international law the source of law, from which the definition is derived, suggests that the jurisprudence of the ICC should not depart extensively from the jurisprudence at those tribunals, nor does the text or drafting history of Article 7 support such a departure. The framers expressly retained the formulation of the ILC that the policy must be authored by a State or organisation.[310] Thus, the restrictive approach taken to CAH not only by the dissent in the Kenya case, but in the *Katanga, Bemba,* and *Mbarushimana* confirmation decisions seem to be consistent with the text and legislative history of Article 7.[311] As some scholars have suggested, the answer may be to align the jurisprudence of the ICC and the *ad hoc* tribunals as regards the application of the 'policy' element, by interpreting element 'as a minimalist threshold excluding random action.'[312]

Judge Kaul's thoughtful dissent and legal conclusions highlights the need for the OTP to charge for CAH where the application to a situation is clear-cut not boarder-line cases that could lead to disputes. It is important that the Court clearly defines the term 'organisation' at the earliest possible time. The framers of the Rome Statute being aware of the potential for resistance to the Court, and the Statute are replete with procedural devices and filtering mechanisms to ensure that the Court respects State sovereignty. These include the requirement of complementarity, the possibility of challenges to admissibility and jurisdiction, the possibility of Security Council deferral, the gravity requirement, robust defence and human rights protections and the very rigorous vetting of cases before trial by the Court's judiciary, for the Court to fulfil its mandate it will be critical prosecuting the CAH successfully as a substantive crime under its jurisdiction.

5.11 Conclusion

The ICC has investigated about 22 situation and 8 cases of the numerous communications received from the international community as at the time of this research. This chapter focuses on the jurisprudence of the Court since its inception, analysing critical issues such as interpretation of policy elements, organisational elements, and State-like elements considered either restrictively or unrestrictedly, noting that the law is unsettled on these issues in spite of the codification in the Statute. Consequently, political intricacies and judicial effectiveness

[310] Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *International Criminal Law and Procedure* (3rd edn, Cambridge University Press, Cambridge 2014) 240.
[311] ICCSt (n 2).
[312] Robert Cryer *et al* (n 310).

are addressed at the ICC and the Court's jurisprudence became relevant contributing to this. Responsibilities fall on the ASP, civil society, other international institutions and the Judges of the ICC to bring to life words that represent the promises made at Rome. Is it true, false or a coincidence that the Court's investigations target African perpetrators? More work needs to be done to counter such perceptions and stir the Court to achieve it purpose and intent. The chapter also considers gender crimes in a renewed effort to push the Rome Statute further and the OTP to be more pragmatic establishing liability for gender crimes,[313] Article 54 (1) (b) of the Statute reiterates investigation of gender crimes. A well-articulated training program for the OTP should become a priority to 'boost staff competence on gender issues.'[314] The OTP must develop an effective operational strategy for prosecuting international crimes 'as the engine of the Court, systematic efforts for professional investigations and effective cooperation are the fuel for the entire Court's success.'[315] In the next chapter the research will conclude by proffering relevant ambitious recommendations and the way forward for a better adjudication of international criminal justice.

[313] International Criminal Court, 'ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, as Special Gender Advisor,' (21 August 2012).
[314] War Crimes Research Office, 'Investigative Management Strategies and Techniques of the International Criminal Court's Office of the Prosecutor,' American University Washington College of Law (October 2012) 50.
[315] Hans-Peter Kaul, 'The International Criminal Court (Current Challenges and Perspectives)' A keynote address on International Criminal Law, delivered at Salzburg Law School (8 August 2011).

Chapter 6

The Future of the International Criminal Court

'*La justices sans la force est impuissante*'[1] (Justice without force is irrelevant)

6.1 Research Findings

The thesis critically examined the prosecutorial challenges of the International Criminal Court (ICC/the Court) and its legal architecture the Rome Statute (the Statute),[2] bothering on the Courts legitimacy and credibility in her attempt to deliver justice and end impunity for perpetrators of heinous crimes. It begins with the Conceptualisation of crimes, analyses of the theoretical approach to current international criminal law and the Court's *modus operandi* prosecuting under the Statute. The Thesis further examines the *Jurisdiction Ratione Materiae* of the Court namely: Crimes against Humanity (CAH), the Crime of Aggression, War Crimes and the Crime of Genocide within the Principles of public international law, criminal law, international humanitarian law, human rights law and customary laws of war. It also considers the Jurisprudence of the Court from its inception to establish the Court's Culture and concludes with relevant recommendations encompassing case and court management to improve current sub-optimal level of performance in accomplishing its *raisons d'être* and the possible future of prosecutions at the Court as the main contribution to knowledge.

The creation of the ICC is a demonstration of the will of the international community to bring to justice those responsible for egregious crimes, prevent impunity of such atrocities and deliver justice to the Victims of such crimes. In attempts to achieve the set objectives, many accused and affected communities question the Court's approach; claiming that all the Cases out of about 22 situations before the Court are located in same geographical continent and geographical jurisdiction is not part of the Court's jurisdiction, could this be an evidence of the Court's behaviour in a particular way or a coincidence? Triggering mistrust for the Court, and portraying the Court as being politically motivated. However, the major problem with the ICC and its *modus operandi* is rooted in the unending fault lines of international law, to be precise the tension between state sovereignty, international accountability and political affiliations. The push back by Libya, for example, against the Trial of Saif al-Islam Gaddafi, the son of former Libyan strongman, at The Hague is one example. The same is true, until the turn around for Kenya when the Court recently dropped charges against the Kenyan President

[1] Blaise Pascal, Theologian, Philosopher, Mathematician, Physicist, Scientist (1623–1662).
[2] UN Doc A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (ICCSt).

for lack of evidence to prove the Charges beyond reasonable doubt, and for Al- Bashir, the need to maximise judicious use of resources led to suspending the case against him.

Key players in the International Panorama such as: the United States, China, Russia, Israel and some others are not State Parties to the ICC. China, the United States and Russia constitute 60 percent of the United Nations Security Council (Permanent 5) members where they often wield their veto powers against the collective will of the International Community. The United Kingdom and France are the only permanent members of the Security Council that are parties to the Rome Statute. While China, the US and Russia are desirous of holding leaders and dissidents from member and non-member states to the Rome Statute who commit crimes under the Jurisdiction of the ICC accountable, these countries are not in themselves willing to have their leaders and citizens held accountable under that same framework to which they subject others. The subtext is that leaders and citizens of these countries are immune from the Crimes over which the ICC has jurisdiction. The US was proactive at the inception and setting up of the necessary machinery leading to the establishment of the Court but ended up lobbying other countries not to ratify the Rome Statute.

Under public international law, it is an established fact that States are unwilling to compromise their sovereignty, the underlying philosophy for proposals during the Commission's work on the creation of the Rome Statute, which led to the Complementarity Regime enshrined in the Statute for it to be commonly accepted. Hence, the *Travaux Préparatoires* reveals the Intention to establish an international criminal court with very limited powers, based on a system that respects states' sovereign superiority. Thus, the Research establishes at this critical period that the ICC needs visionary leadership, practical and effective support from all stake-holders more than ever before. Choices made now by the Assembly of State Parties (ASP) about the Court's effectiveness, core functions, size, cooperation and political backing will affect not only the Court's operations and visible long-term impact, but also the viability of international criminal justice enterprise; crucial areas for the ICC success stand out for the ASP attention, many areas of the Court's operations must be improved upon to make its work more effectiveness, transparent, better acceptance of its decisions compelling motivations thereby improving legitimacy and credibility perception towards the Court, the areas highlighted by the thesis are intrinsic to the Court, the internal dynamics such as its operational and administrative nature, particularly its judicial work through the Chambers and investigation team. The extrinsic influences relevant to the Court

will also affect its acceptance, cooperation towards the Court in the exercise of its jurisdiction to combat impunity and render justice to victims leading to improved international recognition, increased membership, timely payment of subscriptions, increased legitimacy and credibility for the Court.

6.2 Recommendations

The Research establishes that the International Criminal Court is a political organisation up to its establishment[3] (see 2.19) importing the theory of 'Organisations'. Article 4 of the Statute, makes the Court a legal creature[4] emanating from international political permutations and has been unduly influenced[5] by powerful nations evident in indicting and non-indictment of some sitting Heads of States, not minding the Principle of immunity under customary international law.[6] Consequently, support for the Court has diminished to varying degrees, in member and non-member States; this poses a major problem for the Court that derives its legitimacy particularly from the support of Member States and the International Community as a whole. In order to shore up support, the ICC must address the criticisms raised by the international community as stake holders in providing global peace and security.

Furthermore, the Theory of 'Organisational Behaviour' helps address other complex problems of the Court, firstly, it enables the Researcher to understand the Behaviour of the Court established through its jurisprudence. Secondly, how the Behaviour as an organisation affects the Court's internal make-up such as its staff (group dynamics) and their motivation[7] towards the accomplishment of their duties. Thirdly, to understand the Behaviour of the Court in the context of external stake holders such as members and non-member States. Consequently, how the Courts behaviour determines or motivates these external elements leading to the Court's acceptance thereby improving credibility and legitimacy. Acceptance of the Court's decisions increases the possibility of avoiding truancy in obligations to the Court in-respect of payments of subscriptions and or donations to the Court to carry out some of its operations. The Behaviour of the Court like any other organisation does affect its

[3] See definition of a political organisation in Chapter 2 of this research at 2.19 defining an organisation.
[4] ICCSt (n 2) Article 4 (1) The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
[5] Abimbola Oluwofoyeku, *Suing Judges A Study of Judicial Immunity* (Clarendon Press, Oxford US)204,205.
[6] Hans-Peter Kaul, 'The International Criminal Court Current Challenges and Perspectives' [2011] *Salzburg Law School on International Criminal Law.*
[7] Gerald A Cole, *Organisational Behaviour Theory and Practice* (Continuum Publishers, London 1995)3-10.

performance internally and or externally. An attempt to probe the Organisational Behaviour of the Court and proffer some solutions could to some extent minimise the Prosecutorial challenges the Court faces. The Research also establishes the need to breed a new life into and reinvigorate the Court in line with new challenges. Much of the Criticisms of the ICC originate from within the African Union (AU) member states.[8] At the inception of the Court, many AU member States actively supported negotiations that created the Rome Statute.[9] However, the AU became progressively opposed to the Court's behaviour after, the first major change in the AU-ICC relationship occurred after the Court opened investigations in 2005 into Sudan (a non-member state) following a United Nations Security Council (UNSC) referral. The issuance of an arrest warrant for Sudanese President Omar Al-Bashir led many AU Member States to oppose the warrant.[10] Thereafter, the relationship between the two bodies significantly deteriorated, posing a major problem for the ICC, which derives its authority and legitimacy from the support of the international community and individual States. African member states, specifically, represent the greatest conglomeration of ICC member States on any one continent, numbering about 33 in total, consequently their support play a vital role in maintaining the ICC's legitimacy; as such, the ICC must address concerns raised by the AU and its members.

Court Management Recommendation- revitalising the ICC's image starts at the Core of its internal structure, namely the ASP and the four organs of the Court.[11] Although, the organs of the Court are separate branches, they should work fairly independently (to provide checks and balances) and collaboratively to progress performance and meet high standards and obligations expected of them in the Statute.[12] Improving the internal relationships within the ICC, specifically the affairs of the ASP, the Office of the Prosecutor (OTP) and the Judges, will lead to respect and motivation creating legitimacy, and credibility from internal members, external member and non-member states.

[8] Simon Weldehaimanot, 'Arresting Al-Bashir: The African Union's Opposition and the Legalities,' (2011) 19 African Journal of International and Comparative Law 208.
[9] Max Du Plessis, *The International Criminal Court that Africa wants*, Institute for Security Studies August 2010 <www.issafrica.org> accessed 6 July 2014.
[10] Report of the African Union High-Level Panel on Darfur (AUPD) PSC/AHG/2(CCVII) Peace and Security Council 207th Meeting at the Level of the Heads of State and Government 29th October 2009 Abuja Nigeria.
[11] ICCSt (n 2) Article 34 Organs of the Court.
[12] Milan Markovic, 'The ICC Prosecutor's Missing Code of Conduct' (2011) 47 Texas International Law Journal 201.

It is time for the Court's Registry an organ of the Court[13] to be fairly more independent[14] to perform more effectively and encouraged to develop a special department or a lobby-committee to liaise particularly with non-member States and other important stake-holders in the interest of the overall objective of the Court in actualising her mandate. This committee could be an extension to the already overreaching programme currently designed for the grassroots where the Court is present, however the Committee will operate at a higher level and more relevant to induce more ratification by all and sundry. Other relevant duties could be to lobby for more funds even from established blue-chip companies to actualise the Court's programmes and discuss with States Parties that are less positive about their contributions to the Court. Destructive violence that shocks humanity is usually not a single event, but a process developing over time requiring planning and resources. The reality is that egregious crimes could be prevented by acting and mobilising on adequate information as well as having courage and political will to act as at when due not after atrocities.

