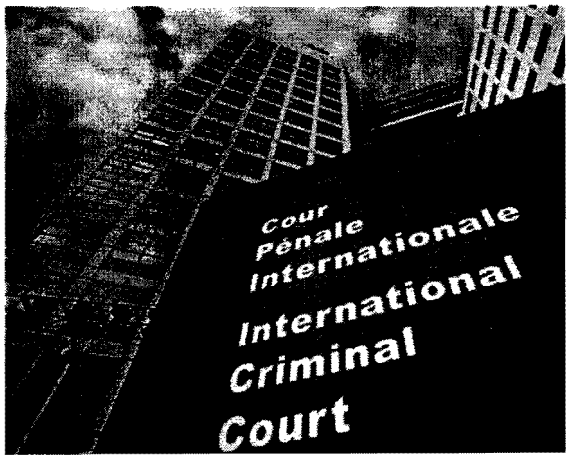
NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

BANGALORE

Dissertation undertaken and submitted in partial fulfilment of the LL.M. Course for the Academic Year 2012-2014

JUXTAPOSITION OF IMPUNITY AND JUSTICE: CAN ICC RISE ABOVE POLITICS AND DELIVER JUSTICE TO AFRICA? - SPECIAL REFERENCE TO KENYAN CASES



UNDER THE GUIDANCE OF

Prof. (Dr.) R. Venkata Rao

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Submitted on
this ***Fourteenth*** day of ***June, 2014*** by:

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LL.M. (Human Rights)

"Only if the **victors *submit***

themselves to the

same law

which they wish to impose

upon the vanquished States

will the idea of

international justice be

preserved."

- ***Hans Kelson***[1]

[1] HANS KELSON, PEACE THROUGH LAW, 114 (University of North Carolina Press, 1944). For an appreciation of this observation, refer Chapter II of this Dissertation.

CERTIFICATE

This is to certify that the Dissertation entitled *"Juxtaposition of Impunity and Justice: Can ICC Rise above Politics and Deliver Justice to Africa? - Special Reference to the Kenyan Cases"* is a bonafide record of independent research work done by Ms. Shivika Choudhary, a 2nd year LL.M. (Human Rights) student (ID No. 538), under my supervision and guidance. The same has been submitted to National Law School of India University in partial fulfillment for the award of the Degree of *Legum Magister* in Human Rights.

Dated June 14, 2014

Place:
Bangalore

Prof. (Dr.) R. Venkata Rao
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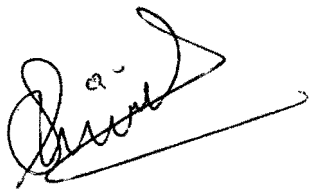
DECLARATION

I, Shivika Choudhary, a bonafide student of LL.M. in Human Rights at National Law School of India University would like to declare that the dissertation entitled *"Juxtaposition of Impunity and Justice: Can ICC Rise above Politics and Deliver Justice to Africa? - Special Reference to Mr. Kenyatta Case"* submitted by me in partial fulfillment of the requirements for the award of the Degree of Master of Laws IN Human Rights is the result of my own work and includes nothing which is the outcome of work done in collaboration except where specifically indicated in the text and bibliography. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at NLSIU or any other University of similar institution.

Dated June 14, 2014

Place: Bangalore



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ACKNOWLEDGEMENTS

With profound gratitude and sense of indebtedness I place on record my sincerest thanks to Prof. (Dr.) R. Venkata Rao, for his invaluable guidance, sound advice and affectionate attitude during the course of my studies. I have no hesitation in saying that he moulded raw clay into whatever I am, through his incessant efforts and keen interest shown throughout my academic pursuit. It is due to his patient guidance that I have been able to complete the task. My research in this endeavour has been greatly facilitated by the consultations with him and I feel privileged and honoured to have received the opportunity to undertake this work under his guidance.

I express gratitude to Prof. (Dr.) Manoj Kumar Sinha, Director, the Indian Law Institute, for providing valuable inputs in the beginning of the research that enabled me to have a more balanced approach to the work of the International Criminal Court in Africa. I also express my heartfelt gratitude for Dr. Anuradha Saibaba for critical inputs and encouragement.

I would like to convey my gratitude to all **my teachers**. I am indebted to the **library staff** at NLSIU for their help and support in finding materials for my research and also accessing them.

I would like to express my love and respect for **my parents** for their affectionate involvement and encouragement in all my endeavours.

It would have been totally impossible to accomplish this task without the blessings of **the Almighty.**

Dated June 14, 2014

Place: Bangalore

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LIST OF ABBREVIATIONS

AC	:	Appeals Chamber
AFRC	:	Armed Forces Revolutionary Council
AU	:	African Union
CAR	:	Central African Republic
CAT	:	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CDF	:	Civil Defence Forces
CEAJ	:	Committee of Eminent African Jurists
CPA	:	Comprehensive Peace Agreement
DDS	:	Director of Public Prosecutions
DRC	:	Democratic Republic of Congo
ECCC	:	Extraordinary Chambers in the Courts of Combodia
ECOWAS	:	Economic Community of West African states
ICC	:	International Criminal Court
ICCPR	:	International Covenant on Civil and Political Rights
ICJ	:	International Court of Justice
ICTR	:	International Criminal Tribunal for Rwanda
ICTY	:	International Criminal Tribunal for the former Yugoslavia
IDP	:	Internally Displaced People
ILC	:	International Law Commission
JCE	:	Joint Criminal Enterprise

LRA	:	Lord's Resistance Army
NGO	:	Non Governmental Organisation
NRA	:	National Resistance Army
OAU	:	Organisation of African Union
OTP	:	Office of Prosecutor
RPF	:	Rwanda Patriotic Front
RUF	:	Revolutionary United Front
SADC	:	Southern African Development Community
SCSL	:	Special Court for Sierra Leone
TC	:	Trial Chamber
TRC	:	Truth and Reconciliation Commission
UN	:	United Nations
UPDF	:	Uganda People's Defence Forces
UNSC	:	United Nations Security Council

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INTRODUCTION

THE SPECTRE OF JUSTICE: THE BITTERSWEET RELATION OF INTERNATIONAL CRIMINAL COURT AND KENYA

In Shakespeare's the Merchant of Venice, Portia enters the courtroom disguised as a magisterial judge to mediate the dispute between Shylock and Antonio and requests for mercy. Upon Shylock's rejection of mercy and demand for a 'pound of flesh' from Antonio, Portio exacts the full scripture of the law of Venice and decrees:

"Tarry a little there is something else.

This bond doth give thee here no jot of blood;

The words expressly are a 'pound of flesh'."[1]

This placed a restriction on Shylock that he may have his bond, but he may not shed one drop of Antonio's blood.[2] The law has frustrated Shylock's revenge, but he is furthered sanctioned by the law for an attempt on a Venetian's life. The contemporary value of this recital is the mystification of justice that surrounds the International Criminal Court (ICC) when it embarked on the herculean task to try Kenyan President and leaders. Primarily, the ICC is devoted to Preambular objective '*to put an end to impunity for the perpetrators of these crimes*'[3] by reading the law as it is, similar to the practice that Portia did. The other end of the spectrum, however, points to the demand of African nations to bring to book leaders

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[1] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 4, sc. 1, 11. 302-04 (Jay L. Halio ed., 1994) [hereinafter THE MERCHANT OF VENICE].
[2] THE MERCHANT OF VENICE, act 4, sc. 1, 11. 305-09.
[3] The Rome Statute of the International Criminal Court, Preambular ¶5 (last amended 2010), Jul. 17, 1998, ISBN No. 92-9227-227-6, *available at* http://www.refworld.org/docid/3ae6b3a84.htm [hereinafter Rome Statute].

other than those of African origin. A noteworthy demand and a one statement critique of the efforts of the ICC while it gets termed as the International Colonial Court. This way, the African nations may view the ICC as Shylock, an extension of the imperialistic ideology to subdue the African nations and extract fanciful demands while putting democratically elected Heads of States to trial. The Court, therefore, stands at the crossroad to select between the two ends of the spectrum, to be Portia would still require a deliberated delivering of the promise of Justice to ensure peace, while being Shylock would become detrimental to the Court's own existence and perpetuation.

The Kenyan trials by the ICC and the widespread movement denouncing the same become more pronounced in the following paragraphs.

I. AMIDST OPPOSITION

Despite widespread opposition, the January of 2012 witnessed the Pre-Trial Chamber of the International Criminal Court confirm charges on the Kenyan President Mr. Kenyatta in *Prosecutor v. Kenyatta*:[4]

> *"The Chamber concludes that there are substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta intended the killings, displacement and the severe physical and mental injuries which took place in or around Nakuru and Naivasha, i.e. that they intended both to engage in the conduct and to cause the consequences {dolus directus in the first degree).*"[5]

[4] *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Int'l Crim. Court Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf [hereinafter Prosecutor v. Kenyatta, Confirmation of Charges].

[5] Prosecutor v. Kenyatta, Confirmation of Charges, supra note 4, ¶ 414.

The confirmation was followed by a spirited movement by the African States to get the investigation deferred by a United Nations Security Council Resolution. The movement witnessed Mr. Kenyatta deliver his speech at the Extraordinary Session of the African Union on October 12, 2013:

> *"As our strength multiplies, and our unity gets deeper, those who want to control and exploit us become more desperate. Therefore, they abuse whatever power remains in their control...Western powers are the key drivers of the ICC process. They have used prosecutions as ruses and bait to pressure Kenyan leadership into adopting, or renouncing various positions."*[6]

This spirited speech encouraged a unanimous decision by the African Union that *"We have agreed no charge shall be commenced, or continued, before any international court or tribunal against any serving head of state or government or anybody acting or entitled to act in such a capacity...during his or her term in office."*[7] This meeting was also attended by Sudanese President Omar al-Bashir, both Mr. Kenyatta and Mr. al-Bashir are wanted by ICC. Surprisingly, the decision has been removed from the official website of the African Union.[8] The request, however, reached a dead-end in the UNSC. Upon failure of this request, the African Union expressed its disappointment at its Session in January 2014:

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[6] PSCU, *Speech by President Uhuru Kenyatta at the Extraordinary Session of the African Union*, STANDARD MEDIA, Oct. 13, 2014 at p. 2-3, *available at* http://www.standardmedia.co.ke/?articleID=2000095433&story_title=speech-by-president-uhuru-kenyatta-at-the-extraordinary-session-of-the-african-union&pageNo=3http://www.standardmedia.co.ke/?articleID=2000095433.

[7] Associated Press, *African Union: ICC Should Delay Kenyatta Trial*, THE WALL STREET JOURNAL, Oct. 12, 2013, *available at* http://online.wsj.com/news/articles/SB10001424052702303382004579131531849361724.

[8] http://www.au.int/en/content/addis-ababa-12-october-2013-%E2%80%93-extraordinary-session-assembly-african-union.

> *"EXPRESSES its deep disappointment that the request by Kenya supported by AU, to the United Nations (UN) Security Council to defer the proceedings initiated against the President and Deputy President of the Republic of Kenya in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not yield the positive result expected."*[9]

The continuously surmounting pressure on the ICC has resulted in procedural shifting of the trial against Mr. Kenyatta who was earlier scheduled to be tried in November 2013, to February 5, 2014 and now October 7, 2014. Amidst this outspoken opposition, it becomes important to examine the court's own criteria for selection of a situation, investigation and conduct of the trial.

II. RESEARCH METHODOLOGY

A. Aims and Objectives

The aims and objectives of this research are:

1. To critically analyse the cases against Kenyatta, Ruto, and Sang ("Kenyan Case 1"); and Ali, Kosgey, and Muthaura ("Kenyan Case 2").

2. To inspect the dilemma of victor's justice and its influence on the working of the ICC.

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[9] Decision On The Progress Report Of The Commission On The Implementation Of The Decisions On The International Criminal Court, Doc. Assembly/AU/13(XXII), Assembly/AU/Dec.493(XXII), Page 1, ¶6, *cited at* Assembly Of The Union, Twenty-Second Ordinary Session, 30 - 31 January 2014, Addis Ababa, EthiopiaAssembly/AU/Dec.490-516(XXII), Assembly/AU/Decl.1(XXII), available at http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20490-516%20%28XXII%29%20_E.pdf.

3. To analyse the political considerations that dictate delivery of justice. Additionally, to critically examine:

    - The impact of deferrals on the functioning of the ICC.

    - Legal basis of referral of the Kenya situation by Waki Commission to the ICC.

4. To examine feasibility of trial of a sitting head of state with reference to Kenyan Case 1.

5. To analyse and deduce the ICC's qualifying criteria for investigation.

B. Hypothesis

In this dissertation, the researcher examines the hypothesis that **"though the ICC was established as an independent and impartial court, yet its decisions may not have a basis in law."** This has become all the more crucial due to the Court's issue of indictments and summons against the sitting head and government leaders of the state of Kenya.

C. Research Questions

The researcher attempts to examine the following questions:

1. How do the considerations in the Kenyan Cases impact the relation that ICC shares with Africa, in particular, and the world, in general?

2. How does the dilemma of victor's justice influence the working of International Criminal Tribunals including the ICC?

3. What is the feasibility of trial of a sitting head of state with reference to Kenyan cases?

4. What is the significance of deferrals to cases before the ICC?

5. What are the ICC's qualifying criteria for investigation and does it apply them impartially?

D. Research Methodology

The Research Methodology relied upon is doctrinal, and Analytical. ***"Doctrinal (Non-Empirical) Method of Research"*** while evaluating international instruments, international criminal law principles, judgments of international criminal tribunals, indictments and judgments of the International Criminal Court, Juristic Writings and Books.

"Analytical Method of Research" while critically assessing, comparing and evaluating the judgments and indictments of international criminal tribunals and International Criminal Court.

E. Significance of the Research

1. It is the maiden study on the Kenyan Cases and their correlation with the legitimacy of the processes of the ICC.
2. It will enable determination of the criteria for selection or rejection of a situation for investigation by the ICC.
3. It will enable a clearer perspective on the role of ICC at challenging Impunity and delivering Justice.

4. It will be significant in analysing the alleged politics of justice that grants impunity to powerful states.

5. It will inspire further research.

F. Limitations

The dissertation is limited to study of ICC and International Criminal Tribunals, thus, it will not discuss in detail the position of Hybrid Courts.

The dissertation will exhaustively examine the Kenyan Cases and study the other cases only when relevant to the study of the same.

G. Mode of Citation

The dissertation will conform to 'The Bluebook: A Uniform System of Citation, 19th Edition.'

H. Tentative Chapterization

The chapters confirm to the sequence of research questions.

In the **first chapter**, the researcher examines the various considerations in the Kenyan Cases that impact the relation that ICC shares with Africa, in particular, and the world, in general. The researcher examines the cases against Kenyatta, Ruto, and Sang ("Kenyan Case 1"); and Ali, Kosgey, and Muthaura ("Kenyan Case 2"). While the former has been accepted by the Trial Chamber for investigation, surprisingly the charges in the latter case were not confirmed.

The **second chapter** deals with the dilemma of victor's justice and its influence on the working of International Criminal Tribunals including the ICC.

The researcher examines the origin, meaning and concept of victor's justice. Impunity rests in the concept of victor's justice. The researcher engages in an historical study of the impact of victor's justice on the Nuremberg and Tokyo trials, judgments of International Criminal Tribunal for Former Yugoslavia ("ICTY") and International Criminal Tribunal ("ICTR"), and other Hybrid courts. Special reference is made to Justice Pal's Dissentient Judgment at International Military Tribunal, Far East. The absolution of the President of Kenya on Feb 5, 2014, is a reflection of the concept of victor's justice, alternatively it is a submission to the influence of politics.

The **third chapter** is dedicated to the concerns regarding the feasibility of trial of a sitting head of state with reference to Kenyan cases. The chapter deals with historical evolution of the concept of trial of heads of state under twin principles of command responsibility and individual criminal responsibility. The contours of Head of State Immunity are less clearly delineated. It is, therefore, pertinent to examine the need of such immunities for maintaining a smooth conduct of international relations and protecting the officials from any possible interference.

The significance of deferrals in politicization of the ICC is examined in the **fourth chapter**. The issue of referral is important in the Kenyan case to know legitimacy of the referral by Waki Board. The question of deferrals has been often raised in the UNSC regarding the Kenyan cases, both resolutions ended in deadlock. But, they brought to forefront the ambiguities that surround issuance of a deferral, for instance, the State of Kenya has requested deferral on two different reasons each time.

