

DISECTING THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN THE PROSECUTION OF WAR CRIMES: CHALLENGES AND PROSPECTS

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Abstract

The twentieth century witnessed some of the worst atrocities committed in the history of humankind, accounting for more than ten million civilian deaths in over 300 armed conflicts in the last five decades International Criminal Justice has become a global concern. The current happenings within the sphere of international Criminal Law in terms of the prosecutions of these atrocities have motivated this write up. It is obvious that there is serious International Humanitarian Law violation. It is also observed that there is significant shift in the global legal landscape since the establishment of the International Criminal Court. The Court is a product of unprecedented International operation geared toward redressing crimes against humanity, war crimes genocide and the crime of aggression. This paper is further motivated by the global consensus growing concern to prosecute and punish the perpetrators of War Crimes. However, it was found that there is remarkable achievement recorded by the International Criminal Court in the prosecution of some of these crimes. However, some factors that stood out to impede the efforts of the court is majorly the challenge of the principle of complementarity that brought about lack of universal ratification of the Rome Statute. The entire global community has witnessed the effort of the court exhibited to ensure global peace and harmony, and that those responsible for these heinous crimes are brought to justice and punished accordingly. This paper therefore, seeks to examine the role the International Criminal Court has played so far in ensuring that the perpetrators of war crimes are brought to book.

Introduction

After the Second World War the impetus to establish an institution to adjudicate on atrocities that were committed during armed conflict resurfaces before the United Nations General Assembly which necessitate the commitment of the International Law Commission for the creation of a court to adjudicate on crimes that were committed during war or armed conflict situation.

Before then, several atrocities have occurred in different parts of the world, which have prepared the international community to accept the concept of an independent supra-national institution to try individual violators of these international crimes to ensure that justice is done. This led the UN General Assembly to establish the first two Ad hoc war crimes tribunals since the Nuremberg and Tokyo Trials after the Second World War to address certain atrocities. These tribunals for the former Yugoslavia in 1993 and the other for Rwanda in 1994. Further, in 1994, the International Law Commission prepared a draft for the General Assembly consideration for the establishment of a permanent court structure for the prosecution of international crimes which the General Assembly in turn established a Preparatory Committee to take appropriate steps. Though a series of meetings were held which culminated to the Rome Conference in 1998 which birthed the Rome Statute.

Subject matter and Jurisdiction of the International Criminal Court

Article 5 of the Rome Statute lists the crimes that will be within the jurisdiction of the Court as genocide, crimes against humanity, war crimes, and the crime of aggression. Article 6 for the purpose of the statute defined genocide as it is been defined under article 2 of the Genocide Convention of 1948. Both the crimes against humanity and War crimes have been carefully defined under article 7 and 8 of the Rome

Statute accordingly. By virtue of article 5, the court have the jurisdiction to entertain crimes of concern to the international community as a whole. Which means the court have jurisdiction over all the crimes provided in the Statute including Aggression which jurisdiction was conferred on the court to prosecute lately in 2010, after the conclusive definition of the crime was agreed at by the United Nations General Assembly through resolution RC/Res. 6 of 11 June 2010. The provisions on the crime of aggression set out the conditions under which the Court may exercise jurisdiction over this crime which must be consistent with the UN Charter.

The procedural provisions of the Rome Statute have been carefully drafted to create optional balance between the following priorities which are as follows:¹

- i. The need for an independent, impartial, apolitical, representation in the court, which can function efficiently and effectively to bring to justice those responsible for the most serious crimes of concern to the international community as a whole;
- ii. The right of states to take primary responsibility for prosecuting such crimes if they are willing and able;
- iii. The need to give victims of such crimes adequate redress and compensation;
- iv. The need to protect the rights of accused persons; and
- v. The role of the Security Council in maintaining international peace and security, in accordance with its powers under Chapter VII of the Charter of the UN.

These considerations are well articulated in the functions and powers of the court, and its relationship with other entities, which are provided in the Statute of the Court.²

The Applicable Laws under the International Criminal Court

The applicable laws in the international Criminal Court are the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence; Applicable treaties and principles and rules of international law, including the established principles of international law of armed conflict; General principles of law derived by the Court from national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with internationally recognised norms and standard; Judicial precedents that is principles and rules of law as interpreted in its previous decisions.³

The Court must at all times apply the principles of justice irrespective of the sex, nationality or race of the person before it. In pursuing the basic principle of law, a person shall not be responsible for offences committed prior to the Statute coming into force and every person shall be punished only in accordance with the Rome Statute.⁴ An accused person or State who wishes to challenge the jurisdiction of the Court may do so on the grounds that the case has been investigated or prosecuted or that investigation is going on.⁵

Ingredients of an International Crimes:

The drafters of the Rome Statute contemplated what qualifies a crime over which the Court would exercise jurisdiction. For this reason, they looked to existing relevant treaties and customary international law when developing the definitions of crimes. They also looked at the most relevant treaties such as the Geneva Conventions of 1949 and their Additional Protocols of 1977, the Torture Convention, the Genocide Convention, the Statutes of International Criminal Tribunals for Yugoslavia and Rwanda and other Conventions such as the Chemical Weapon Convention among others, dealing with specific crimes such as enslavement and apartheid. In some cases, the requirements of what amount to crimes adopted in the Rome

¹ Rules of Procedure and Evidence of ICC 2013

² Muhammed, T.L. 'Strengthening the Understanding of the Rome Statute of the ICC In Nigeria' (NCICC 2008) 5.

³ Art 30 Rome Statute.

⁴ Art 23 and 24 Rome Statute.

⁵ Ibid.

Statute reflect a more expansive interpretation of international law in 1998 when the instrument of the Court was negotiated. A brief examination of these crimes is necessary to aid clearer and better understanding of the principles of responsibilities.⁶

- (1) Genocide
- (2) Crimes against humanity,
- (3) War crimes and
- (4) Crime of aggression.

Genocide

Winston Churchill called genocide the crime without a name.⁷ A few years later, the crime of genocide was coined by Raphael Lemkin in his 1944 work. It was the subject of a United Nation General Assembly resolution. But the resolution spoke in the past tense, describing genocide as crimes which “have occurred”. By the time the General Assembly completed its standard setting, with the 1948 adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, “genocide” had a detailed and quite technical definition as a crime against the law of nations. Yet the preamble of that instrument recognizes that at all periods of history genocide has inflicted great losses on humanity.⁸

As a general rule, genocide involves violent crimes against the person, including murder. Because this crime has been deemed anti-social since time immemorial, in a sense there is nothing new in prosecution of genocide to the extent that it overlaps with the crimes of homicide and assault. In most cases genocide almost invariably escaped prosecution because it was virtually always committed at the behest and with the complicity of those in power.⁹

It is important to state that, historically most perpetrators of the crime of genocide were above the law, at least within their own countries, except in rare cases involving a change in regime. However, the doctrine of International legal norms from which State may derogate has emerged recently. This is in essence the story of International protection of human rights. The prohibition of persecution of ethnic groups runs like a golden thread through the defining moments of the history of human rights.