Recommendation in Respect of the Assembly of State Parties- the Rome Statute states that: the ASP is the Management, Legislative and Oversight body of the ICC.[15] The Assembly's duties include, but not limited to, matters of budgetary concerns, making appropriate amendments to the Statute and providing oversight management to the Organs of the Court.[16] Consequently, the ASP acts as the check to balance the Actions of the Organs of the Court. However, in the first few years of the ICC, the absence of effective management from the ASP is prevalent as it failed to effectively manage and monitor the activities of the Organs, resulting in a sub-par output from the OTP; a lack of cohesion within the Divisions of qualified and knowledgeable judges and investigators.[17] It is time for the ASP to re-organise and establish a more permanent management structure such as the Bureau or a subsidiary to it if necessary under Article 112 (4) (an administrative department to run the day to day activities of the Court separately, recruit, plan, train and develop a bank of professionals/investigators in regions, this could over a period reduce over dependence on State Parties) an expansion of the already laid down structure responsible directly to the ASP like the OTP, rather than the current situation where the Prosecutor as a line manager; also

[13] ICCSt (n 2) Article 34.
[14] ibid Articles 43 (2) (4).
[15] ibid Article 112 Assembly of States Parties.
[16] ibid.
[17] Milan Markovic, 'The ICC Prosecutor's Missing Code of Conduct,' (2011) 47Texas International Law Journal 201.

acts in support/operations capacity of the Court is a conflict of roles and could to a reasonable extent undermine performance of the Role of the OTP. Additionally, the Statute establishes four organs of the Court however, further reading of the Functions of the Registry highlights that the Registry is not that independent, from the Appointment of the Registrar to a host of its other functions largely subsumed into the Presidency;[18] this also leads unconsciously to ineffectiveness.

The ASP is the only body able to hold the OTP accountable for poor performance, as well as adequately address the perception of bias against the Court, but its passive behaviour contributes to the increasing negative sentiments that further undermine the Court. The Assembly must take action by mobilising States Parties that are members of the UN General Assembly and on the Security Council to open up a discussion on UN funding for referrals. It is critical that State Parties build on their collective efforts to help the Court secure the resources it needs to carry out all relevant activities and if necessary diplomatic engagement. The ASP must resolve to make the ICC a workable endeavour. The world would be better-off, with an efficient and effective ICC and effort should be made to protect the determination that led to its inauguration as a court. Holding insensitive leaders accountable through the ICC is important to secure the interest of the Vulnerable anywhere in the world to sustain peace and security for mankind is essential to humanity. The AU leaders and its members should be as always at the forefront of championing the course of the ICC in this critical time. Though a very difficult task to accomplish, but there should be a push for further amendments to the Statute or a creation of an additional legal framework under Article 121 ICCSt to establish enforcement procedures. Justice without enforcement (Blaise Pascal) is no justice. The achievement of improved credibility and legitimacy starts when the leadership of the Organisation initiates a revitalisation or modification of its actions to adequately fulfil its obligations, duties and mandates. The effects will trickle down to all other divisions.

Legal Case Management Recommendation- this thesis establishes that the Court must improve on its knowledge and methodologies for managing the life cycle of cases more effectively; to develop sophisticated information management workflow practices that are tailored to meet specific needs and requirements the Legal field. The Challenge to deliver results at lower costs with greater effectiveness, thus the OTP must develop practice-specific processes and utilise contemporary technologies to assist in meeting such challenges. Law

[18] ICCSt (n 2) Article 38 (3).

practice management processes and technologies include case and matter management, time, litigation support, research, communication, collaboration, data mining, modelling, data security, storage, and archive accessibility. A credible investigation report generation approach would resolve a lot of problems at trial proceedings and on the field. Improving cooperation and communication within investigation teams is important to streamline the investigative process resulting in faster and better outcomes while using fewer resources to accomplish objectives. It is important for investigators to work together as a unit, share facts, information and harness resources for better results that would lead to better prosecution. Working disjointedly also undermines the plight of victims.

Success in carrying out international justice is important, that the ICC holds perpetrators of the most serious international crimes accountable and focus on prosecuting 'those who bear the greatest responsibility for the most serious crimes, based on the Evidence that emerges in the course of an investigation.'[19] Generally, 'those most responsible' are considered to be the highest-ranking individuals in the chain of command that was responsible for the alleged crimes.[20] While the official charging strategy of the OTP as explained in its prosecutorial Strategy reports is adequate, the charging strategy in practice has been too narrow both in terms of who is indicted and which crimes alleged perpetrators are charged with. In order to achieve justice, the Charges brought against alleged perpetrators in any given situation must be a representative sample of the scope of crimes. The case of Lubanga, for example, did not include charges of sexual violence, murder, pillaging, etc even though these crimes were allegedly committed, resulting in many victims' resentment toward the ICC since they were excluded from the Justice process as a result of the narrow charging strategy. The ICC investigators must also conduct investigations that encompass various parties to the conflict. The policy of focusing on 'those most responsible' is ideal because this tactic more directly addresses the root of the conflicts, for this reason the OTP must target 'those most responsible' not only from rebel groups, but also from other parties to the conflicts. Situations in which the OTP only prosecute one side, such as in the DRC, Ivory Coast and Uganda, have damaged perceptions of the Court's credibility by generating ideas that the cases reinforce 'victor's justice' and are therefore politically biased. If members of the losing party in a

[19] ICC-OTP, Prosecutorial Strategy, 2009-2012, 1 Feb 2010.
[20] ICC-OTP, Prosecutorial Strategy, 2009-2012, 1 Feb 2010, The Hague 6; Erika Murdoch, 'The Office of the Prosecutor: Charging Strategy' in Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] Jackson School of International Studies Task Force Report University of Washington.

conflict are the only ones punished for egregious crimes committed, and the winning party goes free, then the process is perceived as merely a political extension of the conflict a 'victor's justice' rather than a true justice guided by an independent pursuit of truth.[21]

Investigators must adhere to the policy of investigating; charging those most responsible by bringing charges for crimes representative of the scope and gravity of criminality in each situation, justice will not be fully served and the legitimacy of the Court will be jeopardised if anything less. At stake is the success of the ICC, not only the survival of the institution itself, but also the legacy of international criminal justice as a fair and effective method to deliver justice, discourage impunity and promote post-conflict peace. If the ICC is to achieve its overall goals of upholding 'quality justice' and developing as a 'well-recognised and adequately supported institution,'[22] the charging strategy must be fair, unbiased and representative.

Recommendations in Respect of the Judges of the Court- the thesis suggests achieving a sensible division of labour and cohesion between the Pre-trial and Trial chambers is important so that the Trial Chamber can utilise the findings of the Pre-Trial Chamber in order to avoid repetition when taking evidence at trials. Continuing professional development (CPD) training is also recommended if not already in place for the Judges. The thesis also recommends that the Judges come up with rigorous and impeccable analyses that will positively contribute to the development of international criminal justice particularly on issues with grey areas and yet to be settled in international criminal law.

Recommendations in Respect of the Office of the Prosecutor- the OTP has been a major source of concern, a main organ of the Court, significant internal changes are essential in order to improve productivity and subsequently the legitimacy and credibility of the Court. To make an internal overhaul, the ASP needs to provide adequate oversight on the OTP (Article 112 (2) (B) ICCSt) being the only committee with such authority. It is critical that the ASP exacts its authority to monitor the Independence of the OTP otherwise the Court will continue to perform sub-optimally in delivering justice. Consequently, developing high ethical standards would enhance cohesion and high performance for all prosecutors occupying the office. It would also help to 'provide a common framework for conceptualising

[21] ibid.
[22] ICC-OTP. Outlining the Prosecutorial Strategy – Fatou Bensouda, Deputy Prosecutor for Prosecutions, Second public hearing, Session 3, 18 Oct 2006, New York.

the Prosecutor's obligations under the ICC Statute' and 'would lower the likelihood of major ethical disagreements and promote goal congruence within the OTP similar to the Code of Conduct for counsels.'[23] Additionally, it would unify the Court and enhance credibility, which are fundamental challenges of the ICC.

The Statute provides that the Prosecutor has a term of nine years and ineligible for re-election.[24] Debatably, the length of the term of office and the prohibition from re-election are challenging, a nine year term could be a long period for a person to be in charge of the OTP. The Prosecutor could become too comfortable in office resulting in a dysfunctional performance. The prohibition of the Prosecutor running for a second term could also be limiting, losing focus or lack motivation to perform up to standard. Hence, amendment for a shorter term of four or five years is recommended to keep up a sustained performance level and a possibility of a re-election after the expiration of the first term. This regenerates motivation that keeps the Prosecutor inspired to fulfil the Roles expected for a potential re-election. The success at the International Criminal Tribunal for Yugoslavia is worthy of emulation for the ASP to evoke, in favour of a five year term with the potential to renew for an additional term, this change would afford the ASP adequate checks on the OTP without intruding on its independence. It will motivate the Prosecutor to fulfil the Requirements outlined in the Statute and the Code for the OTP. The Prosecutor as the head of the OTP needs to be apt. The output of the OTP needs to take significant strides in producing successful trials to increase legitimacy and credibility.[25]

With all formal investigations into situations focused on Africa, the gravity threshold can appear to be applied selectively and justice only brought against less powerfully inclined states. The OTP, by taking into account qualitative factors when conducting preliminary examinations of situations and clarifying the use of gravity in determining admissibility would improve the Court perceived legitimacy, as its decisions would be of a more objective nature. In order to limit self-referral from becoming a 'political tool' used by governments who want to undermine opposition and turn the ICC into a court of first instance, the Prosecutor needs to investigate various sides responsible for the conflict equally and be guided by evidence only, rather than by political affiliations and outside pressures.

[23] ICC-ASP, 'Code of Professional Conduct for counsel,' ICC-ASP/4/Res.1, 2 December 2005.
[24] ICCSt (n 2) Article 42(4).
[25] Chidi Oguamanam, 'African leaders and the International Criminal Court' The Punch (Nigeria) Newspaper, 12 December 2013.

First, without amending the Statute, the OTP must internally raise its standards of proof. It is common for the OTP to go to the Pre-Trial Chambers (PTC) as soon as it believes it has sufficient evidence to meet the minimally required standard of proof. Meeting the lowest standard of proof is risky because it means that the OTP will need to continue to look for more evidence to meet subsequent standards as the case progresses to trial. This is more likely to be avoided if the OTP raises its standard to establishing 'beyond reasonable doubt' before approaching the PTC.

Lastly, having continuity and stability amongst larger and older investigation teams will ensure investigators gain a deep contextual knowledge of a conflict and the ability to gather more reliable evidence that will stand up to scrutiny in court. Above all, 'the Office of the Prosecutor is the Engine of the Court; must develop an effective body and systematic efforts for professional investigation for prosecuting international crimes and effective cooperation are the fuel for the entire Court.'[26]

Recommendations Relating to Enforcement of the Court's Decision- the Court's lack of its own enforcement mechanism and the diverse geographic range of its work entail dependence on States cooperation to carry out the work. The Court stated in its 2009 and 2011 reports that the lack of cooperation by States impairs its efficiency, performance, and the Integrity of legal proceedings.[27] In recent years the Lack of cooperation by states has emerged as a major problem for the Court. The ICC relies on domestic judicial systems and their law enforcement mechanisms to carry out its mandates. Thus, the success of the OTP investigations and prosecutions depend on the willingness of the International Community to assist the Court. As a result, the behaviour and reputation of the Court is essential, as it has the ability to boost or discourage this cooperation.

The primary responsibility to prosecute using the Substantive Crimes under the Statute lies with States, but not subject to detailed treaty provisions on mutual legal assistance, including extradition, between states. Hence, prosecution of these crimes in national courts are often hindered by the lack of an international legal framework for cooperation between States. The lack of detailed treaty provisions regarding mutual legal assistance for the prosecution of core

[26] Hans-Peter Kaul, The International Criminal Court (Current Challenges and Perspectives) a keynote address by the Second Vice-President of the International Criminal Court, delivered at Salzburg Law School on International Criminal Law, 8 August 2011

[27] ICC-ASP, *Report of the Court on cooperation*, ICC-ASP/10/40, December 21, 2011, New York; <http://www.icccpi. Int/iccdocs/asp> accessed 7 July 2014.

crimes creates a gap, efforts should be made through the ASP on how to fill this gap. Consequently, it is recommended that sanctions (no matter how light) should be designed and attached to behaviour of State Parties who refuse to cooperate and carry out roles and obligations expected of them. Mindful of the fact that sanctions could be counterproductive at times, but it should also be noted that States are conscious of the negative perceptions derivable or accruing from such disciplinary actions.