The **last chapter** attempts to decipher the ICC's qualifying criteria for investigation. This would involve thorough study of the selection and strategy

papers of the Office of the Prosecutor ("OTP") of the ICC with a view to examine their consistency, coherence and comprehensiveness. The Kenyan situation is juxtaposed against the deduced criteria.

III. Concluding Remarks

There is an attempt to address the over-whelming concern of African nations that they are being specifically targeted by the ICC. Even though there is nothing continentally-specific about crimes committed during conflict, yet all the situations being investigated are specific to Africa. However, the Court has received criticism for its perpetual focus on Africa and the issue of summons against Kenyan President, Mr Kenyatta. In its quest to end impunity, it is desirable that the work of the ICC extends wherever it is needed throughout the world.

Prof. Nigel D. White reminds us, *"[a] peaceful state can only be achieved by combining security with justice, though a certain priority can be given to peace and security in the transitional phase by, for instance, derogating from certain human rights if the situation remains one of genuine emergency."*[10] Nonetheless, short term security can delay the pursuit of justice for past atrocities, a notion recognized in the Rome Statute, which allows the UNSC to defer any investigation or prosecution of a case in the interests of peace and security.[11] The situation in Kenya has escalated into a debate about legitimacy of the ICC to try African leaders, in specific, and the selection of case, in general. These considerations may appear contrasting, but they collude when it comes to delivering the promise of law through justice. While tempting to let sleeping dogs lie, the evidence suggests that a failure to

[10] Nigel D. White, Advanced Introduction to International Conflict and Security Law 119 (Cheltenham, 2014) [hereinafter Nigel D. White].
[11] Rome Statute, *supra* note 3, art. 16.

address past atrocities will simply delay the need to find the truth, to determine accountability and to provide reparations to victims. If not achieved in the immediate post-conflict stage, tackling injustice will have to occur at a later stage, when it will be more difficult to find the truth, to punish (or forgive) wrongdoers, and when it is too late to compensate victims. Simmering discontent and the entrenchment of victimhood for groups and their descendants will mean that the cycle of violence is not broken, at some point the peace will breakdown because of the failure to address past injustices.[12]

It, therefore, becomes pertinent to ensure that justice is delivered even though many might raise a voice against it. At the same time, it is important to ensure that the arms of law bring into their grasp all those who perpetuate this culture of violence and violation, irrespective of political standing, racial background or financial power.

[12] NIGEL D. WHITE, *supra* note 10, at 120; D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHST LAW 14-15(2nd ed., 2005). *See also,* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF THE INTERNATIONAL CRIMINAL JUSTICE 157-192 (Philippe Sans ed., 2003).

CHAPTER I

KENYAN CASES AND ENSUING COMMOTION: EXAMINATION WITH EMPHASIS ON THE RELATION OF ICC AND AFRICA

"The crisis triggered by the 2007 disputed presidential election has brought to the surface deep-seated and long-standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country."

- Acting Together for Kenya[13]

These lines from the Preamble to the 'Agreement on the Principles of Partnership of the Coalition Government' in Kenya suggest the realization by the opposition and the government of the fallacy of ensuing the violence in Kenya. The agreement was *'designed to create an environment conducive to such a partnership and to build mutual trust and confidence'*.[14] The Agreement failed to achieve its objectives, and both sides engaged in gross violence and abuse of human rights.

The violence was engulfing and destroying the entire country, which was brought to the knowledge of the Prosecutor of the International Criminal Court and pursued by his good offices. The Prosecutor Luis Moreno-Ocampo stated, *"Kenya will be a world example on pre-empting violence."*[15] The investigation, however, was met with scorn from the African nations as being specific targeting by the International Criminal Court. While this chapter examines and

[13] Acting Together for Kenya: *Agreement on the Principles of Partnership of the Coalition Government*, cited by Von Jannek, The full text of the power-sharing deal signed by Kibaki and Odinga, Eyes on Kenya, Feb. 29, 2008, http://eyesonkenya.org/blog/?tag=raila-odinga.

[14] *Id.*

[15] The Joint Victims and Civil Society Communique to Kenyans, the Office of the Prosecutor of the International Criminal Court and the International Community, Nov. 5, 2009, cited by the Prosecutor as ICC-01/09-3-Anx33, *available at* http://www.icc-cpi.int/iccdocs/doc/doc786012.pdf.

studies the factual background of the Kenyan cases and the investigation by the International Criminal Court in the same, it is important to first understand the relationship of the Court and Africa.

I. AFRICA AND INTERNATIONAL COURT OF JUSTICE

Africa is the continent that has witnessed most of the world's complex humanitarian emergencies. To a greater extent than any other continent, it is the region most afflicted by conflicts. It has been marred by more than twenty major civil wars since 1960, and Rwanda, Somalia, Angola, Sudan, Sierra Leone, Liberia, Democratic Republic of Congo (DRC), Chad & Central African Republic (CAR) and Burundi are among those countries that have recently suffered the effects of serious armed conflicts. What has become an issue of increased concern in recent decades is that it is civilians who suffer the most in such conflicts.[16] Today, the higher percentage, roughly 75 percent, of those killed or wounded in wars are non-combatants. Unfortunately, even though that is the case, some of Africa's conflicts have been greeted by inadequate responses, or even inaction, on the part of the international community.

Quantitatively, maximum number of African nations are members of the ICC, thereby, creating a numerical legacy for ICC to become an actual court. Thus, the ICC tried to get greater qualitative acceptance from the African nations by appointing Fatou Bensouda, an African woman from Gambia, as its President in June 2012. The work of the ICC, particularly in Africa, is not only important in ending impunity, but also testimonial to the growing concern for protection of human rights by punishing those who violate them. However, the work of the ICC in Africa has raised a number of critical questions, and different people have viewed the court differently. Until recently, allegations have surfaced from

[16] Jakkie Cilliers, Sabelo Gumedze and Thembani Mbadlanyana, *Africa and the 'Responsibility to Protect': What role for the ICC?*, 20 IRISH STUDIES IN INTERNATIONAL AFFAIRS 55 (2009).

within African political and diplomatic circles that the ICC is targeting African countries, and that some of these countries are unwilling participants in the international law process.[17] Looking at ICC's work in the continent, Mahmood Mamdani argues that ICC is part of a new *'international humanitarian order...on big powers as enforcers of justice internationally... that draws on the history of modern Western colonialism...where state sovereignty obtains in large parts of the world but is suspended in...Africa and the Middle East'*.[18]

On the other hand, those who support the ICC argue that it is the only truly international institution of criminal justice that helps to ensure that justice is done regardless of the authority or prestige of the perpetrators of crime. To some, it is the *'best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor'*,[19] due to its international composition and established rules of procedure, it is also the only international court that can investigate and prosecute without delay.

Those who support the ICC posit that in recent years, the court has been suffering from mounting pressure and resistance to its work from AU member states, despite its relevance and importance in the continent. What is more puzzling about all this newly found courage to resist the work of the court in Africa is the fact that African countries that are signatories to the Rome Statute expect the court to deliver on its mandate, but these same countries fail to understand that *"the ICC cannot succeed in its work without effective and*

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[17] Godfrey M Musila, *Between rhetoric and action: the politics, processes and practice of the ICC's work in the DRC*, 164 INSTITUTE FOR SECURITY STUDIES MONOGRAPH 1-73 (Pretoria, July 2009).

[18] Mamdani's thesis is set out in an article in The Nation, *available at* http://www.thenation.com/doc/20080929/mamdani (3 July 2009).

[19] Du Plessis and Ford, Unable or unwilling, 4.

reliable cooperation and assistance from member states, in particular states where investigations are ongoing".[20]

Currently, the court is dealing with several cases involving former heads of states and rebel leaders, and one case being heard involves the current serving president of Kenya. Max du Plessis and Jolyon Ford suggest that:

> *'of immense importance for Africa is that the ICC's first five "situations" are all on the continent (Democratic Republic of the Congo, Uganda, Sudan, the Central African Republic and Cote d'Ivoire) and so Africa is thus currently a high priority for the ICC, and will remain so for the foreseeable future'.*[21]

The Kenyan trials are specifically important for the ICC as: (i) they have created an uproar as to the biased policy of the ICC against Africa; (ii) it was the first time that a sitting head of the state was indicted; (iii) the outcome of this case will help remove ambivalence surrounding impartiality and independence of the ICC. With the summons issued by ICC to try Mr. Kenyatta,[22] there has been much uproar in the African sub-continent and African Union as discussed in the introduction to this dissertation. The researcher briefly states the facts of the two Kenyan cases being tried by ICC in the next section.

II. BACKGROUND

As early as December 2006, William Samoei Ruto ("RUTO") and Henry Kiprono Kosgey ("KOSGEY"), prominent leaders of the Orange Democratic Movement ("ODM") political party, began preparing a criminal plan to attack those identified

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[20] Musila, Between rhetoric and action.
[21] Du Plessis and Ford, Unable or unwilling, 4.
[22] Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11, Mar. 8, 2011, *available at* http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf

as supporters of the Party of National Unity ("PNU").[23] JOSHUA ARAP SANG ("SANG"), a prominent ODM supporter, was a crucial part of the plan, using his radio program to collect supporters and provide signals to members of the plan on when and where to attack. To reach their goal, RUTO, KOSGEY and SANG coordinated a series of actors and institutions to establish a network, using it to implement an organizational policy to commit crimes. Their two goals were: (1) to gain power in the Rift Valley Province, Kenya ("Rift Valley"), and ultimately in the Republic of Kenya, and (2) to punish and expel from the Rift Valley those perceived to support the PNU (collectively referred to as "PNU supporters").

Kenyans voted in the presidential election on 27 December 2007. The results of the disputed elections were announced by the Election Commission on December 30, 2014, thereby hurriedly declaring Kibaki as the President of Kenya. Rioting and looting breakout in opposition strongholds as the opposition leader Mr. Raila Odinga's Orange Democratic Alliance (ODA) actually won maximum number of presidential votes.[24] Thousands of members of the network ("perpetrators") cultivated by RUTO, KOSGEY and SANG began to execute their plan by attacking PNU supporters immediately after the announcement of the presidential election results on 30 December 2007. On 30-31 December 2007, they began attacks in target locations including Turbo town, the greater Eldoret area (Huruma, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town. They approached each location from all directions, burning down PNU supporters' homes and businesses, killing civilians, and systematically driving them from their homes. On 1 January 2008, the church located on the Kiambaa farm cooperative was attacked and burned

[23] This is a coalition of parties including the Kenya African National Union ("KANU"), Ford-Kenya, Ford-People, Democratic Party and the National Alliance Party of Kenya.

[24] *TIMELINE: Kenya in crisis after disputed elections*, REUTERS, Feb. 8, 2008, *available at* http://www.reuters.com/article/2008/02/08/us-kenya-crisis-events-idUSL0891082120080208, cited by the Prosecutor as ICC-01/09-3-Anx1C in his request for authorization, available at http://www.icc-cpi.int/iccdocs/doc/doc785977.pdf.

with moreIn response to the allegedly rigged victory of Mr. Kibaki, supporters of Mr. Odinga set fire to a church, killing about 30 villagers from Kibaki's Kikuyu tribe than one hundred people inside. At least 17 people died. The brunt of the attacks continued into the first week of January 2008.

All identified attacks occurred in a uniform fashion. Perpetrators gathered at designated meeting points outside of locations selected for attack. There, they met coordinators, who organized the perpetrators into groups with assigned tasks. Perpetrators then attacked target locations. Some perpetrators approached on foot, while others were driven in trucks, as had been previously arranged. SANG helped coordinate the attacks using coded language disseminated through radio broadcasts. The government accuses the opposition of 'ethnic cleansing', however the President commits to a re-election upon order of the court and alternatively offers to form a united government with the opposition. The offer is rejected and violence ensues which requires the African Union to intervene through its Chairman John Kufuor. On January 10, 2008 Mr. Kufuor leaves Kenya stating that both leaders have agreed to mediate through an African panel headed by former United Nations Secretary General Mr. Kofi Annan. The Parliament is convened on January 15 that year, and the opposition gets elected as the Speaker. The next few days witness celebrations of this event by the Opposition defying the ban on rallies which is responded by the police through teargas and bullets.

In response to RUTO, KOSGEY and SANG's planned attacks on PNU supporters, as well as to deal with protests organized by the ODM, prominent PNU members and/or Government of Kenya officials Francis Kirimi Muthaura ("MUTHAURA"), Uhuru Muigai Kenyatta ("KENYATTA"), and Mohammed Hussein Ali ("ALI") developed and executed a plan to attack perceived ODM supporters in order to keep the PNU in power. First, under the authority of the

National Security Advisory Committee, of which MUTHAURA and ALI were Chairman and a member, respectively, the Kenya Police, in joint operations with the Administration Police ("Kenyan Police Forces"), were deployed into ODM strongholds where they used excessive force against civilian protesters in Kisumu (Kisumu District, Nyanza Province) and in Kibera (Kibera Division, Nairobi Province). As a consequence, between the end of December 2007 and the middle of January 2008, the Kenyan Police Forces indiscriminately shot at and killed more than a hundred ODM supporters in Kisumu and Kibera. Second, MUTHAURA, KENYATTA and ALI also developed a different tactic to retaliate against the attacks on PNU supporters. On or about 3 January 2008, KENYATTA, as the focal point between the PNU and the Mungiki criminal organization, facilitated a meeting with MUTHAURA, a senior Government of Kenya official, and Mungiki leaders to organize retaliatory attacks against civilian supporters of the ODM. Thereafter, MUTHAURA, in his capacity as Chairman of the National Security Advisory Committee, telephoned ALI, his subordinate as head of the Kenya Police, and instructed ALI not to interfere with the movement of pro-PNU youth, including the Mungiki. KENYATTA additionally instructed the Mungiki leaders to attend a second meeting on the same day to finalize logistical and financial arrangements for the retaliatory attacks.[25]

As a consequence, the Mungiki and pro-PNU youth attacked ODM civilian supporters in Nakuru (Nakuru District, Rift Valley Province) and Naivasha (Naivasha District, Rift Valley Province) during the last week of January 2008. During these attacks, the attackers identified ODM supporters by going from door to door and by setting up road blocks for intercepting vehicles, killing over 150 ODM supporters.

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[25] Jane Yager, *In Kenya, Annan Denounces Violent 'Abuses': Former UN Head Finds Crisis 'Tragic'; Dozens More Deaths Reported*, NEWSER, Jan. 26, 2008, http://www.newser.com/story/17433/in-kenya-annan-denounces-violent-abuses.html.

The violence ensues, which compelled Mr. Kofi Annan to intervene by arriving in Kenya to start the mediation process. Mr. Kibaki and Mr. Odinga meet in a breakthrough brokered by Mr. Annan during which Mr. Annan denounces the "gross and systematic" human rights abuses in Kenya after continuing post-election violence.[26] Within a period of one month, the Red Cross reported killing of about 1,000 people. The violence resulted in more than 1,100 people dead, 3,500 injured, approximately 600,000 victims of forcible displacement, at least hundreds of victims of rape and sexual violence and more than 100,000 properties destroyed in six out of eight of Kenya's provinces. Many women and girls perceived as supporting the ODM were raped.[27] Violence erupted as The post election violence spread across Kenya affecting many people, the violent hotspots were over fifteen as recorded by in a map prepared by the Data Exchange Platform for the Horn of Africa (DEPHA) UNEP at the UN complex and cited by the ICC Prosecutor in his submission for authorization.[28] The same has been marked and annexed as ANNEXURE- I to this dissertation for reference of the reader. The United Nations Humanitarian Coordinator in Kenya reported that the women and children were specifically targeted not as a collateral of the violence, but as *"a tool to terrorise families and individuals and perpetuate their expulsion from the communities where they live."*[29]

The Waki Commission summarized: *"The Commission found that there was a heavy-handed Police response whereby large numbers of citizens were shot -*

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[26] Jane Yager, *In Kenya, Annan Denounces Violent 'Abuses': Former UN Head Finds Crisis 'Tragic'; Dozens More Deaths Reported*, NEWSER, Jan. 26, 2008, http://www.newser.com/story/17433/in-kenya-annan-denounces-violent-abuses.html.

[27] Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09, Dec. 15, 2010, ¶ 9, http://www.icc-cpi.int/iccdocs/doc/doc1050845.pdf.

[28] Post Election violence hotspots-Kenya, ICC-01/09-3-Anx1B, *available at* http://www.icc-cpi.int/iccdocs/doc/doc785976.pdf. Also annexed as ANNEXURE-I to this Dissertation.