International law's role from persecution of national, racial, ethnic and religious groups can be traced to Peace of Westphalia of 1648, which provided certain guarantees for religious minorities.⁹⁴ Other early treaties contemplated the protection of Christian minorities with the Ottoman Empire⁹⁵ and of francophone Roman Catholics within British North America.⁹⁶ These concerns with the rights of national, ethnic, and religious groups evolved into a doctrine of humanitarian intervention which was invoked to justify military activity on some occasions during the nineteenth century.⁹⁷

The Rome Statute defines genocide⁹⁸ as the commission of certain acts with intent to destroy in whole or in part a national racial or religious group. The acts listed are killing members of the group or causing them serious bodily or mental harm, forcing the group to live in conditions calculated to bring about the groups physical destruction in whole or in part and using forcible measures to prevent births within the group or to transfer children out of the group to⁹⁹ another group. A typical example of the definition is what was clearly seen in Rwanda. However, a legal definition is found in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) Article 2 of this Convention define Genocide as any of the following acts committed with the intent to destroy, in whole or in part, national, ethnical, racial or religious group such as: killing members of the group; deliberately inflicting on the group conditions of life, calculated to bring about a physical destruction in whole or in part, imposing measures intended to bring births within the group(and) possibly transferring children of the group to another.

⁶ Art 6 -7 Rome Statute 2002 and Art 8 of the Amendment to the Statute of 2010.

⁷ Kuper, L. Genocide its political use in the twentieth century New Haven(Yale University Press 1981) 12

⁸ Lemkin, R. Axis Rule in Occupied Europe: Laws of Occupation- Analysis of Government Proposals for Redress (Washington DC Carnegie Endowment for World Peace 1994)

⁹ Lemkin, R. 'Genocide as a Crime in International Law'[2016](4) (1) A J I L; 149

Raphael Lemkin in his masterpiece "Axis Rule in Occupied Europe" (1943) invented the term genocide by combining "genos" (race, people) and "cide" (to kill). He defined genocide as follows: "generally speaking genocide does not necessarily mean destruction of a nation, except when accomplished by massive killing of all members of a nation. It is intended rather to signify a coordinated action aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves. The objectives of such a plan could be the disintegration of political and social institutions, culture, language, national feelings, religion and economic existence of national groups and the destructions of the personal security, liberty, health and dignity and even the lives of the individuals belonging to such groups.

It is important to note, that the preamble to the CPPCG states that the instances of genocide have taken place throughout history but it was not until Raphael Lemkin coined the term and the prosecutions of the perpetrators of the holocaust at the Nuremberg trials that the United Nations agreed to the CPPCG which defines the crime of genocide under International Law came into effect on 12th January, 1952 (Resolution 260 (III)). It contains an Internationally- recognized definition of genocide which was incorporated into The CPPCG and was adopted by United Nation General Assembly on 9th December 1948 and became the national Criminal legislation of many countries and was also adopted by the Rome Statute of the International Criminal Court the treaty that established the International Criminal Court. Subsequently, there was a gap of more than forty years between the CPPCG coming into force and the first prosecution under the provisions of the treaty. To date all International prosecutions of genocide, the Rwandan Genocide and the Srebrenica genocide had been by ad hoc International Tribunals. The International Criminal Court came into existence in 2002 and it has the authority to try people from the States that have signed the treaty.

When the crime of genocide was committed in both Rwanda and Bosnia International Criminal Court was not in existence. Consequently, on the 26 February, 2007 International Court of Justice (ICJ) in the Bosnian genocide case upheld that the ICTY's earlier finding that Srebrenica massacre constituted genocide, but found that the Serbian government had not participated on a wider genocide on the territory of Bosnia Herzegovina during the war, as the Bosnian government had claimed.

Furthermore, during the *Bosnian Genocide between 1993-1995* the ICC was not in existence it was the ICTY that handled the genocide cases. The ICTY was established by the United Nation Resolution 827 of 25 May, 1993. The main purpose behind the tribunal was to bring justice to those who perpetrated crimes, such as crimes against humanity and genocide with the emphasis on the instigators or authorities that allowed the crimes to happen.¹⁰

This Chapter is meant to look at the role of the International Criminal Court in prosecuting international humanitarian crimes. It suffices to state that the International Criminal Court did not play any role in prosecuting the crime of genocide at the time of the crime. This is because when the crime was committed in Bosnia former Yugoslavia and Rwanda, International Criminal Court was not in existence. Rather the prosecution was done by the two Tribunals (the ICTY and ICTR) created by the United Nations as earlier stated.

The ICTY was established by Resolution 827 of the United Nations Security Council which was passed on 25 May 1993. It has jurisdiction over four clusters of crimes committed on the territory of the former Yugoslavia since 1991 which constitute grave breaches of the Geneva Conventions, violations of the laws of war, genocide, and crimes against humanity. The maximum sentence it can impose is life imprisonment. Various countries have signed agreement with the UN to carry out custodial sentences.

The United Nations Security Resolution 808 of 22 February 1993 decided that an International tribunal shall be established for the prosecution of persons responsible for serious violations of International humanitarian law committed in the territory of the former Yugoslavia since 1991 and calling on the Secretary General at that time to submit for consideration by the council a report on all aspects of this

¹⁰ Ibid

matter including specific proposals where appropriated options taking into account suggestions put forward in this regard by Member States.¹¹

The tribunal in its operation in 1994 issued the first indictment against Bosnian Serb camp commander Dragan Nikolic. This followed on 13 February 1995 by two indictments comprising 21 individuals which were issued against a group of 21 Bosnian-Serbs charged with committing atrocities against Muslims and Croat civilian prisoners. While the war in the former Yugoslavia was still raging, the ICTY prosecutors showed that an International court was viable. However, no accused was arrested.¹²

The Court confirmed 8 indictments against 46 individuals and issued arrest warrant. Dusko Tadic became the subject of the Tribunal's first trial.

The Bosnian- Serb was arrested by German Hice in Munich in 1994 for his alleged actions in the Prijedor region in Bosnia - Herzegovina (especially his actions in the Omarska, Trnopolje and Keraterni detention camps). Tadic made his initial appearance before the ICTY Trial Chamber on 26 April 1995 and pleaded not guilty to all of the charges in the indictment.¹³ Between June 1995 and June 1996, 10 public indictments had been confirmed against a total of 33 individuals. Six of the newly indicted persons were transferred in the Tribunal's detention unit. In addition to Dusko Tadic, by June 1996 the tribunal had Tihofil Blaski, Drazen Erdemovic, Zejnil Delalic, Zdravko Mucic, Esad Landzo and Hazim Adelic in custody. The accused Erdemovic became the first person to enter a guilty plea before the tribunal between 1995 and 1996, the ICTY also dealt with miscellaneous cases involving several detainees Djukic Krsmanovic, Kremenovic, Lajic - which never reached the trial stage. Some of the accused had been arrested and others surrendered to the ICTY. However, most of the new states that came out of Yugoslavia — most notably Serbia and the Serbian entity in Bosnia-Herzegovina refused to cooperate with the International tribunal.¹⁴ Since the very first hearing (referral request in the Tadic case) on 8 November 1994, the Tribunal indicted 161 individuals, and has already completed proceedings with regard to 126 of them, 13 have been acquitted, and 64 sentenced.