Recommendation In Respect of Restorative Justice- following an effective and fair charging strategy is critical for the OTP to maintain credibility and proper dispensation of restorative justice. Charging relatively 'insignificant' perpetrators can contribute to perceptions that the Court is not effective and leaves victims unsatisfied. Additionally, charging only individuals who represent one party to the conflict risks undermining perceptions of the Court's impartiality. In regards to which crimes are charged, the OTP has tended to bring a select charge in the interest of time and cost cutting. The charges that the OTP has chosen have not always reflected the scope of crimes committed or represented the main types of victimisation. This has left gaps in justice served to victims, and has undermined perceptions of the Court's legitimacy in civil society and the international community.[28] Furthermore, charging a section of the conflict and letting others get away sets the Stage for future conflicts and does not adequately serve justice as victims of the limited crimes charged will not be encompassing or representative of all victims and therefore limit the dispensation of restorative justice particularly through the mechanism of Trust Fund for Victims.

Recommendation on Outreach Strategies- for the Court to fulfil its mandate, roles and judicial activities it must be understood by a variety of audience hence, the Court's outreach programme has been created to ensure that affected communities in situations subject to investigation or proceedings can understand and follow the work of the Court through the different phases of its activities. The Outreach serves as a critical function for the ICC in developing a network of communication between the Court and the victims far away from The Hague. By spreading accurate knowledge of the judicial proceedings within situation countries, the outreach unit increases the scope of justice for victim communities, eases the investigation process, and strengthens the legitimacy of the Court. The Court faces three main challenges in respect of effective outreach: low levels of awareness, misconceptions, and the

[28] Erika Murdoch,' The Office of the Prosecutor: Charging Strategy' Strategies' 'The International Criminal Court, Confronting Challenges on the path to justice'[2013] Jackson School of International Studies Task Force Report.

process of leaving countries post-trial. It is important that the ICC improves on its current strategies and resolve these issues in order to fulfil the Court's mandate.[29]

The Berkeley Human Rights Centre conducted evaluations of outreach efforts in Uganda (2010), CAR (2010), and the DRC (2008). The rate of awareness and understanding remains low for all countries. The outreach unit has been slow to combat these impressions thereby delegitimising the ICC in the eyes of many such as in Côte d'Ivoire. However, the Research notices a considerable improvement to the 2010 report above but a lot still needs doing in this respect to shore up support for the Court. Outreach plays an invaluable role in the work of the Court. The future of the ICC hinges on its ability to obtain global legitimacy among States and their people. Outreach serves a critical function in improving understanding and demand for international justice, especially in countries where the Rule of Law is weak. Making the outreach unit more effective, means more communities will understand the mission of the Court and support its roles thereby shore-up legitimacy for the Court.[30] Moreover, it establishes and fosters sensitive relationships with victims. Although, the ICC could be regarded as a punitive organisation but victims are central to the Court's mandate and success. It is obligated to provide restorative justice through trial participation, reparations, and the Trust Fund for Victims, all these would be enhanced with improved Outreach Strategies.

Could Amnesty Be An Option/Recommendation Under the Rome Statute?- the primary objective of the ICC is to stop impunity and deliver justice; in achieving these objectives the primary responsibility to prosecute perpetrators of unimaginable atrocities under the Statute lies with State Parties under the Complementarity Regime (Article 17 ICCSt). The Statute is partly designed to overcome problems associated with the Concurrent system or primacy of the *ad hoc* tribunals and establish a better relationship with the domestic transitional justice institutions and respect State's sovereignty. Under the Rome Statute it will be a travesty of justice if national proceedings are designed to shield perpetrator of crimes under whatever sham,[31] in an attempt to wipe the slate clean. Article 16 already provides for the deferment of trials if the international community through the Security Council feels a trial by the ICC would be against the peace and justice of the international community.

[29] Allie Ferguson, 'From the courtroom to the field: ICC Outreach Strategies' 'The International Criminal Court, Confronting Challenges on the path to justice'[2013] Jackson School of International Studies Task Force Report.
[30] Thomas Franck, The Power of Legitimacy Among Nations (OUP Oxford 1990) 16.
[31] ICCSt (n 2) Article 20.

It should also be noted that the ICC is a court of last resort principally designed to bring to justice those who normally would have escaped it. The Court will only act as a last resort in cases where national criminal law systems are unwilling or genuinely unable to carry out the investigation or prosecution.[32] The Researcher does not necessarily expect the Court to be inundated with the responsibility of granting amnesty in its attempt to deliver justice. Amnesty should be a prerogative of National jurisdiction such as the South African approach with a transparent intention to heal and build nationhood rather than a cover-up. Consequently, an opportunity for this is possible under Article 17 of the Statute. Whilst Article 20 ICCSt does not preclude the ICC from exercising jurisdiction over the conduct of persons who have been granted amnesty via truth commissions[33] and amnesty tribunals,[34] Article 53 of the Statute also permits the Prosecutor to abandon an investigation, if it would not serve the interest of justice.

Besides, accepted treaty norms and principles of customary international law deny the legality of amnesties offered under national law,[35] and any scope of national amnesty laws to expunge criminal or civil liability of human rights violators is ultimately unsustainable under international law.[36] Hence, it is recommended that the ICC should not be used as a conduit of escape for perpetrators or to exonerate serious human rights violators from liability for criminal conduct under international law.

6.3 Future of Prosecutions at the International Criminal Court

After over 50 years of legal and political permutations, in 1998 the Rome Statute, the instituting treaty of the ICC regarded as one of the most important treaty/development in international law since the adoption of the UN Charter (1945) established the first permanent International Criminal Court. By enabling prosecution under Article 5 of the Statute, the ICC upholds the idea of maintaining an end to impunity for egregious crimes, for the Court to fully realise its potentials, it must show that it can be a successful permanent institution with clear standards, goals, successful prosecutions and convictions of the Accused in different parts of the world. The establishment of the ICC demonstrates the need for a world criminal court. Restricting the Role of the ICC by complimentary, the Rome Statute and the States that

[32] ibid Preamble paragraph 10 and Article 17 (1) (a).
[33] South African truth commission.
[34] M Arsanjani 'Jurisdiction and Trigger Mechanisms of the ICC' in Hebel, Lammers & Shukking (Eds) *Reflections on the International Criminal Court* (TMC Asser Press 1999) 73.
[35] Ben Chigara, *Amnesty In International Law* (Longman; London 2002).
[36] ibid.

are party to the Treaty created a 'last resort' Court that will be utilised if a country is unable or unwilling to prosecute serious international criminals. It is hoped that in due course the ASP would consider through an amendment the inclusion of 'Terrorism' as a crime in its own right to the list of substantive crimes under ICC jurisdiction. Notwithstanding, the difficult status of terrorism in international law as a crime, additionally, in not too distant future, the surest and swiftest approach for the Prosecution of terrorists will be before an international tribunal with extensive international backing, The ICC would represent the best tool of the international community to combat terrorism by bringing terrorists to justice.[37] Furthermore, the future of the Court should encompass prosecution of human trafficking arguably regarded as modern slavery, a growing issue, affecting men, women and children. This could come under an expanded Article 7 of the statute on the Crime against Humanity, despite the provisions contrary to slavery and other inhumane acts already within the Article. Although, the restriction and interpretation bothering on the policy and state like elements under this Article could be cumbersome to a possible prosecution as it is yet unsettled under international criminal law. It is hoped that this element is settled either through case laws by the Court or through an amendment procedure as specified in the legal framework.

International acceptance, flexibility and adaptability of the Court and the Statute are needed for the overall success and survival of the Court in a constantly changing world. These would ensure the long-term success and stability of the Court. Adjustments have to be made to consolidate a foothold in the global community. Although again, the ICC is a necessary tool for building peace and stability into the future, but as of now, one of the main goals for the Court should be to prevent itself from becoming irrelevant in this process by remaining apolitical. Participation from powerful nations such as the United States and the other permanent members of the Security Council is essential to the survival and effectiveness of the Court, a full universal membership would be an appropriate future to recommend for the Court, in the endless struggle between traditional power politics and crucial efforts to strengthen the Rule of law within the international community. The significance of the International Criminal Court and its growing impact on the rights, duties; interests of numerous actors on the international scene and its increasing scope of authority calls for a deeper and more proactive inquiry about the way the Court achieves her intended purpose. The Thesis therefore suggests possible reviews into future annexation of the International Criminal Court as a permanent, independent and judicial arm of the United Nations to

[37] See UN Doc S/RES/1757 (2007) Statute of the Special Tribunal for Lebanon.

strengthen the Court to achieve its purposive goals with the power of the United Nations behind it, this is worthy of consideration. After all, the genesis of the Court emanates from the United Nations, and so far the International Court of Justice (ICJ) an organ of the United Nations has performed independently and well enough to assure the International Community that annexing the ICC as a permanent criminal court and an independent organ of the United Nations leaves no doubts that it would achieve its aims better.

This thesis also seeks to motivate relevant stakeholders to engage in a serious debate about what justifies the authority of the International Criminal Court and to what extent that authority should be. The thesis adds to the body of literature and knowledge in the field of Public International Law (International Criminal Law) and better administration of justice particularly at the International Level. The study thus establishes an intercourse between law and Organisational Behaviour. Noting that the International Criminal Court is a legal entity (Article 4 ICCSt) hence a corporate personality, a corporate personality is subject to extinction if not satisfactorily managed. Managing the International Criminal Court inside-out is a *conditio sine qua non* for its continued existence. As a legal personality it must imbibe relevant theories of successful multinational organisations if the Intention is to succeed. As an analytical paper the Thesis establishes the need for the Court and the Assembly of State parties to be more proactive in the fight against impunity and to remain dispassionate.

6.4 Final Remarks

The ICC is a milestone in international criminal justice, an era that brings perpetrators in positions of authority theoretically accountable to the International Community. However, it is yet a dream come through, the Court has been accused of being part of a neo-colonialist plot against sovereign States, the claim though arguable, has gained credence amongst Academics, States and Institutions. The African Union claim of unlawful issuance of warrant of arrest to sitting Heads of States with diplomatic immunity triggers outcry and creates a no-win situation. Hence, States have become increasingly hostile towards the ICC. On the opposing side are criticisms by non-governmental and humanitarian organisations. The AU has delegitimised the Courts authority by its refusal to comply with court orders, thus highlighted one of the Court's major weaknesses, the lack of enforcement mechanisms which leaves the Court in a precarious situation, exposing the Court's inability to oblige compliance from Member States. Without a mechanism in place to compel performance, the AU faces no

reprimand for its actions; therefore, little reason to oblige the Court in the future, to remedy the situation and avoid repetition of similar actions, the Court must improve its capacity to compel compliance from Member States. The crux of the matter from the point of view of this research is the enforcement power of the Court. Understandably, expressly avoided during the creation of the Statute due to States sovereignty, this is an area that needs reassessment and possibly a review by the ASP in order not to render the Court a toothless bulldog. To maintain widespread support within the international community, the Court needs to maintain political neutrality, avoiding perceptions of victor's justice will improve the willingness to cooperate and assist in its proceedings. Investigations and indictment must be perceived as fair and representative. States are more likely to support the ICC in its work if it is perceived impartial and independent.

Violent atrocities continue unabated where poverty is rife with serious human rights and the Rule of law subject to abuses. The enormous resources required to prosecute violations of international criminal law, requires the coming together of the international community to make the ICC a workable and acceptable institution for the betterment of mankind supporting the Theories of globalisation that the world is in did a global village. The Aircrafts (MH 370, MH17 and others) lost brought the International Community together as search parties. Additionally, the Chibok girls (bring back our girls campaign) adopted from Nigeria brought the International Community together. The ICC must not be allowed to collapse, it should be reformed to achieve its intent and purpose. A world order of peace and justice is best served by co-operation not confrontation; the ICC has a critical role to play; there is a need for some trade-off between underlying principles of States sovereignty and protecting the Hegemony of humanity.