[29] Office of the United Nations Humanitarian Coordinator in Kenya, HUMANITARIAN UPDATE vol. 2, Jan. 21-28, 2008, cited by the Prosecutor as ICC-01/09-3-Anx31, *available at* http://www.icc-cpi.int/iccdocs/doc/doc786010.pdf.

405 fatally - by Police in Kisumu, Kakgema, Trans Nzoia, Uasin Gishu, Kericho, Nakuru, Nairobi and other places. Among the victims were some who were ostensibly going about their lawful business when they were hit by bullets and many more whose wounds confirmed that they had been shot from behind."[30]

III. RESPONSE OF THE ICC PROSECUTOR

On November 5, 2009, as required by Regulation 45 of the Regulations of the Court,[31] the Prosecutor of the ICC, Luis Moreno-Ocampo, informed the President of ICC Mr. Song that *"on the basis of information on crimes within the jurisdiction of the Court, that there is a reasonable basis to proceed with an investigation into the Situation in the Republic of Kenya in relation to the post-election violence of 2007-2008."*[32] The Prosecutor intended to submit a request for the authorization to the President by December 1, 2009, however, the request was submitted earlier on November 26, 2008 with 40 appended annexures.[33]

On 10 December 2009, the Chamber issued an "Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute."[34] On 11 January 2010, Professors Max

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[30] ICC-01/09-3-Anx5, pp.429-430; OHCHR Report, ICC-01/09-3-Anx7, pp. 5, 11-12; HRW Report, ICC-01/09-3-Anx3, pp. 9, 28 et seq, 63 et seq.

[31] The Regulations of the Court, Official documents of the International Criminal Court, Regulation 45, May 26, 2004, ICC-BD/01-01-04, *available at* http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf

[32] Decision Assigning The Situation In The Republic Of Kenya To Pre-Trial Chamber II, OTP/051109/LMO-r, Nov. 5, 2009, *available at* http://www.icc-cpi.int/iccdocs/doc/doc778245.pdf.

[33] Request for Authorization of Investigation Pursuant to Article 15, ICC-01/09, Nov. 26, 2008, *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/3.aspx.

[34] ICC-01/09-4, in Request for Authorization of Investigation Pursuant to Article 15, ICC-01/09, Nov. 26, 2008, *available at* http://www.icc-

Hilaire and William A. Cohn (the "Applicants") submitted an application to appear as amicus curiae for the sake of filing observations on some issues related to the Prosecutor's Request "within 30 days or within such period" to be decided by the Chamber (the "Amicus Curiae Application").[35] On 15 January 2010, the Prosecutor submitted a request for leave to respond to the Amicus Curiae Application (the "Prosecutor's Request for Leave to Respond").[36] On 20 January 2010, a legal representative for one of the victims filed a response to the Amicus Curiae Application in which he requested the Chamber to reject it on several grounds (the "Legal Representative's Request").[37]

After examining the approximately 1500 pages of supporting materials, the Chamber, however, considered it essential that the Prosecutor provides the Chamber with additional information and clarification with respect to the following requirements: (1) the State and/or organizational policy under article 7(2) (a) of the Statute, and (2) admissibility within the context of the situation in the Republic of Kenya.[38]

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cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/3.aspx.

[35] ICC-01/09-8,in Request for Authorization of Investigation Pursuant to Article 15, ICC-01/09, Nov. 26, 2008, *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/3.aspx.

[36] ICC-'01/09-9, in Request for Authorization of Investigation Pursuant to Article 15, ICC-01/09, Nov. 26, 2008, *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/3.aspx.

[37] ICC-01/09-11, in Request for Authorization of Investigation Pursuant to Article 15, ICC-01/09, Nov. 26, 2008, *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/3.aspx.

[38] Decision Requesting Clarification and Additional Information, ICC-01/09, Feb. 18, 2010, *available at* http://www.icc-cpi.int/iccdocs/doc/doc825223.pdf.

A. Decision on Authorization of Investigation

On March 31, 2010, the Chamber authorized the investigation through its "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya." [39] the Chamber examined the situation on the "Reasonable basis to proceed" standard required by Article 15 (3) and (4).[40] The main point of controversy was whether the Prosecutor should be empowered to trigger the jurisdiction of the Court, of his own motion, in the absence of a referral from a State Party or the Security Council. [41] Insofar as *proprio motu* investigations by the Prosecutor are concerned, both proponents and opponents of the idea feared the risk of politicizing the Court and thereby undermining its "credibility."[42] In particular, they feared that providing the Prosecutor with such "excessive powers" to

[39] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (ICC-01/09), 31 March 2010, available at http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf [hereinafter Decision on Authorization].

[40] Id. at ¶ 17.

[41] Report of the Ad hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), paras 113-114; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. A/51/22 (1996), paras 149-151; E.g., In favour: UN Doc. A/CONF.183/C1/SR.9, paras 84-88 (Lesotho), 89 (Thailand), 89-91 Qordan), 93-94 (Mexico), 95 (Costa Rica), 96-97 (Venezuela), 100 (Morocco), 101-102 (Czech Republic), 106-107 (Ireland), 108-110 (Romania), 116 (Australia), 120-122 (New Zealand), 124 (Belgium), 131-132 (Trinidad and Tobago), 134-135 (Netherlands), 136-137 (Norway); UN Doc. A/CONF.183/C1/SR.9, paras 1-2 (Italy), 3-4 (South Africa), 7-S (Tanzania), 10 (Brazil), 11-12 (Denmark), 13-14 (Madagascar), 15-16 (Germany), 17-18 (Sweden), 19-20 (Slovenia), 21 (Canada), 22 (Chile), 23 (Bahrain), 24 (Andorra), 25-26 (Greece), 28 (Senegal), 31 (Azerbaijan), 32 (Republic of Korea), 33 (Switzerland), 34-35 (Togo), 36 (Sierra Leone), 41 (Portugal), 42 (Burkina Faso), 43 (Peru), 44 (Uruguay), 45 (Namibia), 46 (Poland). Opposed: UN Doc. A/CONF.183/SR.7, para. 88 (Nigeria); UN Doc. A/CONF.183/C1/SR.9, paras 82-83 (Iran), 92 (Kenya), 98 (Yemen), 99 (Iraq), 103 (Indonesia), 105 (India), 111-112 (Israel), 117 (Libya), 118 (Cuba), 119 (Egypt), 123 (Saudi Arabia), 125-130 (United States), 133 (Russian Federation); UN Doc. A/CONF.183/C1/SR.9, paras 6 (Nigeria), 9 (China), 29 (Tunisia), 30 (Algeria), 37 (Turkey), 38 (Japan), 39 (United Arab Emirates), 40 (Pakistan), 47 (Bangladesh).

[42] Report of the Preparatory Committee on the Establishment of an International Criminal Court, U N GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. Al51I11 (1996), para. 151; see also, C. Stahn, *Judicial Review of Prosecutorial Discretion: Five Years On*, in C. STAHN AND G. SLUITER (EDS.). THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 265 (2009).

trigger the jurisdiction of the Court might result in its abuse.[43] Recognizing that the Article 15 "is one of the most delicate provisions of the Statute," the Chamber appreciated the drafters of the Statute to seek a balanced approach that rendered the proprio motu power of the Prosecutor to initiate an investigation acceptable to those who feared it. The words "reasonable basis" referred to in article 15 and the chapeau of article 53(1) are also reiterated in article 53(l)(a) of the Statute. After examining the various thresholds for reasonable basis, the Chamber observed that the interpretation and bearing in mind that the "reasonable basis" standard under article 15 of the Statute is even lower than that provided under article 58 of the Statute (the subject-matter of the Appeals judgment),[44] the Chamber considers that in the context of the present request, all the information provided by the Prosecutor certainly need not point towards only one conclusion.[45] The Chamber examined different situations, but stated that the Chamber could not see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy".[46] Information that politicians and religious leaders inciting the violence during the time concerned points to ad hoc preparations and planning of violent incidents during the period of "post-election violence". Local politicians using criminal gangs for their own purposes is an indicator of a partnership of convenience for a passing occasion rather than an 'organization' established for a common purpose over a prolonged period of time. Taking note of the assistance which the police it provided to vulnerable

[43] Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc, A/51/22 (1996), para. 151.
[44] Appeals Chamber, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Feb. 3, 2010, para. 33.
[45] Decision on Authorization, *supra* note 39, ¶ 34.
[46] Decision on Authorization, *supra* note 39, ¶ 146.

communities, the Chamber observed that it was "unable to deduce that overall the police was implementing a State policy to attack the civilian population."[47]

The information available does not lead to the conclusion of 'one' "attack" during the time frame under examination but a series of numerous incidents, as suggested by the Prosecutor. Numerous violent acts were launched at different times by different groups and against different groups throughout the country. The violence was at the occasion of the as rigged perceived presidential elections in December 2007. The reasons for the violence appear to go beyond allegations of manipulated elections. Albeit the motives of the perpetrators are not decisive and may vary, it nevertheless sheds light on the question of the existence of a possible policy.[48] Even though the Chamber noted deficit of material to support a specific State policy, it authorized the investigation stating, *"the overall picture is characterized by chaos, anarchy, a collapse of State authority in most parts of the country and almost total failure of law enforcement agencies."*[49]

B. Summons

Pursuant to Article 58 of the Rome Statute, the Prosecutor placed a request for summons to the Trial Chamber on December 15, 2010.[50] The Prosecutor believed that summonses to appear are sufficient to ensure the appearance of MUTHAURA, KENYATTA and ALI as all three suspects hold prominent positions within the Kenyan government and there is no indication that they would evade personal service of the summonses.[51] Since the opening of

[47] Decision on Authorization, *supra* note 39, ¶ 147.
[48] Decision on Authorization, *supra* note 39, ¶ 148.
[49] Decision on Authorization, *supra* note 39, ¶ 143.
[50] Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09, Dec. 15, 2010, available at http://www.icc-cpi.int/iccdocs/doc/doc1050845.pdf.
[51] Id., at ¶ 206.

investigations, the Government of Kenya has consistently indicated its commitment and willingness to cooperate with the OTP and with the ICC. This commitment to cooperation has included a commitment to hand over any suspects who may be the subject of an arrest warrant application by the ICC. KENYATTA has consistently indicated in numerous public statements that he is willing to cooperate with the OTP and with the ICC.[52] The Prosecutor noted that ALI's representative has made similar suggestions. The Prosecution did not possess similar information as to MUTHAURA. He has not made a public announcement on this matter.

Additional to the summons to appear, the Prosecutor required those summoned to adhere to following conditions pursuant to Article 58 (7) and Rule 119:[53] To provide the Chamber with all residential addresses and telephone numbers; have no contact with the other suspects personally; have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes in Nyanza Province, Nairobi and the Rift Valley; refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence; refrain from committing crime(s) set forth in Kenyan law or the Rome Statute; timely respond to any request by the Chamber; attend all required hearings at the International Criminal Court; and post a bond or provide real or personal security or surety, as the Chamber deems fit.

On 16 February 2011, the Chamber requested the Prosecutor to submit all witnesses' statements which he relies on for the purposes of his Application under article 58 of the Statute, no later than 23 Febmary 2011 (the "16 February

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[52] R. Jillo, *Uhuru says he has nothing to fear over poll chaos*, CAPITAL NEWS, Oct. 10, 2010, KENOTP- 0033-0269 at 0269.

[53] Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09, Dec. 15, 2010, ¶ 208, available at http://www.icc-cpi.int/iccdocs/doc/doc1050845.pdf

2011 Decision").[54] On 23 February 2011, the Chamber received the witnesses' statements as requested in the 16 February 2011 Decision.[55]

The Trial Chamber provided its *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*[56] on March 8, 2011 in which it issued summons to the three suspects to appear before the Court on Thursday, 7 April 2011 at 14.30 hours for the purposes of the hearing to be held pursuant to article 60 of the Statute and rule 121(1) of the Rules.[57]

In the other Kenyan Case, the Prosecutor made an application for issue of summons on December 15, 2010 as well.[58] The request was answered affirmatively by the Chamber on March 8, 2011 requiring them to appear by April 7, 2011.

IV. KENYAN CASE 1: FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

A. Jurisdiction and Admissibility

Article 19(1) of the Statute provides that: "The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17". Regardless of the mandatory language of article 19(1) of the Statute, which requires an

[54] Pre-Trial Chamber II, "Decision Requesting the Prosecutor to Submit the Statements of the Witnesses on which he Relies for the Purposes of his Applications under Article 58 of the Rome Statute", ICC-01/09-45-Conf-Exp.
[55] ICC-01/09-48-Conf-Exp and its Annexes.
[56] Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11, Mar. 8, 2011, available at http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf.
[57] Id. at p. 23.
[58] Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09, Dec. 15, 2010, http://www.icc-cpi.int/iccdocs/doc/doc1050835.pdf.

examination of whether the Court has the competence to adjudicate the case under consideration, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential feature in the exercise by any judicial body of its functions and is derived from the well-recognised principle of *la compétence de la competence.*[59]

The phrase "satisfy itself that it has jurisdiction" also entails that the Court must 'attain the degree of certainty' that the jurisdictional parameters set out in the Statute have been satisfied.[60] In its 31 March 2010 Decision, the Chamber has examined the different facets of jurisdiction in terms of place {*ratione loci,* i.e., in the Republic of Kenya), time {*ratione temporis,* i.e. crimes allegedly committed after 1 June 2005), and subject-matter {*ratione materiae,* i.e. crimes against humanity). It has also defined the scope of the Prosecutor's investigation with respect to the situation under consideration in view of the above-mentioned three jurisdictional prerequisites, namely the territorial, temporal and material parameters of the situation. It found that all the requirements have been met which led it to authorise the Prosecutor to commence an investigation into the situation in the Republic of Kenya in relation to "crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009".[61] Regarding admissibility, the second sentence of article 19(1) of the Statute dictates that an admissibility determination of the case is only discretionary at the stage of issue of summons, in particular when triggered by the proprio motu powers of the Chamber.

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[59] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 23.

[60] Pre- Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 24.

[61] Decision on Authorization, *supra* note 39.

B. Crimes Charged

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALI, as co-perpetrators, or in the alternative, as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes against humanity:

1. Murder constituting a crime against humanity (Articles 7(l)(a) and 25(3)(a) or (d) of the Statute): the murder of civilian supporters of the Orange Democratic Movement political party in or around locations including Kisumu town (Kisumu District, Nyanza Province), Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(l)(a) and 25(3)(a) or (d) of the Rome Statute.

2. Deportation or forcible transfer of population constituting a crime against humanity (Articles 7(l)(d) and 25(3)(a) or (d) of the Statute): the deportation or forcible transfer of civilian population supporting the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(l)(d) and 25(3)(a) or (d) of the Rome Statute.

3. Rape and other forms of sexual violence constituting a crime against humanity (Articles 7(l)(g) and 25(3)(a) or (d) of the Statute): rape and other forms of sexual violence against civilian supporters of the Orange Democratic Movement political party in or around locations including Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(l)(g) and 25(3)(a) or (d) of the Rome Statute.

4. Other inhumane acts constituting a crime against humanity (Articles 7(l)(k) and 25(3)(a) or (d) of the Statute): the inflicting of great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilian supporters of the Orange Democratic Movement political party in or around locations including Kisumu town (Kisumu District, Nyanza Province), Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(l)(k) and 25(3)(a) or (d) of the Rome Statute.

5. Persecution as a crime against humanity (Articles 7(l)(h) and 25(3)(a) or (d) of the Statute): persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer, in or around locations including Kisumu town (Kisumu District, Nyanza Province), Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(l)(h) and 25(3)(a) or (d) of the Rome Statute.

On the basis of the Application, the information and the evidence presented (collectively, the "material"), the Chamber found that there are reasonable grounds to believe that from on or about 24 January 2008 until 31 January 2008, the Mungiki criminal organization carried out an attack against the non-Kikuyu population perceived as supporting the ODM (mostly belonging to Luo, Luhya and Kalenjin ethnic groups) in Nakuru and Naivasha.[62] The Chamber was satisfied that there are reasonable grounds to believe that Muthaura and

[62] Prosecutor's Application, Annex 3, pp. 114, 128-130; Annex 5, pp. 95, 98; Annex 7, pp. 49-52, 54-55; Annex 8, p. 15; Annex 23, pp. 244, 373, 377-379, bbl-bb8, 664.