In 1998 Major General Radislav Kristic was indicted for genocide. On August 2, 2001 after the Trial Chamber was convinced beyond any reasonable doubt that a crime of genocide was committed in Srebrenica, it had convicted Kristic of genocide, who became the first person to be convicted before the Tribunal which sentenced him to 46 years in prison. Vujadin Popovic was found guilty of genocide, conspiracy to commit genocide. The trial chamber of the Tribunal equally found Ljubisa Beara guilty of genocide, conspiracy to commit genocide. Drago Nikolic was found guilty of aiding and abetting genocide.¹⁴ However, Rodovan Karadzic is accused of genocide and complicity in genocide in several municipalities within Bosnia and Herzegovina. However, on 28 June 2012 the Tribunal made its oral ruling on motion for judgment of acquittal, pursuant to Rule 98 of the Tribunal Rules of Procedure and Evidence, where it granted Karadzic's motion in relation to count one of the indictment in which he was charged with genocide for the crimes committed between March and December 1992 in several municipalities of Bosnia and Herzegovina, leaving only the case of Srebrenica on a count of genocide. Zdravko Tolimir had been indicted by the Prosecutor of the ICTY on genocide charges in the 1992- 95 his trial commenced on 26 February 2010. In the same vein Ratko Mladic was indicted on July 24, 1995 charge (amended on 10 October 2002) by the ICTY prosecutor he was accused of genocide and complicity in genocide in several municipalities within Bosnia and Herzegovina.¹⁵

Similarly, former president of Yugoslavia Slobodan Milosevic was accused of genocide or complicity in genocide in territories within Bosnia and Herzegovina eventually he died on 11 March 2006. Milan Kovacevic was also accused of genocide, complicity genocide he died of natural causes in detention in 1998.

¹¹< http://en.wikipedia.org/wiki/international_criminal_tribunal_for_the_former_Yugoslavia> viewed 10 October 2018

¹² Ibid.

¹³ Ibid

¹⁴ Ibid.

¹⁵ Ibid.

The final indictments were issued in December 2004, last of which were confirmed and unsealed in the spring of 2005. The Tribunal initial aims were to complete all trials by the end of 2012 and all appeals by 2015, with the exception of *Rodovan Karadzic* whose trial is expected to end in 2014 but eventually concluded on 20th March 2019 and recently *Ratko Mladic and Goran Hadzic*. The United Nations Security Council initially called upon the Tribunal to finish its work by 31st December, 2014 to prepare for its closure and transfer of its responsibilities to the International Residual Mechanism for Criminal Tribunals which was to begin functioning for the ICTY branch on 1 July 2013.¹⁶

Tribunal for Rwanda (ICTR) was established in November 1994 by the United Nations Security Council in Resolution 955 in order to judge people responsible for the Rwandan genocide and other violations of international humanitarian law. In 1995 it became located in Arusha, Tanzania under Resolution 977.

In 1998 the operation of the tribunal was expanded in Resolution 1165. The Tribunal has jurisdiction over genocide, crimes against humanity and war crimes, which were defined as violations of common Article Three and Additional Protocol II of the Geneva Convention (dealing with war crimes committed during International conflicts).

It is instructive to note that, so far the tribunal has finished over 50 trials and convicted over 30 accused persons. The first trial of *Jean Paul Akayesu* began in 1997. Interim Prime Minister *Jean Kambanda* pleaded guilty to the crime of genocide, his sentence was affirmed on 19 October 2000. The United Nations Security Council called upon the tribunal to finish its work by 31 December 2014 to prepare for its closure and transfer of its responsibilities to the International Residual Mechanism for Criminal Tribunals which begin functioning for the ICTR branch on 1st July 2012.¹⁷

Former Rwandan Army Chief *Augustin Bizimungu* has been sentenced to 30 years in prison for his role in 1994 genocide. In the same vein Jean — *Paul Akayesu* stood trial for 15 counts of genocide and crimes against humanity despite his defiance the ICTR found him guilty of 9 counts of genocide and crime against humanity. One notable aspect of the trial of Jean- Paul Akayesu was the fact that it was the first time the 1948 Convention on the Prevention and Punishment of the Crimes of Genocide was enforced. On 2 October, 1998, he was sentenced to life imprisonment for each of the nine counts, sentences to run concurrently.¹⁸ One striking characteristic of all the cases prosecuted by the ICTR can be found in *Prosecutor V Kambandai*¹⁹ in which for the first time in history, an accused acknowledged his guilt for the crime of genocide before an International Criminal tribunal and the tribunal convicted a head of government for the crime of genocide. In *Prosecutor v Pauline, Nyiramasuhuko*,²⁰ the accused who was a Minister for family Welfare and the Advancement of Women was tried for genocide and incitement to rape. In 2011 she was convicted of seven charges and sentenced to life imprisonment. *Nyiramasuhuko* was the first woman to be convicted of genocide by ICTR. In the same vein, *Colonel Theoneste Bagosora* is a former Rwandan Military officer who was convicted for genocide and has been sentenced to life imprisonment by the ICTR.¹¹³ It should be noted, that the above-mentioned individuals convicted by the ICTR for the crime of genocide are just but a few from the long list for the absence of space I will not be able to reflect all the issues in this book. However, the essence of citing the above individuals is to show the role ICTR played and still playing in prosecuting crime of genocide on a global scale.

Another crucial point is that in 1997 ICTR indicted three Rwandans for “incitement to genocide” ICTR convicted *Hassan Ngeze, Ferdinand Nahimana, and Jean- Bosco Barayagwiza* for direct and public incitement to genocide. The judges decided that without a firearm, machete or any physical weapon, the deaths of thousands of innocent civilians were caused. 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 the International Court of Justice since Nuremberg. The power of the media to create and destroy

¹⁶ Ibid.

¹⁷ Ibid

¹⁸ <<http://www.bbc.co.uk/news/world-africa>> accessed 10 October 2018

¹⁹ ICTR 23-27-S Judgement 39-40 (4th September 1998)

²⁰ ICTR-98-42-T (14 December 2015).

fundamental human values comes with great responsibility. Those who control the media are accountable for its consequences". However, on appeal by the defendants counsel on 28 November, 2001 the tribunal affirmed the charges of direct and public incitement to commit genocide for *Ngeze* and *Nahimana* the judges reversed the finding of guilt on the charges against *Barayagwiza* ruled that on Radio Television Libre des Mulles Collines (RTL) broadcasts made after April, 6 1994 (when the genocide began) constituted direct and public incitement to commit genocide and *Barayigwiza* no longer exercised control over the employees of the radio station at the time the tribunal did affirm the findings of guilt for instigating the perpetrators of acts of genocide and crimes against humanity. As a result of reversal of some of the charges against the three defendants the judges lowered the defendant's sentences. *Nahimana's* from life imprisonment to 30 years imprisonment, *Ngeze's* from life to 35 years, *Barayigwiza's* from 35 years to 31 years.