Bibliography

Textbooks

Annan K, Lee S R and Lee H C T, *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations and Results* (Martinus Nijhoff Publishers, Leiden; 1999)

Arnold R, '*Terrorism as a Crime Against Humanity under the ICC Statute', in International Cooperation In Counter Terrorism, in International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* by Giuseppe Nesi (ed) (Ashgate, US 2006)

Arsanjani A, 'Reflections on the Jurisdiction and Trigger mechanism of the International Criminal Court,' in H A M Von Hebel et al (ed), *Reflections on the International Criminal Cour*t (TMC Asser Press, US 1999)

Askin D K, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers, The Hague, Netherlands 2012)

Bantekas I, and Nash S, *International Criminal Law* (4th edn, Hart Publishing, England 2010)

Barker C, Grant J (eds), *International Criminal Law Deskbook* (Routledge-Cavendish Publishing, England 2006)

Barriga S, Danspeckgruber W, Wenaweser C (eds), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression 2003 – 2009* (Lynne Rienner Publishers, USA 2009)

Bassiouni M C, *The Statute of The International Criminal Court: A Documentary History* (Transnational Publishers, USA 1998)

Bassiouni C M (ed), *The Pursuit of International Criminal Justice A World Study on Conflicts, Victimization, and Post-Conflict Justice* (2 volumes, Intersentia Publishers, UK 2010)

Bassiouni C M, *International Criminal Justice in Historical Perspective: The Tension between States' Interest and the Pursuit of International Justice in the Oxford Companion to International Criminal Justice* by Antonio Cassese, Guido Acquaviva, Dapo Akande and Laurel Baig (ed) (Oxford University Press, Oxford; 2009)

Bassiouni C M, *Strengthening the Norms of International Humanitarian Law in 'The Future of International Human Rights'* (Burns H Weston and Stephen P Marks (ed)) (Transnational Publishers Inc, Ardsley, NY 1999)

Bassiouni M C, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, USA 2011)

Bassiouni M C, *International Extradition and World Public Order* (A W Sijthoff Doezastraat, Leiden, Netherlands 1974)

Bassiouni M C, *Introduction to International Criminal Law* (2nd edn, Brill Nijhoff, Leiden 2013)

Bassiouni M C, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text,* (Vol 1-3, Transnational Publishers, Ardsley, NY 2005) Vol 1, *Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes; Rules of Procedure and Evidence*. Vol 2, *An Article-by-Article Evolution of the Statute from 1994–1998,* Volume 3, *Summary Records of the 1998 Diplomatic Conference*

Becker S, Bryman A and Ferguson H, *Understanding Research for Social Policy and Social Work: Themes, Methods and Approaches, Understanding Welfare: Social Issues, Policy and Practice* (2nd edn, Series Policy Press, UK 2012)

Bedi D S, *Extradition in International Law and Practice* (Buffalo Dennis, NY 1968)

Bedont B, *'Gender-Specific Provisions' in Essays on the Rome Statute of the International Criminal Court,* Volume 1(edited by Flavia Lattanzi and William A Schabas) (il Sirente, Italy 2003)

Behrens P, Henham R (eds) *Elements of Genocide* (Routledge, New York 2012)

Bengoetxea J, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence,* Oxford European Community law series (Clarendon Press, Oxford University Press, USA 1993)

Bergsmo M, *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjůrn Eide* (Martinus Nijhoff, Boston: Brill Academic 2003)

Bermann A G, Goebel J R, Davey J W, Bermann, Goebel, Davey, and Fox's *Selected Documents Supplement to Cases and Materials on European Union Law,* (American Casebook) (3rd edn, West Academic, USA 2010)

Bingham T, *The rule of law* (Penguin, London 2010)

Brooks I, *Organisational Behaviour: Individuals, Groups and Organiasation* (financial Times Prentice Hall Publishers 2009)

Bryman A, Social Research Methods, (4th edn Oxford University Press, Oxford 2012)

Cassese A and Gaeta P, Cassese's, *International Criminal Law* (3rd edn, Oxford University Press, Oxford 2013)

Cassese A, Acquaviva G, Fan M, Whiting A, *International Criminal Law: Cases and Commentary* (Oxford University Press, England; 2011)

Cassese A, Gaeta P, and Jones R W D J, *The Rome Statute of the International Criminal Court: A Commentary* (Volume 1, Oxford, Oxford University Press, 2002)

Cassese S, Albin Eser, Giorgio Gaja, Philip Kirsch, Alain Pellet, and Bert Swart (ed) *The Rome Statute for an International Criminal Court A Commentary* (Oxford University Press, Oxford 2002)

Cesarani D, *Eichmann: His Life and Crimes, Vintage*; London 2005.

Cheng B, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, Cambridge 2006)

Chigara Ben, *Amnesty In International Law* (Longman, London 2002)

Cole A C, *Organisational Behaviour Theory and Practice* (2nd edn, Cengage Learning, UK; 2001)

Cole A G, *Organisational Behaviour Theory and Practice* (Continuum Publishers, London; 1995)

Crawford J, Brownlie's *Principles of Public International Law* (8th edn, Oxford University Press, Oxford 2012)

Cryer *et al*, *An Introduction to International Criminal Law and Procedure: Principles, Procedures, Institutions* (Cambridge University Press, Cambridge 2007)

Cryer R, Friman H, Robinson D and Wilmshurst E, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press, Cambridge 2014)

Cryer R, *Prosecuting International Crimes: Selectivity and the International Criminal* (Cambridge University Press, Cambridge 2005)

D'Amato A, Weston B & Falk R, *International Law and World Order* (2nd edn, West Publishing Company, United States 1990)

De Gurmendi F S, 'The Role of the International Prosecutor' in Lee R (ed*) The International Criminal Court the Making of the Rome Statute Issues, Medications and Results* (Kluwer Law International, Leiden 1999)

De Tocqueville A, *Democracy In America: Historical-Critical Edition of De la de´mocratie en Ame´rique* (Vol I & II Edited by Eduardo Nolla; Translated from French by James T Schleifer, Liberty Fund Inc, Indianapolis 2009)

De-Vattel E, *The Law of Nations* (J Chitty edn, 1883)

De-Vattel E, *The Principles of Natural Law* (1758)

De-Vitoria F, De Indis De Jure Belli, (*Classics of International Law*, James Brown Scott (ed) 1964 Ocean Publication Inc, Wildy & Sons London)

Dicey A V, *Introduction to the Study of: The law of the Constitution* (8th edn, Macmillan, London 1885)

Dinstein Y, War, *Aggression and Self-defence* (5th edn, Cambridge University Press, Cambridge 2012)

Drost N P, Genocide; *United Nations legislation on international criminal law Volume 2 of The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples* (A W Sythoff, US 1959)

Duffy E, *The 'War on Terror' and the Framework of International Lawn* (Cambridge University Press, Cambridge 2005)

Dugard J, *International Law, A South African Perspective* (4th edn, Juta Legal and Academic Publishers, South African 2011)

Dunford W R, *Organisational Behaviour: An Organisational Analysis Perspective* (Addison-Wesley, Pearson Education, Australia 1992)

Dworkin A, Gutman A, Rieff D and Mendez S A, *Crimes of War: What the Public Should Know 2.0* (W W Norton & Company, Revised edition, 2007)

Elliott C and Quinn F, *Criminal Law* (6th edn, Pearson Longman, England 2006)

Fincham R, Rhodes P, *Principles of Organisational Behaviour* (4th edn, Oxford University Press, Oxford 2005)

Franck M F, *The Power of Legitimacy Among Nations* (Oxford University Press, Oxford 1990)

Friedman L, *The law of war and history, Random House* (Random House, New York 1972)

Friedman L, *War Crimes*: (Macmillan, USA's Encyclopaedia of Crime and Justice; 2002)

Garner A B, *Black's Law Dictionary* (10th edn, Claitor's Pub Division, 2014)

George Bermann *et al*, *Cases and Materials on European Union Law* (2nd edn, 2002) (3rd edn, available in electronic form 2010)

Grotius H, *The Law of War and Peace* (1625)

Guénaël Mettraux, Sadat N L (eds), *Crimes Against Humanity and the Question of a "Policy" Element, in Forging a Convention for Crimes against Humanity* (Cambridge University Press, Cambridge 2011)

Henckaerts J M, Doswald-Beck L, Alvermann C, Dormann K and Rolle R, *Customary International Humanitarian Law Vol I Rules* (International committee of the red cross) (Cambridge University Press, Cambridge 2009)

Henkin L, *International law: cases and materials* (West Publishing Company, US 1987)

Henry A, *A Memory of Solferino* (International Committee of the Red Cross, Geneva 1986)

Hitchens C, *The Trial of Henry Kissinger* (Verso Atlantic Books, London 2002)

Janeczek E J, *Nuremberg judgment in the light of international law* (Genève, Imprimeries Populaires, 1949)

Javaid Rehman, *International Human Rights Law* (2nd edn, Longman, London 2009)

Jean-Marie Henckaerts, Louise Doswald-Beck, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict* (International Review of the ICRC, Vol 1 and 2 by Cambridge University Press 2005)

Jelena Pejić, 'Status of Armed Conflicts' in Elizabeth Wilmshurst and Chatham House (ed), *Perspectives on the ICRC Study on Customary International Humanitarian* Law (Cambridge University Press, Cambridge 2007)

Jennings R and Watts A (ed), *Oppenheim's International Law* (Volume 1, 9th edn, Longman, London 1996)

Johnstone G, Van-Ness D (ed), *Handbook of Restorative Justice* (Willan Publishers, United Kingdom 2007)

Jonathan Herring, *Criminal Law, Palgrave* (8th edn, Palgrave Macmillan, United Kingdom 2013)

Kim S Y, *The International Criminal Court: A Commentary of the Rome Statute* (Wisdom House, United Kingdom 2010)

Kittichaisaree K, *International Criminal Law* (Oxford University Press, USA 2002)

Kleffner K J, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (The International Courts and Tribunals Series, Oxford University Press, Oxford 2008)

Knieriem A V, *The Nuremberg trials* (Regnery Bailey & Swinfen, Chicago 1959)

Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, Cambridge 2003)

Knut Dörmann, *War Crimes under the Rome Statute of the International Criminal Court, with a special focus on the Negotiations on the Elements of Crimes in Armin von Bogdandy and Rüdiger Wolfrum* (Eds) Max Plank Yearbook of United Nations Law, volume 7, 2003, (Koninklijke Brill NV Netherlands, Volumes 1-17, 2013)

Kolko G and Lifton J R (ed) *Crimes of War* (Random House, New York 1971

La-Haye E, *War Crimes in Internal Armed Conflicts* (2nd edn, Cambridge University Press, Cambridge 2010)

Lee S R (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, USA 2001)

Lemkin R, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress* (Carnegie Endowment for International Peace, Washington D C 1944)

M Bergsmo and J Pejic, 'Article 15 Prosecutor' in O Triffterer (ed), *Commentary of the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd edn, C H Beck, Hart, Nomos 2008)

Martin L Friedland, *Double Jeopardy* (Clarendon Press, USA 1969)

Maurice Keen, *Chivalry Yale Nota Bene* (illustrated edition, Yale University Press, US 2005)

May L, *Crimes against Humanity: A Normative Account* (Cambridge Studies in Philosophy and Law) (Cambridge University Press, Cambridge 2005)

McDougal S M, Lasswell D H and Chen L, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press, US 1980)

McGoldrick D, Rowe P and Donnelly E (ed) *The Permanent International Criminal Court: Legal and Policy Issues: 5* (Studies in International Law, Hart Publishing, USA 2004)

Mettraux G, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, Oxford 2006)

Mohamed M EL Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Brill, Leiden 2008)

Morgan G, *Images of Organisations* (4th edn, Sage Publications, New York; 2006)

Mullins J L, *Management and Organisational Behaviour* (10th edn, FT Publishing International, England 2013)

Murphy D S, *Principles of International Law* (2nd edn, Thomson West Academic, London 2012)

Olásolo H, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff Publishers, Leiden 2005)

Olowofoyeku A A, *Suing Judges, A Study of Judicial Immunity* (Oxford University Press, New York 1993)

Ormerod D, *Smith and Hogan's Criminal Law* (13th edn Oxford University Press, Oxford 2011)

Packer L H, *The Limits of Criminal Sanction* (Stanford University Press, USA 1968)

Pascal B, *Thoughts on Religion and Philosophy* (William Collins, Glasgow edition 1838)

Paust J J, Bassiouni C M, et al, *International Criminal Law – Cases and Materials* (4th edn, Carolina Academic Press, USA 2013)

Paust J J, Bassiouni C M, Scharf P M, Gurule J, Sadat L, and Zagaris B, *International Criminal Law: Cases and Materials* (3rd edn Carolina Academic Press, US 2006)

Paust J J, Van Dyke M J, Malone A L, *International Law and Litigation in the US* (American Casebook Series, 3rd edition, West Group, USA 2009)