Kenyatta are criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute and that Ali is criminally responsible as having contributed to crimes committed by a group of persons within the meaning of article 25(3)(d) of the Statute.[63]

V. KENYAN CASE 2: WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY, AND JOSHUA ARAP SANG

A. Jurisdiction and Admissibility

The Chamber had reviewed the Application and the supporting materials and is of the view that, since the Prosecutor has adhered to the Court's territorial, temporal and material parameters defining the situation as confirmed in its 31 March 2010 Decision.[64]

B. Crimes Charged

The Rift Valley, one of eight provinces in Kenya, was the epicentre of violence that followed the 2007 general election. It suffered the greatest number of victims, including over 700 deaths, the largest share of the injuries, and approximately 600,000 forcibly displaced persons. The violence that erupted in the Rift Valley was not spontaneous; rather, it was the product of planning and coordination led by RUTO, together with KOSGEY and SANG. In anticipation of the 2007 presidential election, RUTO, KOSGEY and SANG created a plan to expel PNU supporters from the Rift Valley in the event that the election were rigged. This plan would have the twofold effect of punishing PNU supporters

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[63] Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11, Mar. 8, 2011, ¶ 56, *available at* http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf.

[64] Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11, Mar. 8, 2011, ¶ 11, *available at* http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf.

and removing PNU supporters from the Rift Valley to gain power by creating a future pro-ODM voting block.

Immediately following the announcement of the presidential election results, the Network began to execute attacks against PNU supporters in various locations in Uasin Gishu and Nandi Districts, including Turbo town, the greater Eldoret area (Kiambaa, Yamumbi, Haruma, Kimumu and Langas), Kapsabet town, and Nandi Hills town, with the intent to expel them from the Rift Valley. The brunt of the attacks occurred from 30 December 2007 through the first week of January 2008. The crimes that are the subject of this Application occurred predominantly within a 25 kilometre radius of a house that RUTO owns in Sugoi (Uasin Gishu District), where he held meetings to plan the attacks. SANG used coded language disseminated through radio broadcasts to help coordinate the attacks.[65] After establishing roadblocks at all major roads around towns, including Kapsabet town, Eldoret, Turbo town, and Nandi Hills town, perpetrators attacked and burned properties previously identified as belonging to perceived PNU supporters. They also killed some perceived PNU supporters.

From 30 December 2007 to the end of January 2008, William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, as co-perpetrators, or in the alternative, as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of:

1. **Murder constituting a crime against humanity (Article 7(l)(a) and Article 25(3)(a) or (d) of the Statute):** murder in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi),

[65] Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09, Dec. 15, 2010, ¶24, http://www.icc-cpi.int/iccdocs/doc/doc1050835.pdf.

Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(l)(a) and 25(3)(a) or (d) of the Rome Statute.

2. **Deportation or forcible transfer of population constituting a crime against humanity (Article 7(l)(d) and Article 25(3)(a) or (d) of the Statute):** deportation or forcible transfer of population in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya in violation of Articles 7(l)(d) and 25(3)(a) or (d) of the Rome Statute.

3. **Torture constituting a crime against humanity (Article 7(l)(f) and Article 25(3)(a) or (d) of the Statute):** torture by inflicting severe physical or mental pain or suffering upon civilians, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, and Langas), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(l)(f) and 25(3)(a) or (d) of the Rome Statute.

4. **Persecution as a crime against humanity (Article 7(l)(h) and Article 25(3)(a) or (d) of the Statute):** persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, torture, and deportation or forcible transfer of population, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(l)(h) and 25(3)(a) or (d) of the Rome Statute.

In the Nandi District (encompassing Kapsabet town and Nandi Hills town), the attack ended in the death of 7 persons and the injury of more than 500.[66] A number of houses and business premises were also looted and burned.[67] Ruto and Kosgey are criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute, and that Sang is criminally responsible as having contributed to crimes committed by a group of persons within the meaning of article 25(3)(d) of the Statute, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town, in the Uasin Gishu and Nandi Districts, Republic of Kenya.

The Researcher provides a chronology of the events for easy reference and understanding:

TABLE 1: CHRONOLOGY OF EVENTS IN KENYAN TRIALS	
2007-2008 **Post Election Violence**	An estimated 1,300 die in violent outbreaks after the presidential elections. Mwai Kibaki is declared the winner, opposition leader Raila Odinga disputes the results. More than 3,000 women are raped by gangs paid by political parties, according to eye witnesses and human rights groups. More than 3,500 are injured when hundreds of thousands flee the violence.
2008 **Waki Commission**	Installation of the Waki Commission. This international commission is established by the Kenyan (Kibaki) government in order to investigate the post-election

[66] Prosecutor's Application, Annex 12, p. 2; Annex 13, p. 2.
[67] Prosecutor's Application, Annex 5, pp. 41-42; Annex 9, pp. 137-138; Annex 19, pp. 584-585, 616-617, 619.

	violence. In October 2008, the Waki Commission asks for a special tribunal to investigate and prosecute those who incited violence after the 2007 elections. A few months later, the Kenyan parliament votes against the special tribunal.[68]
2009 **Agreement with ICC**	The Kenyan government and the International Criminal Court (ICC) agree that the people responsible for the violence in 2007 and 2008 should be tried by an independent court.
2010 **ICC investigation into Kenya**	The prosecutor of the International Criminal Court (ICC) starts an investigation into the post-election violence. This is the first time for the ICC to request an investigation. Until now, it waited for a country or the United Nations Security Council to call for investigation.
2010 **Ocampo Six**	ICC prosecutor Luis Ocampo accuses six Kenyans of masterminding the 2007-2008 post-election violence: Uhuru Kenyatta, William Ruto, Joshua Arap Sang, Francis Muthaura, Mohammed Hussein Ali and Henry Kosgey. Ocampo accuses them of being responsible for the violence. The charges: murder, forcible deportation, rape, inhumane acts, persecution and torture.
2011 **Pre-trial Hearings**	The hearings determine if the case against the 'Ocampo Six' will proceed to trial.

[68] For a discussion, refer Chapter IV of this dissertation.

2012 **Acquitted: Ali and Kosgey**	The ICC finds that there is insufficient evidence to proceed to trial against Hussein Ali and Kosgey.
2013 **Acquitted Mathaura**	ICC prosecutor Fatou Bensouda drops charges against Francis Muthaura. Three remaining suspects will be put on trial in The Hague: Uhuru Kenyatta, William Ruto, Joshua Arap Sang.
Sep. 10, 2013 **Trial Against William Samoei Ruto begins.**	The ICC trial against Deputy President of Kenya, William Samoei Ruto, begins in The Hague.
Sep. 10, 2013 **Sang Trial**	The ICC trial against Joshua Arap Sang opens in The Hague. Sang was Head of Operations at Kass FM and, in 2007 and 2008, a radio broadcaster.
Feb. 5, 2014 **Scheduled Start for Trial Against Kenyatta**	The scheduled start of the ICC trial against Uhuru Muigai Kenyatta, President of the Republic of Kenya, but gets shifted to October 2014.

VI. CONCLUDING REMARKS

While it is true, as noted by Prof. Nigel D. White, that *"[p]eace and justice are being forged together in the newest limb of international conflict and security law- post-conflict law or the jus post bellum-where peace building combines*

security with self-determination, and re-assimilation with transitional justice."[69] It should be noted that such peace keeping measures do not hold water when those who commit Crimes against Humanity are enjoying impunity. The peace building process suffers there. The African nations have raised much furore over these trials stating selectivity and threat to their sovereignty. The next two chapters examine the two issues with the Kenyan trials, especially that of Mr. Kenyatta, intermingling of victor's justice and ICC, and questionable enjoyment of sovereign immunity when one has committed crimes against humanity.

[69] NIGEL D. WHITE, *supra* note 10, at 120; D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHST LAW 125 (2nd ed., 2005).

CHAPTER II

VICTOR'S JUSTICE: THE KENYAN CASES AND THE ICC

"Only if the victors submit themselves to the same law which they wish to impose upon the vanquished States will the idea of international justice be preserved."

- ***Hans Kelson***[70]

From the first trial of Peter von Hagenbach to the present trials, the flavour of victor's justice can be found in almost all trials, including the present Kenyan Trials. The understanding of war and peace gets even more intriguing when one reads Prof. Nigel's observation that:

> *"The same act of violence, if carried out in a time of war, would be seen as a 'deed of heroic patriotism,'*[71] *while in times of peace it would be treated as an international crime."*[72]

This conundrum reflects in the war trials as well, especially when a party tries to raise a defence of necessity or *tu quorque*, the part is shunned by the victorious party conducting the trial. If anyone really took the lofty ideals of international justice seriously, say the realists, they would pursue war criminals on the winning side and not just on the losing side. It is easy enough to hold the Germans, Japanese or the Ottoman Empire accountable for war crimes. But what about the war crimes of Stalin's, Mao's or Pol Pot's regimes? The crimes of these latter were surely as heinous as those of the Nazis. The problem, however, is that the Russians, the Chinese and the Khmer Rouge (at least until 1979) did not lose a war. There was no victor to hold them accountable. If liberal democracies really believed in and acted on the notions of international

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[70] HANS KELSON, PEACE THROUGH LAW 114 (1944).
[71] S. NEFF, WAR AND THE LAW OF NATIONS 177 (2005).
[72] NIGEL D. WHITE, *supra* note 10, at 2.

justice, wouldn't they have taken the military risk to bring these criminals to justice?

I. EARLY EXPERIENCES

The view that international criminal tribunals are a form of victors' justice is as old as international relations. As Thucydides said, "*The standard of justice depends on the equality of power to compel.*"[73] Modern-day realists have criticized "legalism" and moralizing in foreign policy[74] and are sceptical of the utility of such tribunals. Realists maintain that international institutions are superfluous at best, because they are simply a reflection of the underlying balance of power,[75] and misguided at worst, because they inject moral issues with their accompanying fervour and stickiness into diplomacy.[76] Indeed, these legalistic exercises risk exacerbating the very conflicts tribunals are supposed to ameliorate. Furthermore, international criminal tribunals can never escape the political interests that led to their creation. If international laws are enforced only when states are subjugated to those laws by more powerful states, the power to enforce and interpret the law resides with a war's winning coalition or a winning coalition on the UN Security Council. In this view, international justice is the product and subject of international politics.

A. Peter von Hagenbach

The case traditionally cited as the first transnational criminal trial occurred in 1474. The case arose from an occupation of the Burgundian city of Breisach, which had been pledged to Charles the bold as security for a loan of 1,00,000

[73] See, FROM NUREMBERG TO THE HAGUE: THE FUTURE OF THE INTERNATIONAL CRIMINAL JUSTICE (Philippe Sans ed., 2003) [hereinafter FROM NUREMBERG TO THE HAGUE].
[74] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 145-166 (4th ed., 2011) [hereinafter WILLIAM A. SCHABAS].
[75] FROM NUREMBERG TO THE HAGUE, *supra* note 73, at 14.
[76] RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 35 (1972) [hereinafter RICHARD H. MINEAR]; DANILO ZOLO, VICTOR'S JUSTICE: FROM NUREMBERG TO BAGHDAD (M. W. Weir *trans.*, 2009) [hereinafter DANILO ZOLO].

gold florins by Sigismund, the Archduke of Austria. Charles appointed von Hagenbach as governor, and proceeded to attempt to annex Breiasch. Von Hagenbach imposed a regime on the areas *'which shocked even by no means over-tender sensibilities of late medieval Europe'*[77] and engaged in the rape and murder of civilians and the taking and destruction of property during military campaigns in northern Europe.[78]

After five years of suffering his regime, and after complaints, inter alia, to Frederick III and Charles, a coalition rose against von Hagenbach. He was tried on May 9, 1474 in Breisach's marketplace. The trial was before a panel of twenty eight judges, appointed by allied towns who had fought Charles and von Hagenbach. This first quoted international trial was also a trial evidencing victor's justice as all judges were appointed by the victorious towns and none belonged to the town of von Hagenbach. Further, von Hagenbach was stripped of his knighthood prior to trial.[79]

In characteristic form, the accused protested the charges, arguing that he was following his master's instructions of brutality and terror to reduce the population of Breisach to total submission. Peter was denied defence of superior orders by the ad hoc court and executed following Marshall's orders: *'Let Justice be done.'*[80]

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[77] Hilaire McCoubrey, *War Crimes Jurisdiction and a Permanent International Criminal Court: Advantages and Difficulties*, 3 JACL 9, 11 (1998).

[78] ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 19-22 (1960); Timothy L.H. McCormack, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudication Violence: Problems Confronting International Law and Policy on War Crimes Against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of International Law*, 60 ALB. L. REV. 681, 690-92 (1997).

[79] ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 17-20 (2005) [hereinafter ROBERT CRYER]; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 78 (2008) [hereinafter CASSESE CRIMINAL LAW].

[80] RICHARD H. MINEAR, *supra* note 76, at 68; Y. DINSTEIN, THE DEFENCE OF OBEDIENCE TO SUPERIOR ORDERS IN INTERNATIONAL LAW 57 (1965).

B. World War I

In the centuries following Hagenbach's trial, States left post-war prosecutions to domestic courts—either the courts of the nations involved in the conflict or other national bodies. This pattern was followed in the aftermath of World War I. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was established on January 25, 1919; its purpose was to determine a viable means by which individuals would be prosecuted and punished for war crimes.[81] In early 1920, the Allies submitted to German officials a list of 896 individuals to be extradited for the purpose of being tried.[82] Reaction in Germany was strongly adverse, not only to the number of individuals listed, but also to the formation of an international body to try German citizens. Germany argued that it should be allowed to prosecute its own war criminals. After rigorous debate, the Allies agreed to Germany's plan and submitted a list of 45 individuals for immediate prosecution. [83] In all, Germany tried 12 individuals; of these, only 6 were convicted.[84] Their sentences ranged from two months to four years imprisonment.[85] The Allies were so dissatisfied with these proceedings that commission observers to the Leipzig proceedings withdrew in protest.[86] The failure of the Leipzig trials settled in the international conscience and became the impetus for change early in post-World War II discussions.

C. Nuremberg and Tokyo Trials

As World War II ended, the international community reached a novel decision—to hold individuals personally responsible for the war's most atrocious effects

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[81] RICHARD H. MINEAR, *supra* note 76, at 27-36.
[82] YVES BEIGBEDER, JUDGING WAR CRIMINALS 29 (1999).
[83] FROM NUREMBERG TO THE HAGUE, *supra* note 73, at 32-34.
[84] *Id.* at 34. The defendants were charged with violations of international criminal law; German law was used for procedural and sentencing aspects of the trial.
[85] *Id.* at 34.
[86] Id.

before an international forum.[87] Some modern scholars are swift to discredit discredit these proceedings as being "victor's justice" imposed upon the enemy rather than genuine legal institutions.[88] And, in some part, their criticism is justified: the proceedings did favor the prosecution; defendants were denied certain defenses, subject to trial in absentia, and lacked access to exculpatory evidence.[89] Some of these alleged "errors" were acknowledged by the participants as the trial proceeded; others reflect recently articulated human rights standards.

At the Tokyo Trials, as early as in the first chapter "Preliminary Question of Law," for instance, Justice Pal criticized with bitterness the judicial basis of the tribunal:

> *"The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. . . . Formalized*

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[87] As Chief Prosecutor Robert Jackson stated during the negotiations establishing the International Military Tribunal at Nuremburg: "We want this group of nations to stand up and say . . . that launching a
way of aggression is a crime and that no political or economic situation can justify it." RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 14 (1971) (quoting Jackson at the London Charter).

[88] See, GERALD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW (2nd ed., 2010); THEODOR MERON, WAR CRIMES LAW COMES OF AGE 210 (1998).

[89] *See,* Kellye L. Fabian, *Proof and Consequences: An Analysis of the* Tadic & Akayesu *Trials,* 49 DEPAUL L. REV. 981, 982 (2000) (delineating certain protections and rules used in the post-World War II trials that are no longer deemed acceptable practice);. *See generally* Michael P. Scharf, *Report of the International Law Association: Published Jointly With Association Internationale de Droit Penal, 13 Novellew Etudes Penales 1997: A Critique of the Yugoslavia War Crimes Tribunal,* 25 DENV. J. INT'L L. & POL'Y 305 (1997) (comparing the Nuremberg trial with the International Criminal Tribunal for the Former Yugoslavia (ICTY) for purposes of showing improvements in policies and rules since the World War II trials).