In the light of the above, it is submitted that the crime of incitement remains firmly in place in the International legal stage. In 1998 an incitement provisions were included in Article, 25(3) (e) of the Rome Statute of the International Criminal Court (in conjunction with Article 6 of Genocide Convention). The Genocide Convention has recently been invoked in the spirit of genocide prevention. On October, 26, 2005 Iranian president Maim-loud 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 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 ICC. Irwin Cotler the former Canadian Minister of Justice and member of the Canadian Parliament has also argued that Iranian president is guilty of state-sanctioned incitement of genocide that is both direct and public as defined in the Genocide Convention there is a general call by the US, UK and Australia upon the UN Security Council to charge Ahmadinejad with violating the Genocide Convention by his repeated calls for Israel to be annihilated. It should be note also, in July 2008 the former ICC Chief Prosecutor requested an indictment of Sudanese president *Omar Al-Bashir*. If the Pre-trial Chamber agrees, it would have been the first ever charge of genocide against a sitting head of State. This request came five years after the International community first became concerned about widespread attacks on civilians in Darfur. Article 86(2) of the ICC states the penalty for the offence of genocide to range between ten (10) to thirty (30) years imprisonment.

Recently, the ICC has demonstrated once again the role of ICC in the advancement of International humanitarian law in the case of *Prosecutor V Jean Pierre Bemba Gombo*.²¹ The ICC on 21st March 2016 found the accused person guilty of a two count charge of crime against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging) the crimes were committed in Central Africa Republic from on or about 26 October, 2002 to 15 March 2003 by a contingent of movement De Liberation De Congo (MLC) Crops. Mr. Bemba was a person effectively acting as military commander with effective authority and control over the force that committed the crimes. He was sentenced on the 21 June 2016 to 18 years of imprisonment.

Another Land Mark achievement of the ICC in the development of the International Humanitarian Law was the *prosecutor V Ahmad at Fagi al-Mahdi. Ahmed*²² al-mahdi a Jihadist on 22 August 2016 pleaded guilty before the ICC and was convicted by the Court with the charge of orchestrating attacks on the Malian city of Timbuktu and the destruction of Shrines at the World Heritage Site. *Ahmad al* is the first person to be charge with War crime arising out of the conflict in Mali and in fact, the first person to ever be convicted by the ICC on a case of this nature. He was handed over to the ICC by Niger Republic in late 2015. He was found guilty and sentenced to 9 years imprisonment on 27 September, 2016 his charge before the ICC was pursuant to article 28 (3) (a) (b) and (c) of the ICC Rome Status.

The case of Al-mahdi, also demonstrated the interpretation of Article 53 of the protocol II Additional to the Geneva Convention relating to the protection of victims of non-international armed conflict of 1977 by the ICC.

²¹<<https://www.icc-cpi.int> car bemba> accessed 18 July 2019

²² ICC-01/12-01/15 (17 August 2017)

Similarly, the Sudanese former president *Omar Al-Bashur* has been on the wanted list of the ICC for some time now for the alleged offence of genocide in the Ijafur region of Sudan, he visited South Africa in 2015 for the Africa Union Summit in which the South Africa Government could not arrest him which generated a heated debate and spurred by the domestic legal pressures. This issues necessitated the present agitation by the South Africa when it said on 21st October, 2016 that it has initiated its withdrawal procedure from the ICC. Even though the South Africa Government Justice Minister said the reason for the withdrawal is to enable his country to focus on continental instruments and institutions such as the African Court of Human and people's Rights.

On the 27 June 2011, the ICC indicted *Muammar Gaddafi* on two counts of crime against humanity with regard to the situation in Libya. As the Leader of the Revolution (the defector head of state) and commander of the Armed Forces of Libya he allegedly planned, in conjunction with his inner circle of advisers, a policy of violent oppression of popular uprisings in the early weeks of the Libyan civil war. He allegedly formulated a plan in response to the 2011 Tunisian and Egyptian revolutions whereby Libyan state security Forces under his authority were ordered to use all means unnecessary to quell public protest against his government. From 15 February 2011 until at least 28 February 2011. Article 13 of the Geneva Convention relating to the treatment of prisoners of war 1949 provides for protection of Prisoners of war and regard any inhuman treatment meted to a prisoner of war as a war crime. Similarly, the ICC indicted *Mahmoud al-Werfalli*. Werfalli²³ on 15 August 2017 on a one count of crime in regard to the situation in Libya. As a Commander of al-Saiqa, an elite unit of the Libyan National Army, he is alleged to have personally carried out the execution of 33 Prisoners during the Libyan civil war in 2014.

In international humanitarian law parlance, Article 3 (1) (a)-(c) of the Geneva Convention relating to the protection of civilian persons in time of war 1949 provide for the protection of civilians who are not taking part in the hostilities in an armed conflict of not an international character. *Laurent Gbagbo* was indicted by the ICC on 23 November 2011 on four counts of crimes against humanity with regard to the situation in the Republic of Cote d'Ivoire. As the president, Gbagbo was alleged to have organized along with members of his inner circle systemic attack against civilians during post-election violence that began on 28 November 2010. The National security forces, the National Armed Forces, Militia and Mercenaries under his command were alleged to have murdered, raped, persecuted and inhumanly treated civilians who were perceived to be supporters to the Alassan Quattara opponent in the 2010 presidential election.²⁴

In another development, the ICC on 8 March 2011 indicted Mwaikibaki on a five counts of crime against humanity with regard to the situation in the Republic of Kenya. Kenyatta as a supporter of the Kenyan president Mwaikibaki, was alleged to have planned, finance, and coordinated the violence perpetrated against the perceived supporters of the orange Democratic Movement (ODM), the political party of the president rival, during the post-election violence from 27 December 2007 to February 2008. He was alleged to have control over the Mungiki organization and directed it to conduct murders, deportations, persecution, rape, sexual violence and other inhuman acts against civilians in the town of Kibera, Kisumu, Naivasha, and Nakuru. However, before the trial began, the ICC Prosecutor withdrew all the charges and the proceeding was terminated on 13 March 2015. Furthermore, the protocol II Additional to the Geneva Convention in Article 4(2) prohibits the act of violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment including pillage. Article 4(3) (c) prohibits the conscription of children in to the armed forces or group for the purpose of taken part in hostilities.

The ICC in the case of *Okot Odhiambo* espoused the above provision by bringing the accused person to trial before the court. Odhiambo was indicted on 8 July 2005 on three counts of crimes against humanity and seven counts of war crimes in regard to the situation in Uganda. He was alleged to be an integral member of the policy-making leadership of the Lord Resistance Army (LRA), an armed group which has been waging guerrilla campaign since 1987 against the Ugandan government. Additionally, he was also a

²³< <https://www.icc.int> alwefali> accessed 18 July 2019

²⁴<<https://www.icc-ipi.int> Gbagbo> accessed 18 July 2019

Military Commander he allegedly issued a standing order which led to the attacks on civilian population which resulted in murder, pillaging of camps, enslavement, and the forcibly conscription of children.