Pictet J, *The Geneva Conventions of 12 August 1949: Commentary* – Volume I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (ICRC, Geneva 1952)

Podgor S E, Trombley R G, Clark S R, *Understanding International Criminal Law* (3rd edn, LexisNexis, USA 2012)

Rawls J, *A Theory of Justice* (Harvard University Press, Reissued edition, US, 2005)

Richard W Dunford, *Organisational Behaviour: An Organisational Analysis Perspective* (Addison-Wesley, Pearson Education, Australia 1992)

Rifaat A M, *International Aggression: A Study of the Legal Concept: Its Development and Definition in International Law* (Prometheus Books, United Kingdom 1979)

Rittenberg L and Tregarthen T, *Principles of Microeconomics* (Flat World Knowledge, USA 2012)

Roberts A & Guelff R, *Documents On The Laws of War* (3rd edn Oxford University Press, Oxford 2000)

Robinson D, 'The Elements of Crimes Against Humanity' in Roy S Lee ed, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, USA 2001)

Robinson N, *The Genocide convention: a commentary, Institute of Jewish Affairs, World Jewish Congress* (New York 1960)

Rollinson D, *Organisational Behaviour and Analysis: An Integrated Approach* (4th edn Pearson Longman, England 2008)

Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc, USA 2001)

Sadat N L, Carden S R, *The New International Criminal Court: An Uneasy Revolution*, Volume 99 of Working paper series (Washington University School of Law, USA 1999)

Sadat N L, 'Forging a Convention for Crimes Against Humanity' in David Keane and Yvonne McDermott (ed) *The Challenge of Human Rights* (Cheltenham, Edward Elgar, 2012)

Sadat N L, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (International & Comparative Criminal Law, Transnational Publishers Inc, USA 2002)

Sassòli M, Bouvier A A, Quintin A, *How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law* (Volume I, 3 edition ICRC, Geneva 2011)

Scaliotti M, *Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility (Mémoire de maîtrise en droit international)* (Université du Québec à Montréal 2001)

Schabas A W, *An introduction to the International Criminal Court* (4th edn Cambridge University Press, England 2011)

Schabas A W, *Crimes Against Humanity: The State Plan Or Policy Element* (Martinus Nijhoff, Leiden 2008)

Schabas A W, *The International Criminal Court A Commentary on the Rome Statute* (Oxford University Press, New York 2010)

Schabas A W, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge 2006)

Schabas W, *Genocide in International Law The Crimes of Crimes* (2nd edn, CUP, Cambridge; 2009)

Scheffer D, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, New Jersey 2011)

Scott Brown James (ed), *Classics of International Law On the law of War* (Oceana Publication Inc, Wildy & Sons Ltd, New York 1964).

Shaw N M, *International Criminal Law* (6th edn Cambridge University Press, Cambridge 2008)

Solis D G, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, Cambridge 2010)

Stahn C and M El-Zeidy M, *The International Criminal Court and Complementarity 2 Volume Set: From Theory to Practice* (Cambridge University Press, Cambridge 2011)

Stahn C, Van den Herik L, (ed), *Future Perspectives on International Criminal Justice* (TMC Asser Press, The Hague, Netherlands 2010)

Steans J, *Gender and International Relations* (3rd edn Polity, United Kingdom 2013)

Steinberg H R, (ed), *Assessing The Legacy of The ICTY* (Martinus Nijhoff, The Hague 2011)

Stone J, *Aggression and World Order A Critique of United Nations Theories of Aggression* (Berkeley, University of California Press 1958, Reprinted by The Lawbook Exchange Ltd 2006)

Sunga S L, *Individual Responsibility in International Law for Serious Human Rights Violations* (International Studies in Human Rights) (Martinus Nijhoff Publishers, Leiden 2012)

Sylvain Vité, *'Typology of armed conflicts in international humanitarian law, legal concepts and actual situations*' (Volume 91 No 873, International Review of the Red Cross 2009)

Taylor T, *The Anatomy of the Nuremberg Trials* (Bloomsbury Publishing, UK 1993)

Trial of the Major War Criminals, before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946 (vol 1, Military Legal Resources, Library of Congress)

Triffterer O, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Hart Publishing, Oxford 2008)

Twining W, Miers D, *How to Do Things with Rules A Primer of Interpretation* (4th edn, Cambridge University Press, Cambridge 2010)

Van Krieken J P (ed), *Refugee Law in Context: The Exclusion Clause* (TMC Asser Press, The Hague, The Netherlands 1999)

Van-Sliedregt E, *Individual Criminal Responsibility in International Law* (Oxford University Press, Oxford 2012)

Von Hebel H, Robinson D, 'Crimes within the jurisdiction of the Court', in Roy S K Lee (ed), *The International Criminal Court: the making of the Rome Statute: Issues, Negotiations and Results* (Martinus Nijhoff Publishers, Kluwer Law International, The Hague 1999)

Von-Hebel A M H, Lammers G J and Schukking J (eds) *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (Asser Press, The Hague 1999)

Vroom H V, *Work and Motivation* (Jossey-Bass, New York 1994)

Wacks R, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, Oxford University Press, Oxford 2012)

Weihrich H and Koontz H, *Management: A Global Perspective*, (10th edn McGraw-Hill Inc, New York 1993)

Werle G, *Principles of International Criminal Law* (3rd edn, Cambridge University Press, Asser Press, USA 2009)

Wexler S, in M Cherif Bassiouni (ed) *International Criminal Law: International Enforcement*, Volume 3 (3rd edn, Martinus Nijhoff, Leiden 2008)

Whatmore R, Kapossy B, De-Vattel (eds), *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (LF edn, 1797)

Willis F J, *Prologue to Nuremberg: Politics and Diplomacy of Punishing War Criminals of the First World War* (Contributions in Legal Studies, Greenwood Press, Westport 1982)

Wilmshurst E (ed), *International Law and the Classification of Conflicts* (Oxford University Press, Oxford 2012)

Articles

Abass A, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933

Abass A, 'Proving State Responsibility for Genocide: The ICJ in Bosnia v Serbia and the International Commission of Inquiry for Darfur' (2007) 31 *Fordham International Law Journal* 871

Akande D, 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong' [2011] EJIL Talk

Akande D, 'Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 (3) *Journal of International Criminal Justice*

Akande D, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' [2010] *Oxford Institute for Ethics, Law and Armed Conflict*

Akande D, 'State Cooperation and Immunities The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' [2012] *Universiteit Leiden Grotius Centre for International Legal Studies*

Akande D, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333

Akande D, 'What Exactly was agreed in Kampala on the Crime of Aggression?' EJIL Talk (21 June 2010)

Akande D, and Sangeeta Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts' (2010) 21 (4) *European Journal of International Law* 815

Akhaven P, 'The Lord's Resistance Army Case: Uganda's Submission of the first State Referral to the International Criminal Court' (2005) 99 *American Journal of International Law* 403

Alexander Z, 'The ICTR's 'Media' Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide' (2005) 16 *Criminal Law Forum* 33-48

Alvarez E J, 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38 *Texas International Law Journal* 405, 442

Ambos K & Steffen Wirth, 'The Current Law of Crimes against Humanity' (2002) 13 *Criminal Law Forum* 1

Ambos K, 'Remarks on the General Part of International Criminal Law' (2006) 4 *Journal of International Criminal Justice* 660, 670

Ambos K, 'The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?'[2010] *Institute for Criminal Law and Justice Department of Foreign and International Law Springer-Verlag Berlin Heidelberg*

Ambos K, 'The Crime of Aggression after Kampala' (2011) 53 *German Yearbook of International Law* 463

Ambos K, and others, 'The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?' [2011] *Institute for Criminal Law and Justice Department of Foreign and International Law*

An-Na'im A A, 'Globalisation and Jurisprudence: An Islamic Perspective' (2005) 54 *Emory Law Journal* 25, 30

Arsanjani H M, 'The Rome Statute of the International Criminal Court' (1999) 93 *American Journal of International law* 22

Askin D K, 'International Criminal Court Takes on Gender Crimes' [2010] *Open Society Foundations*

Askin D K, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law Extraordinary Advances Enduring Obstacles' (2012) 21 *Berkeley Journal of International* Law 301

Askin K and Cole A: 'Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court' (2012) 16 *American Society of International Law*

Aydin Y, 'The distinction between crimes against humanity and genocide focusing most particularly on the crime of persecution' [2011] General Directorate of the European Union Ministry of Justice of Turkey

Badar E M, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity' (2004) 125 *San Diego International Law Journal* 73

Bassiouni C, 'Perspectives on International Criminal Law' (2012) 24 *International Criminal Law Network*

Bassiouni M C, 'Crimes Against Humanity: The Need for a Specialized Convention' (1994) 31 *Columbia Journal of Transnational Law* 457

Bassiouni M C, 'from Versailles to Rwanda in 75 years the need to establish a Permanent International Criminal Court' (1997) 10 (11) *Harvard Human Rights Journal* 50

Bassiouni M C, 'Human Rights in Criminal Justice: Identifying International Protections in National Constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 247

Bassiouni M C, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 *Duke Journal of Comparative & International* Law 247

Bassiouni M C, 'Legal Control of International Terrorism: A Policy-Oriented Assessment' (2002) 43 *Harvard International Law Journal* 83, 101

Bassiouni M C, 'Negotiating the Treaty of Rome on the Establishment of an International Crime Court' (1999) 32 *Cornell International Law Journal* 443, 454

Bassiouni M C, 'Perspectives on International Criminal Justice' (2010) 50 *Virginia Journal of International Law* 269

Bassiouni M C, 'The International Criminal Court: Quo Vadis?' (2006) 4 *Journal of International Criminal Justice* 421

Beittel J, 'Colombia: Background US Relations and Congressional Interest' [2012] *Congressional Research Service Report* 31

Bensouda F, 'ICC-OTP Outlining the Prosecutorial Strategy' [2006] The International Criminal Court The Hague

Bergsmo M and Ling Yan (eds) 'State Sovereignty and International Criminal Law' [2012] *Torkel Opsahl Academic EPublisher* 223

Blakesley L C, 'Wings for Talons: The Case for Extraterritorial Jurisdiction Over Sexual Exploitation of Children through Cyberspace' (2004) 50 *Wayne Law Review* 109, 135

Blanchet R C, 'Some Troubling Elements in the Treaty Language of the Rome Statute of the International Criminal Court' (2003) 24 *Michigan Journal of International Law* 647

Blattmann R and Bowman K, 'Achievements and Problems of the International Criminal Court A View from Within the International Criminal Court five Years On: Progress Or Stagnation?' (2008) 6 *Journal of International Criminal Justice* 711

Blokker N, 'A consensus agreement on the crime of aggression: impressions from Kampala' (2010) 23 *Leiden Journal of International Law* 889

Blokker N, 'The Crime of Aggression and the United Nations Security Council' (2007) 20 (40) *Leiden Journal of International Law* 867

Blumenson E, 'The Challenge of a Global Standard of Justice' (2006) 44 *Columbia Journal of Transnational Law* 801

Boås M and Fafo H A, 'The Northern Uganda IDP Profiling Study' (2008) 6 *Journal of International Criminal Justice* 711

Bohlander M, 'International Criminal Tribunals and Their Power to Punish Contempt and False Testimony' (2001) 12 *Criminal Law Forum* 91

Brittain J, 'US Strategic Interests in Latin America: the Militarization of Columbia' [2009] *Centre for Research on Globalization*

Brown B, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 *Yale Journal of International Law* 383

Bugnion F, 'Les Enfants Soldats le Droit International Humanitaire *et al* Charte Africaine des Droits et du Bien-Être de L'Enfant' (2000) 12 *African Journal of International & Comparative Law* 262

Burke-White W, 'Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration' (2003) 38 *Texas International Law Journal* 729, 750-52

Butters J, 'External Factors Affecting Situation Selection: Political Influence The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report*

Byron C, 'Genocide' [2012] *Cardiff Law School Oxford Bibliographies International Law*

Carswell J A, 'Classifying the conflict: a soldier's dilemma' (2009) 91 *International Review of the Red Cross*

Cassel D, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6 *Northwestern University Journal of International Human Rights* 304

Cassese A, 'Is the ICC Still Having Teething Problems?' (2006) *4 Journal of International Criminal Justice* 434

Cassese A, 'On Some Problematic Aspects of the Crime of Aggression' (2007) 20 *Leiden Journal of International Law* 841, 846

Cassese A, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' 12 (2001) *European Journal of International Law* 993

Cassese A, 'The ICTY: A Living and Vital Reality' (2004) 2 *Journal International Criminal Justice* 585