> *vengeance can bring only an ephemeral satisfaction, with every probability of ultimate regret."*[90]

As a member of the British Commonwealth, India was on the prosecution side. It stood, that is, among the victors as the tribunal was created. This judicial setting notwithstanding, the sentences of Pal's that I have just quoted lead one to ask if he was in reality a judge representing a neutral nation. "Formalized vengeance" must have been the very first criticism of the tribunal to appear in print. In another chapter, Pal did not hesitate to criticize sharply one major country of the Allied powers:

> *"It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war."*[91]

Although he did not explicitly name the country, with these words Pal explicitly censored the United States. It was a courageous accusation most typically expressing his contention that this tribunal was nothing but a case of unilateral "formalized vengeance," with Japan alone being subject to prosecution.

D. International Criminal Tribunals

When the Yugoslavia extermination and ethic cleansing of thousands of Bosnian Muslims at the behest of Yugoslav leaders especially Slobodan Milosevic calling Serbs to '*protect themselves and to extend Serbian influence*'

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[90] INTERNATIONAL MILITARY TRIBUNAL FOR FAR EAST: DISSENTIENT JUDGMENT OF JUSTICE PAL (1999), *available at* http://www.sdh-fact.com/CL02_1/65_S4.pdf.
[91] *Id.*

came to light, the international community responded to the catastrophic human rights crises by the path breaking International Criminal Tribunal for former Yugoslavia[92] [ICTY] established by the UNSC which was *'determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.'*[93]

Unfortunately, a year after establishment of ICTY, violence in Rwanda escalated into genocide and widespread and flagrant violations of human rights of the Tutsis at the hands of Hutu extremist leaders. The UNSC reiterated its resolution of ICTY and established International Criminal Tribunal for Rwanda[94]

E. International Criminal Court

The international community was *'determined to put an end to impunity for the perpetrators of these crimes'*[95] thus, the delegates adopted the landmark Rome Statute of the International Criminal Court, declaring *their intent to try specific individuals and not states.*[96] The jurisdiction and functioning of the Court shall be governed by the provision of the Rome Statute. The ICC can only intervene in the domestic courts, when the national courts are not willing or not able or no longer function to try cases. ICC will only prosecute International crimes committed after the Statute came into force on July 01, 2001.

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[92] International Criminal Tribunal for Former Yugoslavia, *available at* www.un.rg/icty; AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (Virgin Morris and Michael Scharf, eds., 1995).

[93] Creation of an International Criminal Tribunal for Former Yugoslavia, UNSC Res S/RES/808 (1993); Creation of an International Criminal Tribunal for Former Yugoslavia, UNSC Res. S/RES/827 (1993).

[94] Establishment of an International Tribunal for Rwanda, UNSC Res S/RES/955 (1994).

[95] Rome Statute of the International Criminal Court, Preamble, UN Doc. A/CONF.183/9, as reproduced at www.un.org/law/icc/statute.

[96] See homepage of the Rome Statute of the International Criminal Court at www.un.orrg/law/icc. See also the homepage of the Coalition for an International Criminal Court at www.iccnow.org.

The table below, provides an analysis of the position of different criminal tribunals on influences of victor's justice.

TABLE 2: INTERNATIONAL CRIMINAL TRIBUNALS AND VICTORS' JUSTICE	
Responsible for Setting Up	**Critical Analysis**
INTERNATIONAL MILITARY TRIBUNAL FOR NUREMBERG [IMT]	
Set up by the Allied powers, viz. United States of America, France, United Kingdom and Soviet Union under London Agreement to try *'leaders, organisers, instigators and accomplices.'*[97]	It is heavily criticized as a patchwork of political convenience, conducting trial in absentia denying fair trial[98], not prosecuting sexual violence. The victor's justice criticism is affirmed by Telford Taylor, the chief deputy prosecutor from the American team at Nuremberg, *"all the concepts in a single package was the work of a handful of American lawyers."*[99]
INTERNATIONAL MILITARY TRIBUNAL FOR FAR EAST (IMTFE)	
Set up by the United States and representatives from other countries pursuant to Cairo Declaration 1943 between United States, United Kingdom and Republic of China.	No prosecution of crimes against "comfort women." Suffered from domination and unilateral action by the US government

[97] Art. 6, The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279 [hereinafter Nuremberg Charter].
[98] Nuremberg Charter, *supra* note 97, art. 12.
[99] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 41 (1992)

Heavily dominated by the US presence as wide powers given	evident from: Tokyo Charter drafted by the US only;[100] only one Chief Prosecutor, who was American;[101] the justices and Tribunal's President were appointed by the American General Douglas MacArthur alone;[102] Article 17 of IMTFE Charter empowered General MacArthur to change the judgement of Tribunal. Defence lawyers were forbidden from using defence of *tu quoque*, which the judges feared would have opened door to defence argument of American fire-bombing of Tokyo and nuclear bombardment of Hiroshima and Nagasaki[103]. Further, Indian judge in the Tribunal, Justice Pal has severely criticised the victor's justice phenomenon in his dissenting judgment at Tokyo trials.[104] Defence lawyers were forbidden from using defence of *tu quoque*, which the

[100] IMTFE Charter, *supra* note 13.
[101] *Id.* Art. 8.
[102] *Id.* Arts. 2 & 3.
[103] INTERNATIONAL LAW AND WORLD ORDER 170 (Burns H. Weston *et al* eds., 1990); B.V.A. ROLING, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACE MONGER (Antonio Cassese ed., 1993).
[104] INTERNATIONAL MILITARY TRIBUNAL FOR FAR EAST: DISSENTIENT JUDGMENT OF JUSTICE PAL (Kokusho-Kankokai Inc., 1999), *available at* http://www.sdh-fact.com/CL02_1/65_S4.pdf

	judges feared would have opened door to defence argument of American fire-bombing of Tokyo and nuclear bombardment of Hiroshima and Nagasaki[105].
INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA [ICTY]	
Pursuant to Article 39 of the UN Charter, the Secretary General authorized creation of the Tribunal upon determination of threat to peace by UNSC Resolution 827 (1993).[106]	ICTY is appreciated for: providing serious and diligent attention to crimes of sexual violence;[107] resolving dilemma of victor's justice evident in Nuremberg and Tokyo trials; holding non-military leaders responsible when they had *de jure* or *de facto* authority as in case of *Celebići.*[108]
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA [ICTR]	
Established by the United Nations Security Council through a Chapter VII	It suffers from allegations of victor's justice as Rwanda Patriotic Fronts

[105] INTERNATIONAL LAW AND WORLD ORDER 170 (Burns H. Weston *et al* eds., 1990); B.V.A. ROLING, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACE MONGER (Antonio Cassese ed., 1993).

[106] For Chapter VII powers, see, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (B. Simma *et al* eds., 2002).

[107] *The ICTY and Crimes of Sexual Violence*, *available at* http://www.youtube.com/watch?feature=player_embedded&v=PPd4q06julc and http://www.icty.org/sid/10312.

[108] Prosecutor v. Delalić and others, Case No. IT-96-21.T, Trial Chamber II, Judgment, 16 November 1998. *See also* Prosecutor v. Sefer Halilović, Case no. IT-01-48-T, Trial Chamber I, Judgment, 16 November 2005. For responsibility of civilian leaders *see* Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003, ¶ 465.

negotiated resolution UNSC Res 955 (1994). [109]	[RPF] have not been indicted for crimes committed in the 1994 Genocide even though Prosecutor's office had been informed of the evidence.[110] Whereas about 80 Hutu members have been indicted. Rwandan President Kagame who has been charged for assassination of then President Habyarimana and others was not prosecuted as court considered it beyond its ambit[111].
INTERNATIONAL CRIMINAL COURT [ICC]	
Pursuant to signing of the Rome Statute by the requisite number of nations.	It is submitted that most of the situations addressed are those from Africa and Asia, whereas violations of human rights by European and American states have not been dealt as of now.

[109] Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I, Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004.

[110] Prof. Peter Erlinder, *The UN Security Council Ad Hoc Rwanda Tribunal: International Justice Or Juridically-Constructed "Victor's Impunity"?*, 4(1) DEPAUL JOURNAL OF SOCIAL SCIENCE 131 (2010); John Philpot, *Impunity at the ICTR, at ICTR Defence Conference, The Hague*, ICTR LEGACY (2009), *available at* http://www.ictrlegacydefenseperspective.org/papers/John_Philpot_Impunity_at_the_ICTR.pdf; Katherine Iliopoulos, *ICTR accused of one sided justice*, CRIMES OF WAR, *available at* http://www.crimesofwar.org/commentary/ictr-accused-of-one-sided-justice/.

[111] Peter Robinson & Goltriz Ghahraman, *Can Rwandan President Kagame be held Responsible at the ICTR for the Killing of President Habyarimana?*, 6 (5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 981 (2008).

II. KENYA

On 13 September 2007, Kenyatta withdrew from the December 2007 presidential election and said that he would back Kibaki for re-election.[112] He said that he did not want to run unless he could be sure of winning. Following the election, amidst the controversy that resulted when Kibaki was declared the victor despite claims of fraud from challenger Raila Odinga and his Orange Democratic Movement, Kibaki appointed Kenyatta as Minister for Local Government on 8 January 2008.[113] After Kibaki and Odinga reached a power-sharing agreement, Kenyatta was named Deputy Prime Minister and Minister of Trade on 13 April 2008, as part of the Grand Coalition Cabinet. He was the Deputy Prime Minister representing the PNU, while another Deputy Prime Minister, Musalia Mudavadi, represented the ODM.[114] Kenyatta and the rest of the Cabinet were sworn in on April 17, 2008.

Uhuru ran for president in the elections held on 4 March 2013 and garnered 6,173,433 votes (50.03%) out of the 12,338,667 votes cast. As this was above the 50% plus 1 vote threshold, he won the election in the first round thus evading a run-off between the top two candidates.[115] He was therefore declared the fourth President of the Republic of Kenya by the Independent Electoral and Boundaries Commission (IEBC). As Kenyan President has won elections in 2013, it does place a doubt whether this whole criticism is being meted out at ICC by virtue of Kenyatta being victorious. The commission that investigated the Kenyan violence of 2007-08, gave a clean chit to each and everyone

[112] Carol Gakii, *Uhuru pulls out of the presidential race,* KENYA BROADCASTING CORPORATION, Sep. 13, 2007.
[113] *Kenya: Kibaki Names Cabinet,* The East African Standard, Jan. 8, 2008.
[114] *Kenya unveils coalition cabinet,* BBC News, Apr. 13 2008.
[115] *Tally of Presidential results Files,* IEBC, Mar. 9, 2013.

accused.[116] Further, the courts that conducted the trials at national level stated insufficient evidence and absolved all of the charges.[117] This orchestra of fake justice stating that domestic trials have taken place and the ICC does not have jurisdiction are nothing more than the expression of the archaic principle of victor's justice.

Seeing the lax attitude of Kenya at trying those accused of Crimes Against Humanity, when Kenyan leaders charged for crimes against humanity invoked complementarily principle stating that court 'only has jurisdiction when a State is "unable or unwilling" to investigate and prosecute crimes,' ICC answered in negative, thus, challenging impunity.[118]

III. CONCLUDING REMARKS

"...if the Japanese had won the war, those of us who planned the fire-bombing of Tokyo would have been the war criminals..."

- Robert S. McNamara, US Secretary of State[119]

Victor's justice has scarred trials since Nuremberg to ICTY and other tribunals as discussed in the preceding part. Even though values of command responsibility and individual criminal responsibility echo in the charters and regulations of various criminal tribunals including ICC, it is an appalling reality that Justice still takes a second place to politics and economic calculation. For

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[116] Request for Authorization of Investigation Pursuant to Article 15, Annexure 7, ICC-01/09, Nov. 26, 2008, *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/3.aspx [hereinafter *Request for Authorization*]

[117] Id. annex 11.

[118] Alison Smith & Nicole, *No Peace Without Justice*, *available at* http://www.iccnow.org/documents/NPWJ_PR_KenyaAdmissibility.pdf.

[119] THE FOG OF WAR: ELEVEN LESSONS FROM THE LIFE OF ROBERT S. MCNAMARA (Sony Pictures Classics 2003). This 2004 Academy Award winning documentary film by director Errol Morris records McNamara's voiceover to the opening scene of newsreels showing Tokyo ablaze from US napalm bombs that incinerated some 250,000 civilians before atomic bombs were dropped on the civilian populations of Hiroshima and Nagasaki.

instance, in the *Case Concerning the Arrest Warrant of 11 April 2000*[120] the International Court of Justice regarded foreign absolute immunity from criminal jurisdiction and inviolability for foreign affairs minister charged with war crimes and crimes against humanity. Another infamous case of Pinochet elucidates this apathy, in which the Pinochet operative Armando Fernández Larios was tried for the torture and murder of Chilean economist Winston Cabello and others,[121] but Pinochet himself was not extradited to Spain on humanitarian grounds.

In view of the above, it is imperative that the African Union and others States that are protesting Kenyan trials should themselves introspect whether this ordeal is not a manifestation of victor's justice. This principle has marred trials since von Hagenbach's and it should not be allowed to perpetuate further. It is true that ICC has targeted African countries, but most of them have been referred by African States themselves as part of peace process and reconciliation. In view of this, the ICC has to tread carefully so as not to fall prey to this notion.

[120] *Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*)*, Judgment, ICJ Reports, 2002, p.3.
[121] Cabello v. Fernandez-Larios, 402 F. 3d 1148 (11th Cir. 2005).

CHAPTER III

JUSTICE AND SOVEREIGN IMMUNITY: CRITICAL ANALYSIS OF THE ATTEMPTS OF INTERNATIONAL CRIMINAL TRIBUNALS AT CONDUCTING TRIAL OF HEAD OF STATES

I. INTRODUCTION: IMMUNITY EQUALS IMPUNITY?

The offences of World War II were described by leading legal scholars as:

> *'[C]rimes of enormity unprecedented by reason of the vast numbers of the victims and the capacity for evil of the actors, crimes of a gravity never before equalled because committed by the possessors of the sovereignty of states.'*[122]
>
> *(Emphasis added)*

Shockingly, in response to accusations of crimes against humanity the deputy to Adolf Hitler, Hermann Goering, declared:

> *'But that was our right! We were a sovereign state and that was strictly our business.'*[123]

It is not an alarming fact that most human rights violations are orchestrated by people in power, bestowed with the sovereign immunity and cherishing the belief that they alone can decide the means of governance in their respective States by virtue of the international principle of non-intervention. A principle considered sacrosanct for maintenance of international relations and peace that places other States under legal obligation to refrain from

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[122] Vespasian Pella, *Towards an International Criminal Court*, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW 41 (1950).

[123] Hermann Goering, as cited *in* G.M. GILBERT, NUREMBERG DIARY 39 (New York: New American Library, 1961).

intervention as *'to hold otherwise would make nonsense of the fundamental principle of State sovereignty.'*[124] Interestingly, one central and over-riding fact of this wide spread culture of abuse evidenced from Asia to Africa and from Europe to South America is the ideology of governments that how they treat those under their control and the policies that they pursue are exclusively within their own jurisdiction, which created and justified a widespread culture of impunity as an exemption or protection from punishment.[125]

International criminal law qualifies certain types of conduct as crimes under international law[126] incurring liability under the principle of individual criminal responsibility [ICR]. This principle has developed from 15th century onwards, to a more nuanced legal concept through the efforts of various international tribunals. It is, therefore, submitted that within an extremely short period of historical time, there has been tremendous evolution in international criminal jurisprudence, thereby, reducing the impunity. This evasion of impunity is evidenced in the International Criminal Court's trial of the current President of Kenya, Mr Kenyatta[127] who is charged for crimes against humanity and scheduled for trial in October 2014. It has been realized that sovereign immunity is not an absolute state right under the international legal order and

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[124] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA),* (Merits) *[Nicaragua]* ICJ Rep.[1986] p108. *See also* Arts. 2(4), 2(7), Charter of the United Nations, June 26, 1945, 1 U.N.T.S. 16 (hereinafter UN Charter); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations A/RES/2625 (XXV) [1970] Principle 3 [hereinafter RES 2625].

[125] Paul G. Lauren, *"From Impunity to Accountability: Forces of transformation and the changing International human rights context",* in RAMESH CHANDRA THAKUR, FROM SOVERIEGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 15 (2004).

[126] The author uses terms 'international crimes,' 'crimes under international law' and 'core crimes,' interchangeably. These include: war crimes, crimes against humanity and genocide.