Bosco Ntaganda was indicted on 22 August 2006 on three counts of war crimes with regard to the situation in Democratic Republic of Congo (DRC), on 13 July 2012 he was additionally charged with three counts of crimes against humanity and four counts of war crimes. He was alleged to be a third highest-ranking official in the Patriotic Forces of the Liberation of the Congo (FPLC), the armed wing of the Union of Congolese Patriot (UCP), a rebel movement in the northeast part of DRC, that fought in the Ituri conflict from July 2002 to December 2003, Ntaganda was alleged to have ordered FPLC troops to conscript and enlist children to the FPLC and UCP, and using them to participate in hostilities. He was alleged to have ordered the attacks on Lendu and Hema a civilian population in the town of Mongbwalu and the villages of Bambu, Kobu, Lipri and Sayo. In the course of the attacks, murders, rape, and other forms of sexual violence were allegedly perpetuated and homes were pillaged, resulting in death of approximately 800 civilians and the displacement of 60,000.

Another landmark case which gave credence to the ICC is the case of *Callixte Mbarushimana*. Mbarushimana was indicted on 28 September 2010 of five counts of crimes against humanity and six counts of war crimes with regard to the situation in Democratic Republic of Congo (DRC). He was alleged to have been the Executive Secretary of the Democratic Forces for the Liberation of Rwanda (FDLR), a Hutu powerful rebel group fighting in the Kivu conflict, since July 2007 and the de facto president since November 2009. He was accused of commanding FDLR troops that attacked civilian in 11 different villages in the North and South Kivu Province in the Eastern DRC. He was arrested in France on 11 October 2010 and transferred to the ICC on 25 January 2011. On 16 December 2011, the Pre-Trial chamber ruled to decline to confirm the charge against him and ordered for his release. The Prosecution appealed against the decision was rejected, and on 23 December 2011, Mbarushimana became the first person to be detained by the ICC and then be set free at his request, he was released in France.²⁵ ICC convicted Bosco Ntaganda of war crimes including rape and murder. The Congolese war lord was charged and convicted on a 13 counts of war crime on 8 July 2019. ICC judge Robert Fremr in delivering the decision held that Ntaganda was key leader who ordered troops to target and kill civilians in the Ituri region of the Democratic Republic of Congo in 2002 and 2003. The names of persons indicted by ICC is inexhaustible, having examined the prominent among the list of indictees by the Court in performing its role in developing IHL, the prominent question now is that, is the ICC targeting only Africans? Since its inception, the Court has publicly issued over 40 warrants for people. The list is notable non diverse but are all Africans. Their crimes are serious. But equally shocking violations of International humanitarian law have occurred. Elsewhere in the decade. The death toll in Syrian civil war continues to mount. The Islamic State is committing large scale atrocities against ethnic Hazara and other Iraqi civilians. The North Korean regime continues unabated to torture and starve its citizens. Rohingya refugees are risking death on daily basis at sea to escape persecution and ethnic cleansing in Burma. The ICC seemingly single – minded geographical focus on Africa has led some individual and countries to conclude that the Court as an institution has limited control over matters concerning countries that signed the Rome Statute. However, it is the opinion of the writer that the ICC is a treaty organization, which only has jurisdiction over the citizens of member states, and only when they are unable or unwilling to prosecute international crimes domestically that the Statute of the Court can be evoked.

Crimes against Humanity

Article 7 of the International Criminal Court Rome Statute defines crimes against humanity as follows: For the purpose of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with the attack which include:

²⁵ <<https://www.icc-cpi.int> alleged-crimes> accessed 18 July 2019

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of Fundamental rules of International law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced Sterilization or any other form of sexual violence of comparable gravity
- (h) Persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Paragraph 3, or other grounds that are universally recognized as impermissible under International law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Furthermore, Rome Statute Explanatory Memorandum states that crimes against humanity are particularly odious offenses in that they constitute a serious attack on human dignity of grave humiliation or a degradation of one or more human beings. Either they are not isolated or sporadic events, but are part of a government policy (although the perpetrators need not identify themselves with this policy) or a wide practice of atrocities tolerated or condoned by government to a de facto authority. However, murder, extermination, torture, rape, political, racial, or religious persecution and inhumane acts reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice. Isolated inhumane acts of this nature may constitute grave infringements of human rights depending on the circumstances, but may fall short of meeting the stigma attaching to the category of crimes under discussion.

On the other hand, an individual may be guilty of crimes against humanity even if he perpetrates one or two of the offences mentioned above, or engages in one of such offence against a few civilians provided those offences are part of a consistent pattern of misbehavior by a number of persons linked to that offender (for example, because they engage in armed action on the same side or because they are parties to a common plan or for any similar reason).

In order to determine whether the necessary threshold is met one should use the following test; one ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of an inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty and wickedness.

Crimes against humanity under the international law in its strict sense, first entered positive International Law in 1945 when the four Allied powers, France, the Soviet Union, the United Kingdom and the United States, established Military Tribunal at Nuremberg and granted its jurisdiction to try the captured Nazi leaders for either three categories of crimes: crimes against peace (Article 6 (b)); war crimes (Article 6 (b) and crimes against humanity (Article 6 (c)). The concept of crimes against humanity is heavily associated with the Nuremberg Trial.

It suffices to submit that crimes against humanity have existed in customary international law for over half a century and are also evidenced in prosecution before some national courts. The most notable of these trials include those of *Paul Touvier*, *Kluas Barbie*, and *Maurice Papon* in France, and *Imre Finta* in Canada. But Crimes against humanity are also deemed to be part of *jus Cogens* the highest standing in International legal norms. Thus, they constitute a non-derogable rule of International law. The implication of this standing is that they are subject to universal jurisdiction, meaning that all States can exercise their jurisdiction in prosecuting perpetrators irrespective of where the crime was committed.²⁶

²⁶ Chiefe, T. E. C., *Military Law in Nigeria Under Democracy* (Arthill Publishers Ltd 2008) 305-306

It also means that all States have the duty to prosecute or extradite, that no person charged can claim the "Political offense exception" to extradition, and that States have the duty to assist each other in securing evidence needed to prosecute. But of great importance is the fact that no perpetrator can claim the "defense of obedience to superior orders" and that of limitation contained in the laws of any State can apply. Lastly no one is immune from prosecution of such crimes even a head of State.²⁷

Members of the armed Forces who obey superior orders which are manifestly unlawful are liable for the acts or omissions resulting from obedience of the said unlawful orders. Furthermore, the superior who gave the manifestly unlawful orders would also be guilty of the offence.²⁸ One striking feature about the crimes prosecuted by the court as rightly observed is that they are interwoven or interrelated.