Cayley T A, 'Recent steps of the ICC prosecutor in the Darfur situation: Prosecutor v President the Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al-Bashir on Charges of Genocide' (2008) 6 *Journal of International Criminal Justice* 829-840

Cerone J, 'The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes Against Humanity, The Evolution of the Nexus Requirement' (2008) 14 *New England Journal of International and Comparative Law* 191

Charney I J, 'International Criminal Law and the Role of Domestic Prosecutions' (2001) 95 *American Journal of International Law* 120

Chibli M, 'The Original Sin: Terrorism or Crime Against Humanity?' (2002) 34 *Case Western Reserve Journal International Law* 245

Chris M, 'Victor's Justice: What's Wrong With Warlord Charles Taylor's Conviction' *The Atlantic* (New York, 30 April 2012)

Clark S R, 'Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court' (2010) 2 *Goettingen Journal of International Law* 689

Clark S R, 'Judgment of the International Military Tribunal for the Trial of Major German War Criminals' (1947) 41 *American Journal of International Law* 172

Clark S R, 'Negotiating provisions defining the crime of aggression its elements and the conditions for ICC exercise of jurisdiction over it' **(**2010) 20 *European Journal of International Law*

Clark S R, 'Negotiating provisions defining the crime of aggression, its elements and the conditions for ICC exercise of jurisdiction over it' (2009) 20 *European Journal of International Law*1103

Clark S R, 'Nuremberg and the Crime against Peace' (2007) 6 *Washington University Global Studies Law Review* 527

Cogan K J, 'International Criminal Courts and Fair Trials Difficulties and Prospects' (2002) 27 *Yale Journal of International Law* 111, 119

Conway G 'Ne bis in Idem in International Law' (2003) 33 *International Criminal Law Review* 217

D'Argent P, 'Immunity of State Officials and Obligation to prosecute' [2013] Proceedings of the Joint conference of the French and German Societies for International Law, Martinus Nijhoff

Danner M A, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510

Davidson R H, 'The International Criminal Tribunal for Rwanda's Decision in The Prosecutor v Ferdinand Nahimana, et al The Past, Present and Future of International Incitement Law' (2004) 17 *Leiden Journal of International Law* 505

Davis C and others, 'The Crime of Aggression and the International Criminal Court' (2011) 17 The National Legal Eagle

Dawson M G, 'Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?' (2000) 19 *New York Law School Journal of International and Comparative Law* 413

Deen-Racsmany S Z, 'The ICC Peacekeepers and Resolution 1422: Will the Court Defer to the Council?' (2002) 49 *Netherlands International Law Review* 378

DeGuzman M M, 'The Road from Rome: The Developing Law of Crimes Against Humanity' (2000) 22 *Human Rights Quarterly* 335

Di Filippo M, 'Terrorist crimes and international cooperation: critical remarks on the definition and inclusion of terrorism in the category of international crimes' (2008) 19 *European Journal of International Law* 533

Dov J, 'The Sheep in the Box: The Definition of the Crime of Aggression at the International Criminal Court' (2010) The Review Conference & The Future of The ICC Proceedings of The First AIDP Symposium for Young Penalists 131

Dralle M T, 'The Legal Nature of Security Council Referrals to the ICC and Muammar Gaddafi's Immunity from Arrest' [2011]

Drumbl A M, 'Victimhood in Our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order' (2002) 81 North Carolina Law Review 60

Du Plessis M, 'The International Criminal Court that Africa wants' (25, Institute for Security Studies, South Africa 2010)

Du Plessis M, 'The International Criminal Court that Africa wants' [2010] Institute for Security Studies August 33

Dugard J, 'Perspectives on International Criminal Law' (2012) 27 *International Criminal Law Network*

Ehard H, 'The Nuremberg trial against major war Criminals and International Law' (1949) 43 *American Journal of International Law* 223

El Zeidy M, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law* 869

El Zeidy M, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 *International Criminal Law Review* 83

El Zeidy W M, 'Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court' (2006) 19 *Leiden Journal of International Law* 741

Ellis M, 'What did the ICC Review Conference Achieve?' (2010) 2 *Equality of Arms Review* of the International Bar Association's ICC Monitoring and Outreach Programme

Ellis S M, 'Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability' (2006) 2 *Journal of National Security Law & Policy* 111

Elsea K J, 'International Criminal Court: Overview and Selected Legal Issues' (2002) RL31437 *Congressional Research Service*

Emily C and others, 'The International Criminal Court (ICC): Jurisdiction, Extradition and US Policy [2011] *Congressional Research Service*

Ferencz B B, 'Deterring Aggression by Law - A Compromise Proposal' [2001] Law not War

Ferencz B, 'An International Criminal Code and Court: Where They Stand and Where They're Going' (1992) 30 *Columbia Journal of Transnational Law* 375, 377

Ferguson A, 'From the courtroom to the field: ICC Outreach Strategies' in 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report*

Ferstman C, 'The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future' [2012] Redress16

Ford S, 'The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the International Criminal Court's Trial to Take Place at Local or Regional Chambers' (2012) 43 *The John Marshall Law Review* 715

Freeland S, 'How Open Should the Door Be? Declarations by non-states Parties under Article 12(3) ICCSt' (2006) 75 *Nordic Journal of International Law* 211

Frohlich A, 'Reconciling Peace with Justice' (2007) 30 *Suffolk Transnational Law Review* 271

Fry D J, 'Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction' (2002) 7 *UCLA Journal of International Law and Foreign Affairs* 169,190

Fulford A, 'The Reflections of a Trial Judge' (2011) 22 *Criminal Law Forum* 215

Gaeta P, 'Does President Al-Bashir Enjoy Immunity from Arrest?' (2009) 7 *Journal of International Criminal Justice* 315

Gaeta P, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 949

Garbetta C, 'The truth and the trial: victim participation, restorative justice, and the International Criminal Court' (2013) 16 *Contemporary Justice Review: Issues in Criminal Social and Restorative Justice* 193

Gasser P H, 'Internationalised Non-international armed conflicts: Case Studies of Afghanistan Kampuchea and Lebanon' (1983) 33 *American University Law Review*145

Gregory S G, 'The Trial of Peter Von Hagenbach: Reconciling History Historiography and International Criminal Law' (*University of North Dakota - School of Law (February 16, 2012)*

Gruenberg J, 'An Analysis of United Nations Security Council Resolutions: Are All Countries Treated Equally?' (2009) 41 *Case Western Reserve Journal of International Law* 469

Haffajee L R, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory' (2006) 29 *Harvard Journal of Law and Gender* 205, 208

Halling M, 'Push the Envelope – 'Watch it Bend: Removing the Policy Requirement and Extending Crimes Against Humanity' (2010) 23 *Leiden Journal of International Law* 827

Harvard Research in International Law,' Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International Law* 435

Head W J, 'Essay: What Has Not Changed Since September 11 - The Benefits of Multilateralism' (2002) 12 *Kansas Journal of Law & Public Policy* 1

Heller J K, 'Opt-Ins and Opt-Outs' [2010] *Opinio Juris*

Heller J K, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 *European Journal of International Law* 477

Henham R, 'The Philosophical Foundations of International Sentencing' (2003) 1 *Journal of International Criminal Justice* 64

Henkin L, 'Human Rights and State Sovereignty' (1995) 25 *Georgia Journal of International and Comparative Law* 31

Henshaw K and Cho E, 'Transitional Justice for the Future' 'In the International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington

Horn R, 'Coping with Displacement: Problems and Responses in Camps for the Internally Displaced Intervention' (2009) 7 Intervention International Journal of Mental Health, Psychosocial Work and Counselling in Areas of Armed Conflict 110,129

Human Rights Watch, 'Memorandum for the Eleventh Session of the International Criminal Court Assembly of States Parties' (2012) 23

Human Rights Watch, 'The secret Human Rights Watch letter to the ICC OTP' [2008]

International Crisis Group, 'Building a Comprehensive Peace Strategy for Northern Uganda' [2005]

Jackson M H and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington

Jain N, 'Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution' (2008) 6 *Journal of International Criminal Justice* 1013, 1023

Jalloh C C, 'Situation in the Republic of Kenya' (2011) 105 *American Journal of International Law* 540

Jonathan H M, 'Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court' (2003) 8 *Michigan Journal of Race and Law* 503

Kahn-Freund O, 'On Uses and Misuses of Comparative Law' (1974) 37 January No 137 *The Modern Law Review*

Katy G, 'ICC Investigative Strategy under Fire' [2008] *Global Policy Forum Institute for War and Peace Reporting*

Kaul H P, 'Construction Site for More Justice: The International Criminal Court after Two Years' (2005) 99 *American Journal of International Law* 370

Kaul H P, 'From Nuremberg to Kampala - Reflections on the Crime of Aggression' [2010] Chautauqua Institution Robert H Jackson Centre at the 4th International Humanitarian Law Dialogs Crimes against Peace - Aggression in the 21st Century

Kaul P H and Kress C, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court, Principles and Compromises' (1999) *2 Year Book of International Humanitarian Law* 143

Kaul P H, 'Breakthrough in Rome – The Statute of the International Criminal Court' (1999) 59/60 *Law and State by the Institut für wissenschaftliche Kooperation, Tübingen* 114-130

Kaul P H, 'The International Criminal Court (Current Challenges and Perspectives)' [2011] *Salzburg Law School on International Criminal Law*

Keller M L, 'The False Dichotomy of Peace versus Justice and the International Criminal Court' (2008) 3 *Hague Justice Journal I Journal Judiciaries* De La Haye 11

Kelsen H, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 *International Law Quarterly* 153

Khan Z I, 'The Rule of Law and the Politics of Fear: Human Rights in the Twenty- First Century' (2008) 14 *Buffalo Human Rights Law Review* 1

Kirgis L F, 'Clarification of Insight on Terrorist Attacks on the World Trade Centre and the Pentagon' [2001] *The American Society of International Law Insights*

Kirgis L F, 'UN Commission's Report on Violations of International Humanitarian Law in Darfur: Security Council Referral to the International Criminal Court' [2005] *American Society of International Law Insight* Addendum

Kirsch P and Holmes T J, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *American Journal of International Law* 212

Knox H J, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 19, 27

Kreb C, 'On the Outer Limits of Crimes Against Humanity: The Concept or Organisation Within the Policy Requirement'. Reflections on the March 2010 Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855

Kuschnik B, 'The Legal Findings of Crimes against Humanity in the Al-Dujail Judgments of the Iraqi High Tribunal: A Forerunner for the ICC?' (2008) 7 *Chinese Journal of International Law 459*

La Haye E, 'The Jurisdiction of the International Criminal Court: Controversies over The Precondition for Exercising its Jurisdiction' (1999) 46 *Netherlands International Law Review* 1

Lamond G, 'Do Precedents Create Rules?' (2005) 11 *Legal Theory* 1, 5-6

Laplante J L and Theidon K, 'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz' (2006) 28 *Michigan Journal of International Law* 49

Leclerc-Gagné E & Byers M, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 379

Liane A, 'Question and Answers on Victim Participation at the ICC' the Hague 22 February 2013

Liu D, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?' in Bergsmo and Ling (eds) 54

Low J G, 'Malawi Ready to Arrest Sudan's Bashir if He Comes for Summit' *Voice of America* (US 5 June 2012)

Luban D, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal of International Law* 85-167

Luban D, 'A Theory of Crimes against Humanity' (2004) 29 *Yale Journal International Law* 85

Luban D, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11 *Journal of International Criminal Justice* 505

Lüder R S, 'The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice' (2002) 84 *International Committee of the Red Cross Resource Centre* 845

Manson R, 'Identifying the Rough Edges of the Kampala Compromise' (2010) 21 *Criminal Law Forum* 417

Maren B, 'Victim Participation before the International Criminal Court' [2010] Humboldt University

Markovic M, 'The ICC Prosecutor's Missing Code of Conduct' (2011) 47 *Texas International Law Journal*

Marks P S, 'Branding the "War on Terrorism: Is There a "New Paradigm" of International Law?' (2006) 14 *Michigan State Journal of International Law* 71, 86

Marlise S, 'International Criminal Court Issues First Sentence' *The New York Times* (New York 10 July 2012)

Mayombo N, 'State of Pain Torture in Uganda' (2004) 16 *Human Rights Watch*

May Richard and Marieke Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha' (1999) 37 *Columbia Journal of Transnational Law*

McDonnell M T, 'The Death Penalty—An Obstacle to the "War on Terrorism?' (2004) 37 *Vanderbilt Journal of Transnational Law*

McKay F, 'Victim Participation in Proceedings before the International Criminal Court' [2008]