[127] *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali,* ICC-01/09-02/11 (ICC Pre Trial Chamber II).

the veil of sovereignty can be lifted to address violations of humanitarian law. This section examines the concept of sovereign immunity and traces the development of principles of individual and superior responsibility from the Nuremberg to International Criminal Court as these courts challenge impunity by putting on trial former or incumbent Heads of State.

These trials illustrate collision of the two mentioned interests in contemporary international law: the growing need for international accountability for crimes under international law and a system of immunities deriving its origins, as most often claimed, from principle of sovereign equality of States.[128] The topicality of this legal issue regarding trial of sitting heads is important from the practical perspective for similar cases which may arise before other courts, seen especially in the increased activities of the first permanent criminal court, the International Criminal Court (ICC).[129]

Further, it is an increasing matter of concern as to securing compliance to charter/treaty of such international tribunals when the country of the respondent Head of state is not party to the same. The same questions in the context of immunities of third states not parties to the Rome Statute may appear before the ICC, particularly in the situation when there is no referral by the Security Council under Chapter VII of the UN Charter.

II. GENESIS OF SOVEREIGN IMMUNITY

The culture of impunity, essentially, draws inspiration from the sovereign equality of states on which international law is founded.

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[128] *See differently*, L.M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 41 (2003).
[129] R. Cryer, *A 'Special Court' for Sierra Leone?*, 50 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 435 (2001).

A. Sovereign Immunity entrenched in Concept of State Sovereignty

The enforcement of principles of international criminality is frustrated by operation of the well-established principle of immunity of a Head of State based on the notions of sovereign equality of states.[130] Thus, the traditional starting point for this view is the maxim *par in parem non habet imperium*, meaning literally "*an equal has no power over an equal.*"[131]

To define sovereignty, Prof. Nigel mentions Hans Morgenthau's conceptualization that a sovereign is the *'centralized power that exercised its law making and law enforcing power within a certain territory'*; a power that was 'superior to the other forces that made themselves felt in that territory'.[132] Traditionally, heads of States were not subject to the jurisdiction of national courts for whatever acts they may have committed and there were no international courts which would have jurisdiction over heads of state. It is, therefore, submitted that the Head of the State or the sovereign enjoyed this immunity that was bestowed upon the State itself, which treated the Head as the originator of the Sovereignty of the State. During sixteenth century, Jean Bodin enunciated principle of national sovereignty as "*power absolute and perpetual,*" "*supreme*" and "*subject to no law*"[133] which was further recognised in law by the Treaty of Westphalia, 1648. Further, this immunity

[130] C. DAMGAARD, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES (SELECTED PERTINENT ISSUES), 263-357 (2008).
[131] BRYAN A. GARNER, BLACK'S LAW DICTIONARY, 1673 (7th ed., 1999).
[132] NIGEL D. WHITE, ADVANCED INTRODUCTION TO INTERNATIONAL CONFLICT AND SECURITY LAW 8 (Cheltenham, 2014)
[133] JEAN BODIN, LES SIX LIVRES DE LA REPUBLIQUE, vol. I, 179-228 and 295-310 (1576).

was extended to high ranking state officials who engaged in commission of crimes, based on traditional rues safeguarding the sovereignty of States.[134]

B. Need for Immunities

The most well-defined area of immunities is that of diplomatic immunities which have always been regulated by its own regime,[135] however, the contours of Head of State immunity are less clearly delineated[136] and is largely a matter of custom.[137] The lack of state practice is probably a reflection of the reluctance of States to interfere with Heads of State.[138] It is widely accepted that Heads of State enjoy at least the same immunities as diplomats: immunity *ratione personae* while in office, *immunity ratione materiae* for official acts which were carried out while in office.[139] The Vienna Convention on Diplomatic Relations has been used extensively in order to determine the treatment of Head of State.[140] Thus, the immunities serve to prevent foreign states from interference into the affairs of other states and from exercising jurisdiction over another state.

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[134] A. Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality,* in C. ROMANO, A. NOLLKAEMPER AND J. KLEFFNER (EDS.), INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, CAMBODIA AND KOSOVO (2004).

[135] R. CRYER, H. FRIMAIN, & D. ROBINSON, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 424 (2008).

[136] J. L. Mallory, *Resolving the Confusion Over Head of State Immunity: The Defined Right of Kings,* 86 COLUMBIA LAW REVIEW 169, 177 (1986).

[137] See generally, *Case Concerning the Arrest Warrant of 11 April 2000* (D.R.C. v. Belg.), 14 February 2002, I.C.J. 21 [hereinafter Yerodia case]; D. Akande, *International Law Immunities and International Criminal Court*, 7 AMERICAN JOURNAL OF INTERNATIONAL LAW (2004); J. BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS (1997); A. Watts, *The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers, in* RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL, Vol. III, 82 (1994).

[138] R. CRYER, H. FRIMAIN, & D. ROBINSON, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 424 (2008).

[139] Id. at 425.

[140] E. DENZA, DIPLOMATIC LAW (COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS), 3rd edition, 1-8 (2008).

C. Ramifications and Elements of Sovereign Immunity

Nevertheless, the interest of international community in maintenance of effective and smooth functioning of international relations through grant of immunity to Heads of State is being confronted with the interest of bringing alleged perpetrators of international crimes to justice. These two contesting interest serve different purposes, yet, the matter of interest is that it may be frustrated by operation of the well-established principle of individual criminal responsibility. There are three concerns *viz.*, need for international tribunal, sitting or former head, and State party to the agreement.

1. International or National Court

It is submitted that relevant state practice and opinion juris do not yet confer the national courts with the power to extinguish immunity to serving Heads of States or senior state officials. Serving officials such as Yerodia Ndombasi, Fidel Castro and Muammar Qaddaffi were all said to enjoy immunity before national courts. Arguably, were Augusto Pinochet still incumbent President, he would have enjoyed immunity as well.[141]

Nevertheless, exercise of jurisdiction over a Head of State becomes more acceptable if the forum is an international one. In tandem with this view, the International Court of Justice (ICJ) held in the *Yerodia* case[142] that in 'certain international courts' an incumbent or former Minister of Foreign Affairs could be subject to criminal prosecution, without providing any further guidance whether term 'certain international courts' excludes some other international

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[141] Katerina Novotna, *Relationship between Crimes under International Law and Immunities: Coexistence or Exclusion? Charles Taylor Case*, in INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS (Manoj Kumar Sinha ed., 2010) at 242.

[142] *Case Concerning the Arrest Warrant of 11 April 2000* (D.R.C. v. Belg.), 14 February 2002, I.C.J. 21, (hereinafter 'the *Yerodia* case').

courts. The ICJ, however, observed that an international court is a court that is established by two or more states or by a Security Council resolution under Chapter VII mandate of the United Nations Charter.[143]

Nonetheless, there is no general rule that immunity cannot be pleaded before international courts, lest, there would be no requirement for international courts and tribunals to justify in their Statutes derogation from immunities. The proposition that immunities do not apply before international tribunals depends on the following factors which have to be considered: (i) the Statute of that international court denies immunity to a Head of State,[144] and (ii) the establishment instrument of the court must bind the concerned State.[145]

2. Sitting or Former Head

The most important factor appears to be whether the senior official is serving or former one. Most of the legal scholars suggest that the operating principle in general international law is that a serving head of state is entitled to absolute immunity, unless it has been waived by the State concerned.[146] Even though this has been the dominant view for some time, situations have altered this perception to reduce impunity.[147]

As regards the practise of international courts, amicus curiae invited by SCSL stated that "the international courts and tribunals which have been

[143] *Yerodia* case, supra note 137, at para 61.
[144] Chatman House, *Immunity for Dictators?*, A summary of discussion at the International Law Programme Discussion Group at Chatham House (9 September 2004).
[145] D. Akande, *International Law Immunities and International Criminal Court*, 7 AMERICAN JOURNAL OF INTERNATIONAL LAW (2004).
[146] Katerina Novotna, *Relationship between Crimes under International Law and Immunities: Coexistence or Exclusion? Charles Taylor Case*, in MANOJ KUMAR SINHA (ED.), INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS (2010) at 241.
[147] P. Sands, Immunities before International Courts, Guest Lecture Series of the Office of the Prosecutor (18 November 2003); A. Cassesse, *Why may Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 853 (2002).

established, practise has been consistent, in that no serving Head of State had been recognized as being entitled to rely on jurisdictional immunities."[148] This practice is supported by example of ICTY indicting then President of Federal Republic of Yugoslavia, Slobodan Milosevic. This is also evident in cases of Gaddafi, Charles Taylor and Kenyatta.

3. State Party to the Agreement

Legal scholars and jurist hold opinion that as long as the State concerned has not consented to the exercise of jurisdiction, there is no difference whether the exercise of this jurisdiction is done unilaterally by a foreign state or through some collective judicial body.[149] Judge Shahabuddeen argued in his Dissenting Opinion in Krstic that there has to be some indication in the establishing instrument of the international tribunal suggesting abrogation of immunities which otherwise exist under international customary law:

> *"A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise."*[150]

It is, however, observed that incumbent President of Liberia Charles Taylor was tried and sentenced by SCSL even though SCSL was established by a bilateral treaty between the Republic of Sierra Leone and the United Nations, to which Liberia was not a party. Similar situations have arisen before the ICC, especially in the indictment of Gaddaffi.

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[148] D. Orentlicher, Submissions of the Amicus Curiae on Head of State Immunity in the case of the Prosecutor v. Charles Ghankay Taylor' (SCSL-2003-01-I).

[149] D. Akande, *International Law Immunities and International Criminal Court*, 7 AMERICAN JOURNAL OF INTERNATIONAL LAW (2004).

[150] Prosecutor v. Krstic (IT-98-33-T), Judgment, Dissenting Opinion of Judge Shahabuddeen, (17 September 2003), paras. 11-12 (emphasis added).

In such situations, that do not qualify the above requirements, the only recourse lies in universal jurisdiction, which is by no means indisputable. As Schabas puts it, 'the exercise of universal jurisdiction reminds us of Mark Twain's famous comment about weather: Everyone talks about it, but nobody does anything about it.'[151] It is regarded as *'one of the magic bullets in the campaign against impunity.'* However, state practice suggests that nobody has been recently imprisoned as a result of this principle, nor do States initiate prosecution regardless of the seriousness of international crime unless there is either territorial or personal nexus, or a treaty obligation to prosecute or extradite. The author does not aim to deal with universal jurisdiction in detail,[152] rather, it is desirable to focus on the practice of international courts at prosecuting Heads of States.

III. EMERGING PRINCIPLES OF CRIMINAL LIABILITY THAT STRIKE AT SOVEREIGN IMMUNITY

"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."

- The Nuremberg Tribunal[153]

A. Individual Criminal Responsibility

Representatives and Heads of states have been granted sovereign immunity under the public international law, however, modern international criminal law

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[151] Schabas, in L. REYDAMS, UNIVERSAL JURISDICTION, INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2004).

[152] For deep insight and analysis on universal jurisdiction, see, L. REYDAMS, UNIVERSAL JURISDICTION, INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2004).

[153] "Proceedings of the International Military Tribunal Sitting at Nuremberg, Judgment of 1 October 1946", *in* THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Vol. 22, 447 (1950).

has acknowledged the *principle of individual autonomy* whereby the individual is normally endowed with free will and the independent capacity to choose his conduct.[154] The Nuremberg Charter *held the individuals directly accountable for war crimes under international law.*[155] Attribution is premised on the satisfaction of *actus reus* at any stage of commission of crime including conspiracy, aiding and abetting, ordering, or planning and preparation; and *mens rea* that is required volition and knowledge or foresight. By stating that "international law imposes duties and liabilities upon individuals as well as upon States has long been recognized,"[156] the Tribunal confirmed the role of individuals as subjects of international law.

B. Command Responsibility

Post World War II, the doctrine of *command responsibility* crystallized into an international customary rule imposing on military commanders as well as civilian leaders the liability for crimes committed by their subordinates if following cumulative conditions are met:[157] (i) Commission of international crimes by troops or other subordinates; (ii) Effective command or control over the subordinates; (iii) Knowledge or breach of obligation to acquire

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[154] Hermann Goering, *as cited in* G.M. GILBERT, *supra* note 16, p. 39; .Tadić, Case No. IT-94-I-A, Appeals Chamber, Appeal, 15 July 1999; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 33 (2nd ed., 2008).

[155] Göring and others, IMT judgement and sentence of 1 October 1946, *in* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, VOL. I, 255-79 (1947); Nuremberg Charter, *supra* note 12, art. 6(b).

[156] See the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg Trial Procedings, Vol. 22, p. 466.

[157] The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279 [hereinafter Nuremberg Charter]; International Military Tribunal for the Far East (IMTFE) Charter, *available at* http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00206653-00206660.pdf [hereinafter IMTFE Charter]; Additional Protocol I of 1977 to Geneva Conventions 1949, Art. 86(2); Statute of the International Tribunal, art. 7(3), UN Doc. S/25704/Annex (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda. Security Council resolution 955 (1994) of 8 November 1994 [hereinafter ICTR Statute]; CASSESE CRIMINAL LAW, *supra* note 79, at p. 247-249.

knowledge; and (iv) Failure to act. In the *Yamashita*[158] where the Commanding General of the Japanese Army in Philippines was held liable for permitting his troops to massacre a part of civilian population, the court enunciated the doctrine and stressed that command responsibility is consequent upon breach of the duties incumbent upon commanders.[159]

In spite of these developments, some amount of impunity exists. When in September 1969, an American Army lieutenant William Calley Jr. was charged by the US army with murder of over 100 Vietnamese civilians in a little hamlet known as My Lai, the US was criticised for failure to practise in Vietnam the lessons it had sought to teach the rest of the world during trials at Nuremberg and Tokyo.[160] The need for an impartial international tribunal to deal with war crimes again became a matter of considerable global attention in wake of gross human rights violations in Yugoslavia and Rwanda.

IV. INTERNATIONAL TRIBUNALS

A. Nuremberg

"The wrongs... so malignant and so devastating that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."

-Justice Robert Jackson[161]

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[158] Yamashita, US Supreme Court, 4 February 1946, 18 AILC, 1-23.

[159] *See also* Araki and others (the Tokyo Trial), IMTFE, 1 November 1948, in B.V.A. RÖLING AND C.F. RÜTER (EDS.), THE TOKYO JUDGMENT, vol. I, 1-469 (1977); Wilhem List and others (Hostages case), US Military Tribunal sitting at Nuremberg, 19 February 1948, TWC, XI, 1230-319 at 1271-2.

[160] FROM NUREMBERG TO MY LAI (Jay W. Baird ed., 1972); JOSEPH GOLDSTEIN ET AL., THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF LAW? (1976).

[161] Justice Robert Jackson, 21 November 1945, *in* THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILLITARY TRIBUNAL, Vol. 2, 98-99 (International Military Tribunal: Nuremberg, 1947-1949).

The offences of World War II were described by leading legal scholars as nothing short of *'an orgy of inhuman brutalities,'*[162] thus the London Agreement established Nuremberg International Military Tribunal to try *'leaders, organisers, instigators and accomplices.'*[163] As required by United Nations General Assembly Resolution 177 of 1947[164], the International Law Commission[165] formulated the principles which organized and operated these International Military Tribunals. These principles stated Individual criminal responsibility of individuals, denied immunity on grounds of being head of state or sovereign orders or internal law, recognised fair trial rights of the accused, identified Crimes against Peace, War Crimes and Crimes against Humanity and criminalized complicity in commission of any of the acts.

Even though the horrifying evidence revealed at these trials shocked the conscience of humankind; in response to accusations of crimes against humanity the deputy to Adolf Hitler, Hermann Goering, declared, *'But that was our right! We were a sovereign state and that was strictly our business.'*[166] Such hollow and obsolete claims of a culture of immunity didn't dissuade the court from passing a judgment against the accused individuals ensuring punishment from the lowest foot soldier to the highest government official.

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[162] George A. Finch, *Retribution for War Crimes*, vol. 37, AMERICAN JOURNAL OF INTERNATIONAL LAW, 81 (1943)

[163] Nuremberg Charter, supra note 157, art. 6.

[164] United Nations General Assembly Resolution 177 (II), 21 November 1947, *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/177(II)&Lang=E&Area=RESOLUTION, paragraph (a): "*formulate the principles of international law recognized in the Charter of nüremberg Tribunal and in the judgment of the Tribunal*".

[165] International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal 1950, in* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II (1950).