The fact remains that crimes against humanity have been committed by a wide range of people. The accused could be a foot soldier or a high-level government official. The International Criminal Tribunal for the former Yugoslavia (ICTY) for example has indicted former Serbian president Slobodan Milosevic for a variety of crimes as well as police commanders and prison guards for murder and torture, and common soldiers for rape, among other crimes. International Criminal Tribunal (ICTR) indictees include former Prime Minister *Jean Kambanda*.²⁹

The term crimes against humanity also includes actions by members of paramilitary organizations (these groups are typically unofficial or quasi-official and are often funded by the government) warlords, rebel, leaders and members of rebel militias. For instance, in northern Uganda, government forces have been accused of numerous abduction, killings, and torture as they have battled the rebel Lord's Resistance Army (LRA), which in turn has been accused of kidnapping as many as 20,000 children soldiers and slaves. In 2005, the head of the LRA, *Joseph Kony*, was indicted by the ICC on 33 counts 12 of those counts were for crimes against humanity, including murder, enslavement, sexual enslavement, and rape¹¹⁸

At present the International Criminal Court in its effort to prosecute international crimes has to date, opened investigations into four conflicts:

Uganda, DRC Congo, the Central African Republic and Darfur, including Nigeria. The ICC is an independent, permanent Court of last resort to be turned to only if a state is unable or unwilling to prosecute this crime.

Similarly, there are many different levels of Criminals that have been tried by ICTY and the ICTR. Some have been convicted of crimes against humanity as they do nothing to prevent such crimes from taking place. While others such as Slobodan Milosevic are seen as high level officials that incited such crimes to take place. The ICTY initially had two senior officials that were earlier at large but later arrested and prosecuted. *Ratko Mladic and Goran Hadzic*. *Mladic* was charged with crimes against humanity. There was special Court which was a first "hybrid" of International court, the first modern International court to sit in the country where the crimes took place, and the first to be funded by voluntary contributors. *Charles Taylor* faced eleven (11) counts the indictment alleged that he is one of those bearing the greatest responsibility for crimes against humanity, war crimes, and other serious violations of International humanitarian law committed by rebel forces in Sierra' Leone from November, 1996 until the end of the war in January 2002.

It should be noted that in 2006 when Charles was arrested and transferred to the Special Court, the UN Security Council expressed concern about security in the sub-region. At the time International Criminal Court in The Hague had an empty courtroom which the special court was able to use. Taylor trial was moved to the special Tribunal for Lebanon's courtroom. It is the role of the International Criminal court to prosecute crimes against humanity since violations against humanity endanger values of global community, growing on international conventions outlaws these crimes, allows any nation to prosecute those charged with them. There are various conventions which prohibit crimes against humanity. Among them, i.e, the convention on the Non- Applicability of Statutory Limitations to War and Crime against humanity,

²⁷ Ibid.

²⁸ Ibid.

²⁹ Study Guides Series on Peace and conflict Confronting Crimes Against Humanity by the Endowment of the United States Institute of Peace (2008) 4

Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.³⁰

It should be observed that the above conventions were drafted by the United Nations. Furthermore, the United Nations has been primarily responsible for the prosecution of the crime against humanity since it was chartered in 1948. The International Criminal Court (ICC) as organized by the Rome Statute and the United Nations has delegated several crimes against humanity cases to the ICC. Because these cases were referred to the ICC by the United Nations.

The ICC has broad authority and jurisdiction for these cases. It should be noted, that ICC acting without the United Nations referral lacks the broad jurisdiction to prosecute crimes against humanity, and cannot prosecute crime, particularly if they occur outside the ICC member Nations.

The most recent is in when the 2005 United Nations referral to the ICC of Darfur resulted in an indictment of the Sudanese president for genocide, crime against humanity, and war crimes in 2008. The first person to be handed over to the ICC was *Thomas Lubanga*. His trial was recently completed. Followed by that of *Joseph Kony*. When the ICC president reported to the United Nations regarding its progress handling this crime against humanity case, Judge Philippe Kirsch said the Court has no power to arrest these persons. That it is the responsibility of the state and other actors. Without arrest there can be no trial. The United Nations has not referred any further crimes against humanity cases to the ICC since March, 2005.

A report on the 2008-9 Gaza war by Richard Goldstone accused Palestinian and Israeli forces had targeted civilians or committed crime against humanity. In 2011, Goldstone said that he no longer believed that Israeli forces had targeted civilians or committed crimes against humanity.

In the light of the foregoing, it suffices therefore to state that the recent happenings in Gaza is enough to observe that the killing of 162 people mostly women and children as at the 21 December, 2012 until the declaration of the cease fire constituted crime against humanity.

The crime against humanity has become a common denominator which has been under search light of the International Criminal Court. The Civil War that is taking place in Syria, Libyan civil war are recent examples. *Saif Gaddafi* was recently charged with crime against humanity. Four Kenyans accused in two separate cases had appealed against decision of the Trials. The Deputy Prime Minister Uhuru Migai Kenyatta. Former cabinet Minister Samuel Ruto former public service Chief Francis Kiririni Muthura, and radio Journalist Joshua Arap Sang.

It should be noted, that crimes against humanity is prevalent in the continent of Africa. On 3 November 2011 *Laurent Gbagbo* was indicted on four counts of crimes against humanity with regard to the situation in the Republic of Cote d'Ivoire. He stood trial along with his wife *Mr. Simone Gbagbo* who was indicted on 29 February, 2012 also on four counts of crimes against humanity. Gbagbo and his wife are alleged to have organized along with members of his Cabinet systematic attacks against civilians during post-election violence that began on 28 November 2010. National Armed Forces, militias and mercenaries, under the command of *Gbagbo* were alleged to have murdered, rape, persecuted, and maltreated civilians who were perceived to be supporters of *Alassane Ouattara*, *Gbagbo's* opponent in the 2010 presidential Election. His trial took place at The Hague by the International Criminal Court. While Mrs. *Gbagbo* was not transferred to ICC the Ivorian government has indicated that it does not intend to extradite her case against her with regard to post-election violence because the Ivorian prosecutors were ready to proceed against her. The recent development in regard to the crimes against humanity in Africa was the visit of the Chief prosecutor of the International Criminal Court to Nigeria on the 3rd July, 2012. Mrs. Bensouda, (as she then was) said the International Criminal Court has put Nigeria under a preliminary - 4 examination due to the Boko Haram insurgency in the northern Nigeria. The chief Prosecutor after meeting with President Goodluck Jonathan at the Presidential Villa, Abuja, submitted that the attacks by the Islamic Fundamentalists could also be described as crime against humanity. The Chief Prosecutor further said, that her office had commenced a (preliminary examination for the past 5 years regarding the trouble in the Middle Belt Area

³⁰ Memari, R. The Duty to Prosecute Crimes Against Humanity Under Universal Jurisdiction, Customary International Law, and International Convention (2012)

Bensouda added "As long as Nigerian government is taking steps to address this crimes the ICC Will not intervene".³¹

On the whole, there is a magnificent improvement on the part of the International Criminal Court in prosecuting crimes against humanity more particularly with regard to the recent development on the part of the Chief Prosecutor in ensuring that no perpetrators or offenders go unpunished.