Mégret F, 'Justice in Times of Violence' (2003)14 *European Journal of International Law* 327

Mendez E J, 'Human Rights Policy in the Age of Terrorism' (2002) 46 *St Louis University Law Journal* 377

Merzon S, 'Extraterritorial Reach of the Trafficking Victims Protection Act' (2007) 39 *George Washington International Law Review*

Mettraux G, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 *Harvard International Law Journal*

Miller M, 'Investigating Gender Crimes "The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington

Mokhtar A, 'Nullum Crimen, Nulla Poena Sine Lege Aspect and Prospects' (2005) 26 *Statute Law Review* 41

Murdoch E, 'ICC-OTP Prosecutorial Strategy' (2012) 6 The Office of the Prosecutor: Charging Strategy

Murphy D S, 'Criminalizing Humanitarian Intervention' (2009) 41 (241) *Case Western Reserve Journal of International Law 103-104*

Newman G D, 'The Rome Statute, Some Reservations Concerning Amnesties and a Distributive Problem' (2005) 20 *American University International Law Review* 293

Newton M, 'Charging War Crimes: Policy and Prognosis The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' [2012] *Universiteit Leiden, Grotius Centre for International Legal Studies*

Nicolson J D, 'The Citizens duty to assist the police' (1992) *Criminal Law Report* 611

Nienke G, 'The Normative Legitimacy of International Courts' (2013) 86 *Temple Law Review University of Baltimore School of Law Legal Studies Research Paper* 2014-03

Nsereko D N, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87

Nyland E, 'International Relationships of the ICC: The International Criminal Court Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington

Obokata T, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2005) 54 *International and Comparative Law Quarterly* 445

Ocampo M L, 'Statement to the Fourth Assembly of States Parties to the Rome Statute' (The Hague, 28 November 2005)

Ocampo M L, 'The International Criminal Court and prospects for peace in Africa' (2007) London School of Economics

Oguamanam C, 'African leaders and the International Criminal Court' *The Punch Newspaper* (Nigeria, 12 December 2013)

Olásolo H, 'Triggering Procedure of the International Criminal Court Procedural Treatment of the Principle of Complementarity and the Role of Office of the Prosecutor' (2005) 5 *International Criminal Law Review*

Open Society Justice Initiative, 'Challenges Facing the International Criminal Court: Recommendations to the Assembly of States Parties' [2011]

Paust J J, 'Congress and Genocide: They're Not Going to Get Away with It' (1990) 11 *Michigan Journal of International Law* 90

Paust J J, 'Controlling Prohibited Weapons and the Illegal Use of Permitted Weapons' (1983) 28 *McGill Law Journal* 608

Paust J J, 'Human Rights Responsibilities of Private Corporations' (2002) 35 *Vanderbilt Journal of Transnational Law* 801

Paust J J, 'The Other Side of Right: Private Duties under Human Rights Law' (1992) 5 *Harvard Human Rights Journal* 51

Paust J J, 'The Reality of Private Rights, Duties and Participation in the International Legal Process' (2004) 25 *Michigan Journal of International Law* 1229

Paust J Jordan, 'The International Criminal Court Does Not Have Complete Jurisdiction Over Customary Crimes Against Humanity and War Crimes' (2010) 43 *John Marshall Law Review* 681

Paust Jordan, 'Selective History of International Tribunals And Efforts Prior To Nuremberg' (2004)10 *ILSA Journal of International & Comparative Law* 207

Pedaliu G H E, 'Britain and the of Italian War Criminals to Yugoslavia, 1945-48' (2004) 39 *Journal of Contemporary History* 503

Pejic J, 'The United States and the International Criminal Court: One Loophole Too Many' (2001) 78 *University of Detroit Mercy Law Review* 267-270

Philips B R, 'The International Criminal Court Statute: Jurisdiction and Admissibility' (1999) 10 *Criminal Law Forum* 61

Proulx V, 'Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?'(2004)19 *American University International Law Review* 1009

Reddi V, 'The ICC and the Crime of Aggression: A Need to Reconcile the Prerogatives of the SC the ICC and the ICJ' (2008) 8 *International Criminal Law Review* 655

Reisman M W and Silk J, 'Which Law Applies to the Afghan Conflict?' (1988) 82 (3) *American Journal of International Law* 459

Robert R, '1994 Mclean Lecture on World Law: The Proposal for an International Criminal Court*'* (1995) 56 *University of Pittsburgh Law Review*

Roberts K, 'The Law of Persecution before the International Criminal Tribunal for the Former Yugoslavia' (2002) 15 *Leiden Journal of International Law* 623

Robinson D, 'Defining "Crimes against Humanity at the Rome Conference' (1999) 93 *American Journal of International Law* 43

Robinson D, 'Developments In International Criminal Law: Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 *American Journal of International Law* 43

Robinson D, 'Essence of Crimes Against Humanity Raised by Challenges at ICC' (2011) *European Journal of International Law Talk*

Robinson D, 'Three Concepts of Crimes Against Humanity' The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' [2012] *Universiteit Leiden Grotius Centre for International Legal Studies.*

Roger S C, 'Elements of Crimes in Early Confirmation Decisions of Pre-trial Chambers of the International Criminal Court' (2008) 6 *New Zealand Yearbook of International Law* 209

Roht-Arriaza N, 'The Complex Architecture of International Justice' (2006) 10 *Gonzaga Journal of International Law* 38

Ronzitti N, 'Is the Rome statute of the international criminal court a real breakthrough in international law?' 1998 33 (3) *Italian Journal of International Affairs*

Roper D S and Barria A L, 'State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects' (2008) 21 *Leiden Journal of International Law* 457

Sabine S V, 'Human Rights: Substantive and Institutional Implications of the War Against Terrorism*'* (2003) 14 *European Journal of International Law* 265, 272

Sadat N L and Carden R S, 'The New International Criminal Court: An Uneasy Revolution' (2000) 88 *Georgetown Law Journal* 381,391

Sadat N L, 'Crimes against Humanity in the Modern Age' (2013) 107 *American Journal of International Law*

Sadat N L, 'Custom Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute' (2000) 49 *DePaul Law Review*

Sadat N L, 'Judgment at Nuremberg: Foreword to the Symposium' (2007) 6 *Washington University Global Studies Law Review*

Sadat N L, 'Terrorism and the Rule of Law' (2004) 3 (135) *Washington University Global Studies Law Review*

Sadat N L, 'The Application of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again' (1994) 32 *Columbia Journal of transitional law* 289, 303-11

Sadat N L, 'The Nuremberg Paradox' (2010) 58 *American Journal of Comparative Law* 151

Sadat N L, Kress C, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855

Sadat W L, 'The Proposed International Criminal Court: An Appraisal' (1996) 29 *Cornell International Law Journal* 665

Sadat Wexler L, 'Prosecutions for Crimes against Humanity in French Municipal Law: International Implications' (1997) 91 Proceedings of the Annual Meeting Implementation Compliance and Effectiveness: *American Society of International Law* 270

Sang-Hyun S J, 'Reflections on the ICC Review Conference: Perspectives of the ICC President by the IBA' (2010) 2 *Equality of Arms Review* 7

Sayapin S, 'A Great Unknown the Definition of Aggression Revisited' (2009) 17 *Michigan State University Journal of International Law* 377

Schabas A W, 'On the Genocide Convention' [2011] human right international criminal law forum

Schabas A W, 'Prosecuting Dr Strangelove, Goldfinger and the Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 *Leiden Journal of International Law*

Schabas A W, 'Punishment of Non- State Actors in Non-International Armed Conflict' (2003) 26 *Fordham International Law Journal*

Schabas A W, 'State Policy as an Element of International Crimes' (2008) 98 *Journal of Criminal Law and Criminology*

Schabas A W, 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forums*

Schaeffer R, 'The Audacity of Compromise: The UN Security Council and the Pre-conditions to the Exercise of Jurisdiction by the ICC with Regard to the Crime of Aggression' (2009) 9 *International Criminal Law Review*

Scharf M, 'The Letter of the Law: 'The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems*

Scheffer J D, 'Staying the Course with the International Criminal Court' (2002) 35 (47) *Cornell International Law Journal*

Schwelb E, 'Crimes Against Humanity' (1946) 23 *British Yearbook of International Law*

Shamsey J, '80 Years too late: The International Criminal Court and the 20th century's fist Genocide' (2001) 11 *Journal of Transnational Law & Policy*

Sievert R, 'A New Perspective on the International Criminal Court: Why the Right Should Embrace the ICC and How America Can Use It' (2006) 68 (77) *University Of Pittsburgh Law Review*

Sivakumaran S, 'Sexual Violence Against Men in Armed Conflict' (2007)18 *The European Journal of International Law*

Smith L, 'What did the ICC Review Conference achieve?' (2010) 2 (2) Equality of Arms Review of the International Bar Association's ICC Monitoring and Outreach Programme

Smith M J, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal*

Solera O, 'The Definition of Aggression: Lessons not learned' (2010) 42 *Case Western Reserve Journal of International Law*

Soriano M L, 'The Use of Precedents as Arguments of Authority and Arguments of Reason in Civil Law Systems' (1998) 11 *Ratio Juris*

Spectar M J, 'Beyond the Rubicon: Presidential Leadership, International Law & the Use of Force in the Long Hard Slog', (2006) 22 *Connecticut Journal of International Law*

Ssenyonjo M, 'Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya's Serving Senior State Officials' (2014)1 State Practice and International Law Journal 17

Ssenyojo M, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders'(2013) 13 *International Criminal Law Review*

Stahn C, 'The end the Beginning of the end or the end of the beginning? Introducing debates and voices on the definition of aggression' (2010) 23 *Leiden Journal of International Law* 875-882

Stahn C, 'Why Some Doors May Be Closed Already: Second Thought on a Case by Case Treatment of Article 12(3) Declarations' (2006) 75 *Nordic Journal of International Law* 243.

Stahn C, El Zeidy M and Olasolo H, 'The International Criminal Court's Ad Hoc Jurisdiction Revisited' (2005) 99 *American Journal of International law* 421

Stanton G, 'Ivory Coast Genocide Watch' in Henry M Jackson and others 'The International Criminal Court Confronting Challenges on the Path to Justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington

Stanton G, 'Ivory Coast" Genocide Watch, Julie Butters, External Factors Affecting Situation Selection: Political Influence' in 'The International Criminal Court, Confronting Challenges on the path to justice' [2013] *Jackson School of International Studies Task Force Report* University of Washington

Stephens B, '*Sosa v Alvarez-Machain:* The Door is Still Ajar for Human Rights Litigation in US Courts' (2005) 70 *Brooklyn Law Review* 533.

Stewart J, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 *International Review of the Red Cross* 313.

Sunga S L, 'The Crimes within the Jurisdiction of the International Criminal Court' (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 61

Susana S and Cleary K, 'Victims' Participation in the Investigations of the International Criminal Court' (2008) 17 *Transnational Law and Contemporary Problems* 76

The Nuremberg Tribunal, 'The Opinion and Judgment of the IMT' (1946) 41 *American Journal of International Law*

Theofanis R, 'The Doctrine of *Res Judicata* in International Criminal Law' (2003) 3 *International Criminal Law Review*

Tiefenbrun S, ‘A Semiotic Approach to a Legal Definition of Terrorism’ (2003) 9 *ILSA Journal of International & Comparative Law*

Tladi D, ‘Cases before International Courts and Tribunals the ICC Decisions on Chad and Malawi on Cooperation Immunities and Article 98’ (2013) 11 *Journal of International Criminal Justice*

Tsagourias N, ‘Nicolas Politis’ Initiatives to Outlaw War and Define Aggression, and the Narrative of Progress in International Law’ (2012)23 *the European Journal of International Law* 255–266

Tsagourias N, ‘Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity’ (2011) 24 *Leiden Journal of International Law* 539-559

Tsagourias N, ‘The Application of Public International Law to the Crisis in Libya’ (2012)14 *International Community Law Review* 305-307

University of London, ‘In the Shadow of the ICC: Colombia and International Criminal Justice’ [2011] Human Rights Consortium the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study University of London

Van Sliedregt E, ‘Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?’ (2009) 12 (3) *New Criminal Law Review* an International and Interdisciplinary Journal

Van Sliedregt E, ‘Modes of Liability the Law and Practice of the International Criminal Court: Achievements, Impact and Challenges’ [2012] Leiden, Grotius Centre for International Legal Studies.