[166] Hermann Goering, as cited *in* G.M. GILBERT, NUREMBERG DIARY, 39 (1961).

Article 6 of Nuremberg Charter provides Individual criminal responsibility which was greatly developed by the IMT trial of imminent leaders like Joachim von Ribbentrop, the German Ambassador to the United Kingdom (1936-38) and later Minister of Foreign Affairs (1938-45), who was awarded death sentence.[167] The IMT tried 23 of the most important political and military leaders except three including Adolf Hitler who had all committed suicide.[168] Further, it denied the defence of superior orders.[169] The second in command to Adolf Hitler, Göring, was sentenced to capital punishment.[170]

B. Tokyo

Similarly, International Military Tribunal for Far East (Tokyo Tribunal)[171] selected twenty eight Class A offenders which included mostly military and civilian leaders. Article 6 of the IMTFE Charter provides individual and command responsibility. Apart from civilian and military leaders, industrial and financial magnates who had engaged in weapons manufacturing industries were also prosecuted. It utilized the doctrine of command responsibility to indict Class A offenders. Severe punishment (seven death sentences) decreed to civilian leaders including Prime Minister (later foreign Minister) Kōki Hirota and military leaders including General Hideki Tōjō, the Commander of Kwantung Army (later prime minister).

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[167] Judgment: Ribbentrop, International Military Tribunal, in the Avalon Project, Yale Law School, Lillian Goldman Library, *available at* http://avalon.law.yale.edu/imt/judribb.asp.
[168] COOPER, ROBERT W. THE NUREMBERG TRIAL, 38 (2011).
[169] Henry T. King, Jr., *Without Nuremberg—What?*, 6/653 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 657, *available at* http://law.wustl.edu/wugslr/issues/Volume6_3/king.pdf
[170] Göring & others, *supra* note 155.
[171] IMTFE Charter, supra note 157.

The Nuremberg and Tokyo trials resulted in formulation of many human rights instruments[172] and a renewed agreement to consider a permanent international criminal jurisdiction.

C. International Criminal Tribunal for former Yugoslavia (ICTY)

In ICTY's maiden *Tadić* case[173] when the issues regarding legitimacy of the court being formed through UNSC resolution were settled, the court sentenced him guilty for crimes against humanity and war crimes. For the first time, ICTY listed rape as crime against humanity and about 40% of the cases decided included crime against personal integrity.[174]

Article 7 (1) of the ICTY Statute[175] provides for Individual Criminal Responsibility which evidences in cases of *Hadžihasanovid* and *Tadić*, the ICTY reiterated that individual responsibility was part of customary international law.[176] Article 7 (3) of the Statute provides for command responsibility. In it was held that when 'primary basis of responsibility cannot be applied', superior responsibility is attracted.

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[172] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res A/RES/2106 A (XX) (1965); International Covenant on Civil and Political Rights and International Covenant o Economic, Social and Cultural Rights, UNGA Res A/RES/2200 A (XXI) (1966); Convention on Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UNGA Res A/RES/2391 (XXIII) (1968); International Convention on the Suppression and the Punishment of the Crime of Apartheid, UNGA Res A/RES/3068 (XXVIII) (1973).

[173] Prosecutor v. Dusko Tadić, Case No. IT-94-1-AR72, Appeals Chamber, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, 2 October 1995; Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, Trial Chamber II, 14 July 1997.

[174] The ICTY and Crimes of Sexual Violence, *available at* http://www.youtube.com/watch?feature=player_embedded&v=PPd4q06julc and http://www.icty.org/sid/10312; *see also* Kunarac et al (February 22, 2001), Case no. IT-96-23-T (ICTY Trial Chamber III)

[175] ICTY Statute, supra note 157, art. 7(1).

[176] Enver Hadžihasanovid, Case No. IT-01-47, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, ¶ 44; Duško Tadić, Case No. IT-94-1-T, Trial Judgement, 7 May 1997, ¶¶ 666-9; Duško Tadić, Case No. IT-94-1-A, Appeal Judgement, 26 Jan. 2000, ¶¶ 188-192.

D. International Criminal Tribunal for Rwanda (ICTR)

The ICTR resulted in official conviction of the former Prime Minister Jean Kambanda, in the first ever conviction of the head of State for genocide and crimes against humanity.[177]

Individual Criminal Responsibility provided in Article 6(1) of the ICTR Statute,[178] Even when one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases, they are liable.[179] Physical presence of accused is not mandatory.[180] Article 6 (3) provides for command responsibility. The doctrine has been successfully applied in Kambanda case,[181] where the Prime Minister of caretaker government of Rwanda was condemned to life imprisonment for crimes including genocide. Rwandan President Kagame who has been charged for assassination of then President Habyarimana and others was not prosecuted as court considered it beyond its ambit.[182]

These tribunals paved the path for reducing impunity, however, it also remained a fact that tyrants such as Pol Pot of Cambodia, Idi Amin of

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[177] Kingsley Chiedu Moghalu, *Rwanda Panel's Legacy: They Can Run But Not Hide*, INTERNATIONAL HERALD TRIBUNE, 31 October-1 November 1998.

[178] Statute of the International Criminal Tribunal for Rwanda. Security Council resolution 955 (1994) of 8 November 1994.

[179] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, ¶ 480; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, Trial Chamber I, 6 December 1999, ¶ 37.

[180] Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-A, Judgement, Appeals Chamber, 28 November 2007, ¶ 660.

[181] Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-T, Trial Chamber, Judgment, 4 September 1998. *See also* Prosecutor v. Omar Serushago, Case No. ICTR-98-39-T, Trial Chamber, Sentence, 5 February 1999; Prosecutor v. Clément Kayishema, Case No. ICTR-95-1-T, Trial Chamber, Judgment, 21 May 1999.

[182] Peter Robinson & Goltriz Ghahraman, *Can Rwandan President Kagame be held Responsible at the ICTR for the Killing of President Habyarimana?*, 6 (5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 981 (2008).

Uganda and Augusto Pinochet of Chile had never faced trials for heinous human rights abuses.

E. Hybrid Tribunals

The international tribunals were criticised for focusing on building international case law but not addressing lawlessness flowing from weak domestic justice systems, thus need was felt *'to help build domestic capacities.'*[183] The author submits that though the Rome Statute was formulated in 1998, however, as some hybrid courts came into existence earlier than the International Criminal Court [ICC] they are being discussed preceding the ICC. Hybrid courts are unique as they prosecute more perpetrators in less time, do domestic justice while upholding international criminal law and ensure compliance to international fair trial standards.[184] Most importantly they have jurisdiction over both domestic and international crimes. Instances of hybrid courts include, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, Serious Crimes Panels in the District Court of Dili in East Timor and the Iraqi Special Tribunal. Even though these courts have reduced impunity by punishing individuals and leaders accused in specific political setting, they are criticized for addressing region specific issues. The international dream of an international criminal court [ICC] resulted in the extraordinary United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[185]

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[183] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, p. 1.

[184] A. Pellet, *Internationalized Courts: Better than Nothing*, in INTERNATIONALIZEDCRIMINAL COURTS AND TRIBUNALS, 439 (C. Romano *et al.* eds., 2004).

[185] United Nations General Assembly, Resolution 52/160, 1997, Establishment of a Criminal Court, 15 December 1997.

Article 6 provides for individual criminal responsibility and Article 6(2) provides that official position is no defence or excuse. The case of Charles Taylor was unique as being only the second Head of State in history after Slobodan Milosevic, and the first African head of State to be indicted for crimes under international law at an international level. Additionally, the court had to address another pressing issue of compliance by States when Liberia was not a party to the agreement that established the Special Court for Sierra Leone (SCSL). The key submission of the Defence was that Taylor was entitled to absolute personal immunity from criminal prosecution as Liberia's incumbent Head of State at the time of his indictment.[186] The defence also analyse *Yerodia* and stated that the immunity is more a matter of procedure than substance, with procedural immunity subsisting for as long as the official is in office.

D. International Criminal Court

The ICC elucidated superior responsibility of non-military commanders and brought principles of a different form of common purpose liability called co-perpetration (Article 25(3)(a)), indirect co-perpetration (Article 25(3)(a)) and other forms of common purpose liability (Article 25(3)(d)). However, the reactions to the signing of the Rome statute reveal much about the process of evolution of international human rights in terms of visions, reality and historical perspective. The Asian region remains significantly under-represented at the ICC as only nine countries ratified the Rome Statute.[187] Further, UNSC can refer situations to ICC when the state is not a party to Rome Statute as in case of Libya and Sudan.[188] This provision is criticized as

[186] *Prosecutor v. Taylor, supra* note 205, para 6.
[187] http://www.iccnow.org/?mod=region&idureg=7
[188] Article 13 (b), Rome Statute; UN Doc S/Res/1593 (31 March 2005); UN Doc S/Res/1970 (26 February 2011)

it enables members of UNSC to refer dispute to ICC even though three of the permanent five have not ratified Rome Statute. Inadvertently, there is a possibility of the ICC becoming a policy tool to advance the political interests of those states represented on the Security Council, evident from failure of UNSC to refer situations of Sri Lanka, Ghaza and Syria.[189]

Article 25 of Rome Statute provides for individual responsibility. Article 30 lays down standard of *mens rea*. Sixteen cases in seven situations that have come before the court which invoke principle of individual criminal responsibility.[190] Under Article 28, differentiated Command Responsibility for military and other commanders is provided.[191] Under article 13(b) of the Rome Statute, the Security Council acting under Chapter VII, can refer a specific situation 'in which one or more of such crimes appears to have been committed' to the Prosecutor. This mechanism can trigger the jurisdiction of the ICC without consent of the concerned State, which is not a party to the Rome Statute.[192]

The first conviction of military commander Lubanga[193] by the court affirmed application of this principle. The recent trial instituted against Mr Kenyatta[194] is landmark in the sense that for the first time a sitting head will be tried by the Court. Similar to the case of Charles Taylor, the case of Kenyatta deals

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[189] Hemi Mistry and Deborah Ruiz Verduzco, The UN Security Council and the International Criminal Court, International Law Meeting Summary (March 16, 2012) *available at* http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/160312summary.pdf.

[190] Situations and Cases, INTERNATIONAL CRIMINAL COURT, *available at* http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/

[191] Article 28 (b) (2), Rome Statute.

[192] See, V. Gowlland-Debbas, *The Relationship between the Security Council and the International Criminal Court*, GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, WELTPOLITIK (2001), *available at* http://www.globalpolicy.org/intljustice/icc/crises/2001relationship.htm.

[193] *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber I, Judgment, March 14, 2012).

[194] Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Pre Trial Chamber II, 23 January 2012.

with the central issue whether as an incumbent President at the time of issuance of the indictment he was entitled to claim immunity for crimes under international law. However, it is submitted that most of the situations addressed are those from Africa and Asia, whereas violations of human rights by European and American states have not been dealt as of now.

V. CRITICAL ANALYSIS

The table, hereunder, represents a brief analysis of the different criminal tribunals on sovereign immunity:

TABLE 3: INTERNATIONAL CRIMINAL TRIBUNALS AND SOVEREIGN IMMUNITY	
COMMAND RESPONSIBILITY OR INDIVIDUAL RESPONSIBILITY	**IMMUNITY**
INTERNATIONAL MILITARY TRIBUNAL FOR NUREMBERG [IMT]	
Article 6 of Nuremberg Charter provides for both Individual Criminal Responsibility and Command Responsibility.[195]	No sovereign immunity as the deputy to Adolf Hitler, Hermann Goering was also tried. Adolf Hitler's early demise prevented his trial.
INTERNATIONAL MILITARY TRIBUNAL FOR FAR EAST (IMTFE)	
Article 6 of the Charter provides for both.[196]	Immunity to those involved with Unit 731 and used biological and chemical

[195] The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279 [hereinafter Nuremberg Charter].

[196] International Military Tribunal for the Far East (IMTFE) Charter, *available at* http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00206653-00206660.pdf [hereinafter IMTFE Charter].

	weapons, as they had surrendered.[197] Immunity granted to Emperor Hiroshito of Japan and all members of the imperial family, such as career officer Prince Yasuhiko Asaka.[198]
INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA [ICTY]	
Provided in Article 7 of the ICTY Statute.[199]	It is criticized for failure to establish what criteria are required for responsibility of civilian leaders as in *Kordić* case;[200] and for permitting Serbs, Croats, and Muslims to grant each other political absolutions.[201]
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA [ICTR]	
Provided in Article 6(1) of the ICTR Statute.[202]	Conviction of the former Prime Minister Jean Kambanda, in the first ever conviction of the head of State

[197] Hal Gold, UNIT 731: TESTIMONY, 109 (Tuttle, 2011).
[198] Zhang Wanhong, *From Nuremberg To Tokyo: Some Reflections On The Tokyo Trial (On The Sixtieth Anniversary Of The Nuremberg Trials)*, 27/4 CARDOZO LAW REVIEW 1673 (2006).
[199] Statute of the International Tribunal, art. 7(1), UN Doc. S/25704/Annex (1993).
[200] Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Trial Chamber III, Judgment, 26 February 2001.
[201] Stephen S. Rosenfeld, *Where's the War Crime Court*, WASHINGTON POST, July 30, 1993
[202] Statute of the International Criminal Tribunal for Rwanda. Security Council resolution 955 (1994) of 8 November 1994.

	for genocide and crimes against humanity.[203] However, Mr. Kagame was not tried due to US influence on the trial as revealed by Chief UN Prosecutor Carla Del Ponte, *"I find it wounding to see that we have managed to ridicule the principles of international justice... because Kagame has signed a bi-lateral agreement [with the United States]..."*[204]
SPECIAL COURT FOR SIERRA LEONE [SCSL]	
Article 6 provides for individual criminal responsibility and command responsibility.	Trial and sentencing of former President of Liberia Charles Taylor[205] evidences that impunity is no longer available.
INTERNATIONAL CRIMINAL COURT [ICC]	
Article 25 of Rome Statute provides for individual responsibility. Under Article 28, Differentiated Command	The recent trial instituted against Mr Kenyatta[207] is landmark in the sense that for the first time a sitting head

[203] Kingsley Chiedu Moghalu, *Rwanda Panel's Legacy: They Can Run But Not Hide*, INTERNATIONAL HERALD TRIBUNE, 31 October-1 November 1998.
[204] FLORENCE HARTMANN, PAIX ET CHATIMENT, LES GUERRES SECRKTES DE LA POLITIQUE ET DE LA JUSTICE INTERNATIONALS, 271-72 (2007).
[205] Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I, Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004.

Responsibility for military and other commanders is provided.[206]	will be tried by the Court. However, the Court has faced problems indicting al Bashir and Qadaffi, so it would be interesting to see how the court garners the presence of Mr. Kenyatta.

VI. CONCLUSION

Major consideration is that the contours of Head of State Immunity are less clearly delineated. It is, therefore, pertinent to examine the need of such immunities for maintaining a smooth conduct of international relations and protecting the officials from any possible interference.

Regardless of these observations, it is a fact that the later years of the 20th century have seen momentous developments in international criminal law and human rights protection. It has been realized that trials for international crimes are not a matter of whim; they are required by the Rule of Law and common moral decency.[208] As a consequence and from the perspective of history, this whole process of transformation offers dramatic confirmation of the capacity of humans to change and to move from an entrenched culture of impunity towards a new and evolving culture of accountability for the purpose of providing international protection for human rights. The next chapter analyses the trial of President Kenyatta in detail.

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[207] Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Pre Trial Chamber II, 23 January 2012.
[206] Article 28 (b) (2), Rome Statute.
[208] Henry T. King, Jr., *Supra* note 40, at 655.

Prof. Nigel also warns that "State's internal monopoly on the use of force has proved much more resistant to regulation by international law; until recent times, internal sovereignty was not seen as the proper subject matter for international regulation."[209] This resistance continues to evidence in the ongoing Kenyatta trials, during which the African nations have ostracised the trials and labelled them as imperialism. It is amusing to note that whether such a reaction is an attempt to safeguard their sovereignty or take refuge against trials for international crimes under the garb of sovereign power. This ideology reflects in Mr. Kenyatta's speech at the Extraordinary Session of the African Union on October 12, 2013, during which he was trying to gain support for instituting a motion of deferral in the United Nations Security Council:

> *"These interventions go beyond interference in the internal affairs of a sovereign State. They constitute a fetid insult to Kenya and Africa. African sovereignty means nothing to the ICC and its patrons."*[210]

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[209] NIGEL D. WHITE, ADVANCED INTRODUCTION TO INTERNATIONAL CONFLICT AND SECURITY LAW 9 (Chelterham, 2014)

[210] PSCU, *Speech by President Uhuru Kenyatta at the Extraordinary Session of the African Union*, STANDARD MEDIA, Oct. 13, 2014 at p. 2-3, *available at* http://www.standardmedia.co.ke/?articleID=2000095433&story_title=speech-by-president-uhuru-kenyatta-at-the-extraordinary-session-of-the-african-union&pageNo=3http://www.standardmedia.co.ke/?articleID=2000095433.