War Crimes

Under the Rome Statute, war crimes are any of the following breeches of the

- (i) Willful killing
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Extensive destruction and appropriation of property, not justified by Military necessity and carried out in lawfully and wantonly;
- (iv) Compelling a prisoner of war or other protected person to serve in forces of a hostile
- (v) Willfully depriving a prisoner of war or other protected person of rights of fair and regular trial;
- (vi) Unlawful deportation or transfer or unlawful confinement;
- (vii) Taking of hostages.

Under the definition of war crimes, the Court will also have jurisdiction over the most serious violations of the laws and customs applicable in International armed conflict within the established framework of International law. These violations are defined extensively in Article 8 sub paragraph (17) of the Rome statute. The sub paragraph provides thus;

Other serious violations of the laws and customs applicable in International armed conflict, within the established framework of International law, namely any of the following acts:

In the Geneva *Conventions* of 12 August 1949, perpetrated against any person which include

- (i) Intentionally directing attacks against the civilian populations as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, unit or vehicles involve in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the International law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilian or damage to civilian objectives or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding by whatever means, towns, villages, dwellings or buildings which are defended and which are not military objectives; Killings or wounding a combatant who, having laid down his arms or having no longer means of defiance, had surrendered at discretion;
- (vi) Making improper use of a flag or truce, of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva conventions, resulting in death or serious personal injury;
- (vii) The transfer, directly or indirectly, by the Occupying Power of part of its own civilian population into the territory it occupies or the deportation or transfer of all parts of the population of the occupied territory within or outside this territory;
- (viii) Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

³¹<[http:// www. Punch.com](http://www.Punch.com)> (posted on 3rd July 2012)

- (ix) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endangers the health of such person or persons;
- (x) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xi) Declaring that no quarter will be given;
- (xii) Destroying or seizing the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war;
- (xiii) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xiv) Compelling the nationals of the hostile party to take in the operations of war directed against their own country, even if they were in their belligerent's service before the commencement of the war;
- (xv) Pillaging a town or place even when by assault;
- (xvi) Employing poison or poisoned weapons;
- (xvii) Employing asphyxiating poisonous or other gases, and all analogous liquids, materials or devices;
- (xviii) Employing bullets which expand or flatten easily in the human body such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xix) Employing weapons projectiles and material and method of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violations of the International law of armed conflict provided that such weapons projectiles and material and methods of warfare are subject of a comprehensive prohibition and are concluded in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123
- (xx) Committing outrages upon personal dignity in particular humiliating and degrading treatment;
- (xxi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in Article 7 paragraph 2 enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxii) Utilizing the presence of a civilian or other protected person to render certain points areas or military forces immune from military operations;
- (xxiii) Intentionally directing attacks against building, material, medical units and transport, personnel using the distinctive emblems of the Geneva Conventions in conformity with International law;
- (xxiv) Intentionally using starvation of civilians as a method of warfare by depriving them objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxv) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. It is pertinent to note, that this in particular was tried by the ICTRY and ICTR.

The truth is that the crime was rampantly committed in the former Yugoslavia and Rwanda as was rightly observed earlier that by resolutions United Nations created the two tribunals to prosecute people that allegedly committed the war crimes. However, some of the notorious persons indicted by the two tribunal are the likes of *Slobodan Milosevic*, *Drogan Erdemovic karadzic*, *Mladic* e.t.c.

The International Criminal Court has played and still playing an outstanding role in prosecuting war crimes. For instance, in 2006 it indicted and arrested the former Vice President of the Democratic Republic of Congo on three counts of war crimes.

Former Liberian President Charles Taylor was taken to The Hague for war crimes he was convicted in April 26 2012,³² The Sudanese president *Omar Al-basher* is also indicted with war crimes for his role in

³² <<http://www.nytimes.com> Accessed 16 November 2020.

the Sudan up risen. The former Libyan President *Muammar Gaddafi* was also charged for war crimes for allegedly ordering the killings of protesters and civilians during the 2011 Libyan civil war. Another celebrated case in the history of ICC in prosecuting war crimes is that of *Thomas Lubanga Dyilo* of Democratic Republic of Congo, he is the first person to be convicted by ICC for war crimes.

Thomas Lubanga Dyilo was found guilty of war crimes on 14 March, 2012. He was faced with maximum sentence of 30 years. On 10 July, 2012, the Trial Chamber 1 of International Criminal Court sentenced Lubanga to a total period of 14 years of imprisonment, and also ordered that at the time Lubanga's surrender years should be deducted from 14 years term which means he will spend 8 years. One distinct feature of this case is that, Lubanga was found guilty on the counts of war crimes particularly for conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities.³³

Bosco Ntaganda was also indicted on 22 August, 2006 on three counts of war crimes with regard to the situation in Democratic Republic of the Congo he was additionally charged with four counts of war crimes on 13 July, 2012. He was alleged to have ordered PFLC (Patriotic force for the Liberation of the Congo) troops to conscript and enlist children to the PFLC and CP and for using them to participate actively in hostilities, he was convicted on 8th July 2019 by the court. Initially the Congolese government has refused to arrest him but it later indicated intention to arrest him having defected from the Congolese government.³⁴

Okot Odhiambo was indicted on 8 July, 2005 on seven counts of war crimes in regard of situation in Uganda. He is alleged to be an integral member of the policy making leadership of the Lord's Resistance Army (LRA). He allegedly issued standing orders which resulted in murder, Pillaging of camps, enslavement and forcible conscription of children.³⁵

In the same vein, *Ahmed Haroun* was also indicted on 27 April, 2012 on 22 counts of war crime. He is alleged to have co-ordinated the operation in Sudanese Military, Police, Security Janjaweed Forces in Darfur region.³⁶

Abdel Rahim Hussein is also indicted by the ICC on six counts of war crimes with regard to situation in Sudan.³⁷ Other inductees who were charged with war crimes by the court include *Saleh Jerbo* and *Germain Katanga*. *Jerbo* was charged with three counts of war crimes with regard to Darfur situation, while *Germain Katanga* was indicted by the court on 2 July, 2012 on a six counts charge of war crimes with regard to situation in Democratic Republic of Congo, after an International warrant for his arrest was issued. He was transferred to the ICC on 17 November 2007, his trial began on 24 November, 2009 in conjunction with *Mathieu Ngudjolo*.³⁸

One distinct feature about most of the indictments by the ICC on war crimes is that the indictees are also in one way or the other indicted for crimes against humanity. It is important to note that the list of the persons indicted on war crimes cannot be exhausted. However, for the purpose of this article, the writer picked few names from the list to give an insight of the role of the ICC in ensuring that the violators of international does not go unpunished, without be held responsible for their actions.

Crime of Aggression

The International Community finally adopted article 8 *bis* to amend the Rome statute to criticize acts of aggression in 2010. Article 8 *bis* of the Rome statute defines the crime of aggression as “the Planning preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct

³³< <http://www.icc-cpi.intdrc-lubanga>> Accessed 16 November 2020.

³⁴<<http://www.icc-cpi.int-drc-natanga>> Accessed 16 November 2020

³⁵<<http://www.icc-cpi.int-okot>> Accessed 16 November 2020.