Verbitsky J, ‘What Should be the Relationship Between the International Criminal Court and the United Nations Security Council in the Crime of Aggression’ (2008) 4 *Review of International Law and Politics*

Villa-Vicencio C, ‘The Reek of Cruelty and the Quest for Healing’ (2000) 14 *Journal of Law and Religion*

Von Knieriem A and Doman R N, ‘The Nuremberg Trials’ (Chicago; Regnery, 1959) *Columbia Law Review* (1960)

War Crimes Research Office, ‘Investigative Management, Strategies, and Techniques of the International Criminal Court’s Office of the Prosecutor’ [2012] American University Washington College of Law

Warren Richey, ‘Tribunals on Trial’ The Christian Science Monitor [2001]

Washington College of Law, ‘Investigative Management, Strategies, and Techniques of the International Criminal Court’s Office of the Prosecutor’ [2012] War Crimes Research Office American University Washington College of Law

Weldehaimanot S, ‘Arresting Al-Bashir: The African Union's Opposition and the Legalities’ (2011) 19 *African Journal of International and Comparative Law*

Wells M, ‘What Will the ICC’s Legacy Be in Côte d’Ivoire?’ [2012] *Human Rights Watch*

Wenaweser C, ‘Reaching the Kampala compromise on aggression: the Chair's perspective’ (2010) 23 Leiden Journal of International Law.

Winer C, ‘Smoke ‘Em Out: US Counterterrorist Mishaps Necessitating the Expansion of Interpol’s Capabilities to Meet the New Terrorist Threat’ (2010) 33 *Suffolk Transnational Law Review*

Women’s Initiatives for gender justice, ‘Making a Statement: A review of charges and prosecutions for gender-based crimes before the International Criminal Court’ [2008] *Beni Declaration Publication The Hague*

Wright Q, ‘The legal Liability of the Kaiser’ (1919) 13 *American Political Science Review*

Yan L, ‘On the Principle of Complementarity in the Rome Statute of the International Criminal Court’ (2005) 4 *Chinese Journal of International Law*

Zappala S, ‘Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC’ (2003) 1 (3) *Journal of International Criminal Justice*

Websites

<http://dx.doi.org/10.2139/ssrn>
<http://germany3rdreich.info/>
<http://http://ww.icccpi.>
<http://humanrightsdoctorate>
<http://lawlib1.lawnet.fordham.edu/research/eu.pdf>
<http://opiniojuris.org>
<http://ssrn.com/>
<http://tilman-dralle.de/pdf/Gaddafi>
<http://www.bbc.co.uk>
<http://www.capitalfm.co>
<http://www.coalitionfortheicc.org>
<http://www.ejiltalk.org>
<http://www.encyclopedia.com>
<http://www.globalforum.com>
<http://www.hrw.org>
<http://www.icccpi.Int>
<http://www.iccnow.org/>
<http://www.icrc.org/ihl/intro/>
<http://www.iringlobal.com>
<http://www.iss.europa.eu/uploads/media/solanae.>
<http://www.lubangatrial.org/>
<http://www.nytimes.com/>
<http://www.opensocietyfoundations.org>
<http://www.reuters.com/>
<http://www.sudantribune.com/>
<http://www.telegraph.co.uk>

Reports, Resolutions and Others

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines36 ILM 1507

Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal (United Nations General Assembly Resolution) 11 December 1946, GA Res 95(l), UN Doc A/64/Add 1 (1946); International Law Commission, Report on the formulation of Nurnberg principles (A/CN.4/22, 12 April 1950, reproduced in Yearbook of the International law commission, 1950, vol II)

African Union (AU) decisions on non-cooperation are contained in AU Assembly Decision on the Meeting of States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec 245(xiii) 3 July 2009, x 10

African Union decision on the Progress Report of the Commission on the Implementation of AU Decision on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, Assembly/AU/Dec 296(xv) 27 July 2010, x 5

African Union Assembly Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/ Dec 397(xviii), 30 January 2012, xx 6 and 8. For ICC ASP decisions on cooperation

Bensouda F, 'The Reckoning: The Battle for the International Criminal Court' Public Broadcasting Television Service (Virginia, 14 July 2009)

ICC Resolution on Cooperation, ICC-ASP/10/Res 2, 20 December 2011

ICC Resolution on the Strengthening of the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res 5, 21 December 2011, x 6 ICC Kampala Declaration,

Declaration RC/ Decl1, 1 June 2010, x 7 and generally the Kampala Declaration on Cooperation, Declaration RC/Decl.2, 8 June 2010

Commentary on the Draft ICC Guidelines on Intermediaries (18 August 2011)

Communication/reports on 'The Responsibility of UK Officials for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008'; In 2004 there were reports by the International Committee of the Red Cross, by Amnesty International about the abuses and mistreatment of the detainees in Iraq by British forces.

Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants, ICC-01/05-01/08

Definition of Aggression in the Context of the Statute of the ICC, Annex II A, Doc ICCASP/4/32

Doc No ICC-ASP/1/3; Elements of Crimes; adopted by the Assembly of States Parties.

Draft code against the security of mankind; 51 UN GAOR Supp (No 10) at 14 UN Doc A/CN4/L532, corr1 corr3 1996

Draft Policy Paper on Sexual and Gender Based Crimes February 2014. The Hague

Draft Regulations of the Office of the Prosecutor

Expressing grave concern at the situation in the Libya; SC/8351 (31 March 2005) the vote on Resolution 1970 was unanimous, SC Res 1970 (26 February 2011)

GAR 2625 (xxv) of 24 October Resolution adopted by the General Assembly adopted on a Report from the Sixth Committee (A/8082); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

General Assembly Resolutions 1991A and B (XVIII) of 17 December 1963, United Nations General Assembly Resolution 1991 was a resolution adopted by the UN General Assembly on 17 December 1963. The resolution made provisions for amending the United Nations Charter in order to increase membership of the Security Council to fifteen member states and membership of the Economic and Social Council to twenty-seven member states

Historical Review of Developments Relating to Aggression, UN Doc PCNICC/ 2002/SGCA/L 1 and Add 1

Historical Review of Developments Relating to Aggression, UN Doc PCNICC/2002/WGCA/L 1 and Historical Review of Developments Relating to Aggression (Addendum) UN Doc PCNICC/2002/WGCA/L1/Add 1

International Criminal Court Policy Paper on Sexual and Gender-Based Crimes June 2014

ICC-02/05-01/09, 12 December 2011, 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 Hassan Ahmad Al Bashir

ICC-BD/01-01-04, Regulations of the Court, Adopted by the judges of the Court on 26 May 2004 Fifth Plenary Session 2004

ICC-OTP November 2013 Policy Paper on Preliminary Examinations

ICC-OTP Policy Paper on Preliminary Examination 4 October 2010 The Hague

International Court of Justice advisory opinion on the legality of the Threat or Use of Nuclear Weapons, ICJ report of 8 July1996; Advisory Opinion on the request made by the General Assembly of the United Nations on the question concerning the Legality of the Threat or Use of Nuclear Weapons.

International Law Commission Report, Report of the International Law Commission on the Work of Its Forty-Sixth Session (1991)

International Committee of the Red Cross (ICRC), Concerns on Threshold for War Crimes Committed in Non-international Armed Conflicts as Contained in the Bureau Proposal in Document A/CONF183/C1/L59 and Corr 1, UN Doc A/CONF183/INF/11

International Convention for the Protection of All Persons from Enforced Disappearance Art 2, adopted by GA Res 61/177, Annex, UN Doc A/RES/61/177/Annex (2006)

International Criminal Court, Assembly of States Parties, *Report of the Special Working Group*, 7th Session ICC Doc ICC-ASP/7/SWGCA/2 (20 Feb. 2009)

International Criminal Court, Draft Guidelines governing the relations Between the Court and Intermediaries, August 2011

International Criminal Court, Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add1 (2000), UN Doc PCNICC/2000/INF/3/Add 3

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No 10 (A/56/10), chp IV E1

Lieber Code, signed and issued by US President Abraham Lincoln to the Union Forces of the United States in April 24, 1863, during the American Civil War

P46 Stat 2343, TS No 796, 94 LNTS 57, Act of Paris or Treaty Providing for the Renunciation of War as an Instrument of National Policy

Proposal for a definition of crimes against humanity submitted by the delegation of France, UN Doc A/AC.249/1997/WG.1/DP.4 (19 February 1997)

Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, Geneva 17 1925

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996)

Report of the African Union High-Level Panel on Darfur (AUPD) PSC/AHG/2(CCVII) African Union Peace and Security Council 207th Meeting at the Level of the Heads of State and Government 29 October 2009 Abuja, Nigeria

Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea A/HRC/25/CRP1

Report of the Court on cooperation, ICC-ASP ICC-ASP/10/40, 21 December 2011

Report of the International Commission of Inquiry on Darfur to the Secretary-General S/2005/60 (1/02/ 2005) Pursuant to Security Council Resolution 1564 of 18 September 2004

Report of the International Law Commission on the Work of Its Forty-Ninth Session (12 May–18 July 1997) UN Doc A/52/10

Report of the International Law Commission on the Work of Its Forty-Sixth Session 2 UN Doc A/49/10; May 22 July 1994

Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No 10; A/49/10

Report of the International Law Commission on the Work of Its Forty-Eighth Session 1996; UN Doc A/CN 4/SER A/1996/Add1

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 office of the Prosecutor (ICC) 'Prosecutorial Strategy 2009 – 2012; The Hague 1 February 2010

Report of the Special Working Group on the Crime of Aggression, Doc ICC-ASP/7/SWGCA/2 (2009) (2009 Working Group Report)

Report of the Special Working Group on the Crime of Aggression, Doc ICC-ASP/7/SWGCA/1 (2008)

Resolution ICC-ASP/8/Res 6 Adopted at the 8th plenary meeting, on 26 November 2009, by consensus; Review Conference the Assembly of States Parties; Recalling previous resolutions and reports on the Review Conference, and in particular resolution ICC-ASP/7/Res 2, the Report of the Bureau on the Review Conference,

Resolution RC/Res 4 Adopted at the 11th plenary meeting, on 10 June 2010, by consensus to retain Article 124 RC/Res 4 (2010)

Resolution RC/Res 6 Adopted at the 13th plenary meeting, on 11 June 2010, by consensus on the definition of the Crime of aggression

Respect for Human Rights in Armed Conflicts. Resolution 2444 (xxiii) of the United Nations General Assembly, 19 December 1968, Resolution 2444 (xxiii) affirms, in paragraph 1, the resolution on the protection of civilian populations against the dangers of indiscriminate warfare, which was adopted by the international Conference of the Red Cross in Vienna in 1965. However, of the four principles of international law laid down in the Red Cross resolution, only three are expressly repeated in the UN resolution.

Rules of Procedure and Evidence Doc ICC-ASP/1/3 Adopted 09 September 2002, Entry into Force 09/09/2002

Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-A) SC Res 1593, (2005) Security Council Referral of Situation in Darfur Sudan to the Prosecutor of the ICC

SC Res 1970 (Feb. 26, 2011); Adopted by the Security Council at its 6491st meeting, the Security Council,

Second Protocol to the Hague Convention of 1954 for the protection of Cultural Property in the event of Armed Conflict, The Hague 26 March 1999

South African Truth and Reconciliation Commission Reports 7 Volumes

The 1874 Brussels Declaration (which was never adopted by all major nations) listed 56 Articles that drew inspiration from the Lieber Code. Much of the regulations in the Hague Conventions were borrowed from the Lieber Code.

The International Criminal Court; OTP, Prosecutorial Strategy 2009-2012, 1 February 2010
The United Nations Human Rights Council issued a report on Syria on 23 November 2011. It states that gross violations of human rights have been committed by Syrian military and security forces since the beginning of the protests in March 2011 and issued a 7th Report of Commission of Inquiry on Syria - A/HRC/25/65, 12 February published on 5 March 2014

UN Doc A/CONF 95/15 1980, 19 ILM 1523, 1530; United Nations Conference on Prohibitions or Restrictions on Use of Certain Conventional Weapons

UN Doc S/RES/1757 (2007) Statute of the Special Tribunal for Lebanon

UN Human Rights Council, Report of the International Commission of Inquiry on Libya, 2 March 2012, A/HRC/19/68

United Nations Conference on Diplomatic Intercourse and Immunities Vienna; A/CONF 20/14/Add l; 2 March - 14 April 1961

United Nations General Assembly 1974 Definition of Aggression, GA Res 3314 (xxix), 29 UN GAOR Supp No 31, 142 UN Doc A/9631 (1974)

United Nations General Assembly Resolution 1653 (xvi) (1961): Declaration on the Prohibition of Use of Nuclear and Thermonuclear Weapons

Waki Commission report; The Report of the Commission of Inquiry into the Post-Election Violence in Kenya 2007-2008 (known as the Waki Commission) 16 July 2009