³⁶<<http://www.icc-cpi.int-darfu-harun>> Accessed 16 November 2020.

³⁷< <http://www.icc-cpi.int-darfur-hussein>> Accessed 16 November 2020.

³⁸ <http://www.internationalcrimesdatabase.org> Accessed 16 November 2020.

the political or military action of a State, of an act of aggression which constitutes a manifest violation of the charter of the United Nations.”³⁹

The crime of aggression as defined by article 8 *bis*, must be committed by a person in a position direct or control the actions of the State or military. Article 25 (3) *bis* additionally seems to extend this actor limitation to accessory modes of liability, providing that in respect of the Crime of Aggression the provision of this article shall apply only to person in a position effectively to exercise control over or direct the political or military action of a State.⁴⁰

Similarly, the Nuremberg tribunal explicitly contemplated the possibility that non- government official including industrialist could be liable for the crime of aggression, according to one Nuremberg judge (krupp) he stated that in order to establish the crime of aggression there are two essential elements to establish criminal liability for aggression: “*There must be not merely nominal but substantial participation and responsibility for activities vital to building up the power of a country to wage war. To establish the require criminal intent, it seems necessary to show knowledge*” like the Nuremberg tribunals article 25(3)(d)(ii) requires an act *us reus* of significant contribution and a *mens* of knowledge for the accessory liability. Article 25(3)⁴¹ *bis*, however, requires, in addition to the *mens rea* and *actus reus*, that the individual must be in a position effectively to exercise control over or to direct the state’s Political and Military actions. This is additional requirement that the suspect must be a member of a particular class of individuals guts the power of article 25(3) to hold all responsible accessories liable for the crime of aggression to which they contribute normally under article 25 (3) (d) an individual is liable for any Rome statute crime if he/she “contributes to the commission or attempted commission of such a crime” and the contribution is both “Intentional” and either made with the aim of furthering the criminal activity or criminal purpose of the group or made in the knowledge of the intention of the group to commit the crime.⁴² Nuremberg precedent is analogous to this form of accessory liability. Using the article 25(3) (d) standard for individual liability for aggression which suddenly put all corporate actors at the risk for liability. The level of liability has its own internal standards protecting defendants from unnecessary unreasonable criminal prosecution, namely providing the requisite *mens rea* of knowledge of the intent to commit the crime and a sufficiently “significant contribution” to the crime. The crime of aggression should not be a special case in which accessory modes of liability otherwise available under article 25 are inapplicable.¹²⁵

The purpose of the Rome statute include ensuring¹²⁶ “That the most serious crime of concern to the International Community as a whole do not go unpunished” and putting an end to impunity for the perpetrators of these crimes if the Rome Statute aims to do more than simply protect the sovereignty of States and the crime of aggression must also be defined to implicate more than just those individuals in positions to control or direct State or Military action.⁴³

Having examined the international crimes which the ICC is vested with jurisdiction to prosecute, it will be pertinent to now look at the challenges and prospects of the Court.

Challenges

One of the challenges of the Court from inception to date is that the ICC is contenting with the issues of complementarity. The Court only comes into focus when State is unwilling to launch an investigation and prosecution on any situation.

Since 2002, the ICC has been grappling with the issues of universal ratification of the Rome Statute. The absence of universal jurisdiction is mitigating against the success of the Court which is resulting into problems in securing sufficient state cooperation, the difficulties of investigating in war/conflict zones

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Rome Statute Article 25 (3) (d)

couple with security issues confronted by investigators and a host of other issues has negatively affected the ability of the court to assume jurisdiction over certain cases.

The Court requires support in some areas including the arrest and surrender of suspect, in most cases the court relied on the cooperation of states parties to carry out its key mandate and responsibilities. While laying emphases in facilitating national jurisdictions faces obstacles in connection to state cooperation is because orders and request of ICC are enforced through national jurisdiction. States are prepared to carry out investigation as well as prosecution for international crimes in domestic courts where non cooperative. States refuse to investigate, prosecute extradite and provide evidence. The uncooperative stand of powerful states not only impedes the efficacy of the court but also affects its international legitimacy.

The supports given to member states to the court falls short of what is required to assist the court to have a broad impact in promoting international justice and helping impunity.

The continuous refusal of the United States of America to sign the Rome Statute has negatively affected the court in the investigation of American troops and diplomats who have been charged for the violation of international crimes thereby giving other personnel the guts to commit such crimes with impunity.

Prospects

The entire premise of the Court is based on the principle of complementarity which means that the court will extend and use its jurisdiction when the national court is unable or unwilling to genuinely investigate or prosecute international crimes. The first priority is given to national jurisdictions. There is a need to review the aspect of the principle of complementarity within the premise of ICC. There is a direct need for the States referring cases to the ICC to enact complementarity provisions in their municipal laws in order to demonstrate real commitment to the ICC.

States cooperation is one of the factors that determine international credibility of the ICC, as an unbiased umpire and independent institution. For the court to act greatly it will require vibrant cooperation from states at all stage of proceedings, such as, execution of arrest warrants issued by the court, providing evidence and enforcement of sentences of the convicted persons. Cooperation is absolutely a crucial mechanism and should be put in place to enforce the arresting and surrendering of persons on the wanted list of the court.

States parties to the Rome Statute have to reaffirm their commitment to combat impunity for the most serious atrocities. Universality and implementation of the Rome Statute play a fundamental role in that regard, the fight against impunity is the common responsibility of all States whether or not they are parties to the Rome Statute. States should desist from paying lip service to the fight against the commission of international crimes. States should sign, ratify, domesticate and implement the Rome Statute.

The ICC should expand its horizon. There is a wide speculation that investigations of the court is mostly focus on Africa, even when atrocities are also been committed in other countries such as Iraq, Afghanistan, Syria, North Korea, Israel etc.

There should be mechanism for speedy investigation and conclusion of trials. There is apparent overwhelming concern over the speed at which investigations are being carried out by the court and trial itself, the general view is that the court is slow in its approach to handling cases, more proactive measures ought to be taken to facilitate these processes.

The United States of America should become a party to the Rome Statute. The US is more particular about possible charges against its citizens and has not been supportive of the Court. The US wields great powers and it is a super power in the comity of nations.

Article 43 (6) of the Rome Statute provides for victims witness protection. However, there is the need for the court to intensify more efforts in providing more protective measures and security arrangement and other forms of assistance for witnesses and victims during investigation, prosecution and after

Conclusion

The establishment of the International Criminal Court in 2002 is a breakthrough in the restitution of sanctity to humanity. It also guarantee the sanctity to humanity.

The Court has significantly entrenched on ensuring, protecting and advanced international criminal justice by ensuring that the perpetrators, violators of war crimes are made to face sanctions. The cardinal objectives of court is to deter genocide, war crimes, crimes against humanity and the crime of aggression. It obvious that the court cannot within 18 years of existence put a total end to these crimes. However, it has no doubt brought remarkable success in the prosecution of individuals who have committed war atrocities it the past few years. The establishment of the court has also provide a mechanism to address the issues of massive human rights abuses that have been committed and continued to be committed worldwide.

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