CHAPTER IV

KENYAN TRIAL AND DEFERRALS: REQUESTS MANIFOLD, LAW OBSCURE

"Fair is foul and foul is fair."

- William Shakespeare, Macbeth.

[211]

This juxtapose from Macbeth resonates the thought that something that appears righteous may actually be tainted. Similarly in contemporary times, the International Criminal Court (ICC) is heralded as the harbinger of justice yet its own Statute may spell complexities for it to function effectively. There has been tremendous research on politics surrounding United Nations Security Council (UNSC) referrals to the ICC, however, not much has been elucidated on UNSC deferrals to the ICC. The ICC has competency under various jurisdictions that it has, viz., Personal (*ratione personae*) jurisdiction,[212] territorial (*ratione loci*) jurisdiction,[213] subject-matter (*ratione materiae*) jurisdiction,[214] and temporal (*ratione temporis*) jurisdiction.[215] The jurisdiction is triggered by three mechanisms enlisted in article 13 of the Rome Statute, State Party Referral, Security Council Referral and Proprio Motu Authority of the Prosecutor.[216] The UNSC Deferral in Article 16 prevents the ICC from exercise of jurisdiction. The State of Kenya has raised a plea for UNSC deferral twice, in 2011 and 2013, both resulting in deadlock.

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[211] WILLIAM SHAKESPEARE, MACBETH, Act. II.
[212] Rome Statute, *supra* note 3, art. 12(2)(b).
[213] Rome Statute, *supra* note 3, arts. 12(2)(a), 12(3) & 13 (b).
[214] Rome Statute, *supra* note 3, art. 5.
[215] Rome Statute, *supra* note 3, art. 11.
[216] WILLIAM A. SCHABAS, *supra* note 79.

Even though it has not been successfully utilized as of now, the instrument is often open to influence and impacts the independence and impartiality of the ICC.

I. SECURITY COUNCIL DEFERRAL

The Court may be prevented from exercising its jurisdiction when so directed by the Security Council, according to Article 16. This is called 'deferral'. The Statute says that the Security Council may adopt a resolution under Chapter VII of the Charter of the United Nations requesting the Court to suspend prosecution, and that in such a case the Court may not proceed. The Relationship Agreement between the Court and the United Nations states:

> *"2. When the Security Council adopts under Chapter VII of the Charter a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate, inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard."*[217]

A. Tailoring of Article 16 in the Rome Statute

Article 16 of the Rome Statute is a rather significant improvement upon a text in the original draft statute prepared by the International Law Commission. In that document, the Court was prohibited from prosecuting a

[217] International Criminal Court (ICC), Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Art. 17, 22 July 2004, ICC-ASP/3/Res.1, available at: http://www.refworld.org/docid/51b080fa4.html.

case 'being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides'.[218] Such a provision would have allowed a State that was a member of the Council to obstruct prosecution by placing a matter on the agenda, something that could only be overridden by a decision of the Council itself. And a decision of the Council itself can be blocked at any time by one of the five permanent members exercising its veto. This also evidence that the initial negotiations for the creation of a permanent international criminal court taking place within the UN International Law Commission (ILC) had envisioned a court that was perfectly subordinated to the UNSC and operating within the Charter of the United Nations.[219] Specifically, the five permanent members of the UNSC had envisioned a 1) strong role for the UNSC *vis-á-vis* the ICC and, 2) a considerably circumscribed jurisdiction of the Court.[220] Opposed to this vision were all the other countries that were extremely suspicious of the intentions of the UNSC, whose record of being an impartial and fair institution was, to say the least, questionable. Thus, as time passed and pressures to create a politically independent institution grew,[221] the ILC opted for a solution that would compromise between the two sets of

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[218] Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May-22 July 1994, UN Doc. A/49/10, Art. 23(3).

[219] Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW 22-43 (1999). William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, EUROPEAN JOURNAL OF INTERNATIONAL LAW 701-720 (2004).

[220] Philippe Kirsch and John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW 2-12 (1999).

[221] In one very critical editorial, Cherif Bassiouni, Chairman of the Drafting Committee of the Rome Diplomatic Conference to Establish an International Criminal Court suggested "better not to have an ICC, than to have it in the service of a political body that has hardly distinguished itself by adherence to the rule of law." Cherif Bassiouni, *Where is the ICC Heading? The ICC –Quo Vadis?*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 421-427 (1999).

expectations standing at the opposite ends of the bargaining spectrum between political independence and political subordination.

The International Law Commission proposal met with sharp criticism as interference with the independence and impartiality of the future court. By allowing political considerations to influence prosecution, many felt that the entire process could be discredited.[222] At the same time, it must be recognized that there may be times when difficult decisions must be taken about the wisdom of criminal prosecution when sensitive political negotiations are underway. Should the Court be in a position to trump the Security Council and possibly sabotage measures aimed at promoting international peace and security?

The debate in the Preparatory Committee and the Rome Conference itself about the International Law Commission proposal was in many respects a confrontation between the five permanent members and all other countries. The uninformed observer might have been given the impression that United Nations reform was being accomplished indirectly, in the creation of a new institution - the International Criminal Court - that would be involved in many of the same issues as the Security Council but where there would be no veto. 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.[223] But even the compromise was bitterly opposed by some delegates who saw it as a blemish on the independence and impartiality of the Court. In a statement

[222] For the debates, see Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, paras. 124-5; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, paras. 140-4.

[223] *See* Lionel Yee, "The International Criminal Court and the Security Council: Articles 13(b) and 16', in LEE, *THE INTERNATIONAL CRIMINAL COURT*, pp. 143-52 at pp. 149-52.

issued on the night of the final vote in Rome, India said it was hard to understand or accept any power of the Security Council to block prosecution:

> On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the Conference accepts the proposition that justice could undermine international peace and security.[224]

B. The UNSC in the ICC Treaty

Within the jurisdictional preconditions of the ICC Statute (Articles 12-19) there are two specific provisions that deal with the relationship between the UNSC and the ICC. The first of these provisions, Article 13 Section (b) establishes that the UNSC may refer to the ICC a situation in which crimes that are under the jurisdiction of the ICC have been committed. The UNSC operates its functions under Chapter VII of the UN Charter and, in referring the situation to the ICC, de facto extends the jurisdiction of the ICC to crimes committed in territories of states that are no party to the ICC Treaty or by nationals of non-member states.

Article 16, is the second article of the ICC Statute dedicated to the UNSC, and it establishes that:

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[224] 'Explanation of Vote by India on the Adoption of the Statute of the International Criminal Court, Rome, July 17,1998', p. 3.

> *No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.*

Under these two provisions the UNSC seems to be something in between a "triggering institution" and a "gatekeeper institution". On the one hand, it promotes investigations and, on the other, can stop them based on concerns of security. The deferral power, in particular, was based on the need to reconcile peace and justice in situations in which the presence of peace talks or security concerns makes justice a secondary goal to the international community. As mentioned above, the two articles are the result of extensive bargaining leading to the Rome Conference of 1998, during which the final Statute of the ICC was adopted. The result is a mixed jurisdictional system in which, court authority is recognized by the consent of states, but also where the UNSC has two different functions: 1) extending ICC jurisdiction and thus overcoming the requirement of "state consent" and imposing obligations that go beyond the ICC Statute; and 2) blocking ICC operations when the pursuit of peace and security and the pursuit of justice are at odds.

C. The Usage

Nobody at Rome expected Article 16 to be invoked by the Security Council even before the Court was actually operational. After all, it was designed to block the activities of the Court. Prior to election of the judges and the Prosecutor, there could be no activities to block. But that is precisely what

happened in July 2002, barely days after the entry into force of the Statute. In late June 2002, the United States announced that it would exercise its Security Council veto over all future peacekeeping missions unless the Council invoked Article 16 so as to shield United Nations-authorized missions from prosecution by the Court. The result was Resolution 1422, adopted by the Security Council on 12 July 2002, allegedly pursuant to Article 16 of the Statute. It 'requests' that, 'if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation [the Court] shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise'. It therefore extended deferral to such operations as the Stabilization Force (SFOR) in Bosnia and Herzegovina, whose role is authorized by a Security Council resolution although it is not at all under United Nations control. The resolution only applied to nationals of States that are not parties to the Statute.

Although adopted without opposition in the Council, the initiative was resoundingly condemned by several States during the debate, including such normally steadfast friends of the United States as Germany and Canada. Its legality is highly questionable, of course, because Article 16 contemplates a specific situation 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 of the Charter of the United Nations, applicable only when there is a threat to the peace, a breach of the peace or an act of aggression. Some United Nations-authorized missions are not even created pursuant to Chapter VII of the Charter.

Conceivably, the Court could assess whether or not the Council was validly acting pursuant to Chapter VII of the Charter of the United Nations (just as it might with respect to a Security Council referral, which must also be made pursuant to Chapter VII).[225] There has been much debate among international lawyers about whether or not Security Council resolutions can even have their legality reviewed by courts. The International Court of Justice has been hesitant to do this, because the International Court of Justice and the Council are both principal organs of the United Nations. The International Court of Justice has felt that the Charter does not establish a hierarchy in which one principal organ of the United Nations can review the decision of the other. This consideration does not apply to the International Criminal Court, which is not created by the Charter of the United Nations and, for that matter, is not an organ of the United Nations at all. The International Criminal Tribunal for the former Yugoslavia considered that it was entitled to review the legality of Resolution 827, which is in effect its constitutive act.[226] In other words, to the extent that Resolution 1422 was an abuse of the powers of the Security Council, its legality, at least theoretically, could eventually be challenged in proceedings before the International Criminal Court.

Resolution 1422 expired after twelve months but was renewed for another year in 2003.[227] In 2004, the United States found itself dreadfully embarrassed by reports of torture carried out in prisons in Iraq and at its base in Guantanamo, Cuba. It did not pursue adoption of a third resolution based on Article 16. Resolutions 1422 and 1483 are ugly examples of

[225] This is discussed earlier in this chapter. See, e.g., Z. S. Deen-Racsmany, 'The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?', (2002) 49 *Netherlands International Law Review* 378.
[226] *Tadid* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.
[227] UNDoc.S/RES/1483(2003).

bullying by the United States, and a considerable stain on the credibility of the Security Council. In practice, however, neither resolution posed an obstacle to the fulfilment of the Court's solemn mission.

Debates about the role of Article 16 returned in 2008, when the Prosecutor applied for an arrest warrant against the head of State of Sudan. Many African States, mainly through the African Union, objected that the Prosecutor was jeopardizing an ongoing peace process. They were frustrated to learn that the Prosecutor and many friends of the Court were holding out Article 16 as the sole mechanism to be employed when justice threatened peace. After all, the Security Council, at least in its present composition, is not always viewed as a friend of the global south. The African Union proposed an amendment to Article 16 by which deferral could also be imposed by the General Assembly of the United Nations.[228] Critics say this would 'further politicize' the mechanism, although it is hard to see how there could be anything more political than a monopoly in the hands of the Security Council. Explaining that the role of political considerations in decisions to defer prosecutions should be restricted as much as possible does not provide an adequate answer to the concerns of the African Union when the Rome Statute as it currently stands treats the matter as a monopoly of the Security Council.

II. DEFERRALS IN KENYAN TRAILS

A reference to requirements under Chapter VII for issue of deferral, lead to *Article 39*,[229] that permit the UNSC to undertake a situation to *'determine existence of any threat to the peace, breach of peace, or act of aggression,'*

[228] 'Appendix VI, African Union States Parties to the Rome Statute', ICC-ASP/8/20, p. 70.
[229] B. Simma *et al* (eds.), THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Oxford University Press, 2002).

and *'to maintain or restore international peace and security.'* These open-ended phrases would mean that if a nation threatens to engage in an act of aggression lest proceedings by ICC are deferred, it may qualify as a valid ground. The term 'aggression' has not been defined under the Rome Statute and does not have a universally accepted definition, this would create further uncertainty in law. The terminology of *'international peace and security'* is extremely flexible to include in its ambit any or every situation. The travesties and ambiguities associated with exercise of Chapter VII powers were, invariably, read into *Article 16* of the Rome Statute.

The ensuing ambiguity has resulted in States citing different reasons for deferrals. In March 2011 Kenya's request for deferral, in a letter to the United Nations:

> *"the Orange Democratic Movement (ODM) party, at its National Executive Council/Parliamentary Group meeting chaired by the Prime Minister Rt. Hon. Raila Odinga, adopted a decision to push for the International Criminal Court cases relating to Kenya to be handled locally through a credible local mechanism."*[230]

This request suggests setting up of a local tribunal to investigate in consonance with *Article 17* complementarity principle, which was however denied. It is to be noted that such a criteria is not evidenced in Chapter VII of the UN Charter in consonance with which a deferral may be issued under Article 16 of the Rome Statute.

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[230] Letter dated 23 March 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council, Request of Kenya for deferral under article 16 of the Rome Statute of the International Criminal Court, ¶3, UN Doc. S/2011/201, Mar. 23, 2011, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kenya%20S%202011%20201.pdf.

In October 2013, the Kenyan government again pushed for deferral citing reason of *'threat to the peace, breach of the peace or act of aggression likely to arise in the light of the prevailing and continuing terrorist threat existing in the Horn of Africa and East Africa.'*[231] The request for deferral were backed by the African Union[232] and the request was formally submitted through their representative on Nov. 1, 2013.[233] The official resolution was drafted by Azerbaijan, Burundi, Ethiopia, Gabon, Ghana, Kenya, Mauritania, Mauritius, Morocco, Namibia, Rwanda, Senegal, Togo and Uganda.[234]

The request was, however, denied due to split in UNSC, these requests in the same cases highlight the lacunae that exist in law due to the failure to lay down the criteria for request/grant of such deferrals. During the deliberations, Mr. Churkin, representative of Russia, stated:

> *"We feel that the African countries presented very compelling arguments. Indeed, at such a critical time for Kenya, when the military contingent of that country is playing a key role in combating terrorism in Somalia, and when Kenya itself has become a target for terrorist attacks, the democratically elected President and Deputy President of that country should be able to*

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[231] Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, ¶3(1), UN Doc. S/2013/624, Oct. 23, 2013, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf.

[232] Id.

[233] Letter dated 31 October 2013 from the Permanent Observer of the African Union to the United Nations addressed to the President of the Security Council, Nov. 1, 2013, UN Doc. S/2013/639, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_639.pdf.

[234] http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_660.pdf.

remain in their country and resolve the pressing tasks faced by their Government."[235]

The Chinese representative, who voted in favour of the deferral, asserted that:

"The proceedings of the International Criminal Court in the Kenyan case illustrate a tension between demands for justice by international courts and respect for democratic choice for the people of Kenya. That is a new situation; therefore, there should be a new solution that addresses that genuine political and legal predicament"[236]

An almost evenly divided Security Council, lacking the requisite nine affirmative votes, today failed to adopt a resolution seeking a one-year delay in International Criminal Court proceedings against the President and Deputy President of Kenya. Seven Council members voted in favour of the text (Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, Togo), none voted against, and 8 abstained (Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom, United States).[237]

This existing ambiguity has some potential consequences, for instance, the UNSC may find that if the instrument of deferral is successfully lobbied by a State under investigation on the ground of such investigation being a threat to international peace and security, then it may be faced with permanent

[235] http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7060.pdf
[236] Id.
[237] SECURITY COUNCIL RESOLUTION SEEKING DEFERRAL OF KENYAN LEADERS' TRIAL FAILS TO WIN ADOPTION, WITH 7 VOTING IN FAVOUR, 8 ABSTAINING, Nov. 15, 2013, http://www.un.org/News/Press/docs/2013/sc11176.doc.htm.

blackmail by a recalcitrant state in order to induce the Council to renew the deferral every twelve months. Unfortunately, within the ambit of *Article 16* of Rome Statute and *Chapter VII* of UN Charter, this deferral may be made perpetually with constant renewal. It is also desirable that in advent of utilization of UNSC deferral, it is pegged at the highest threshold to prevent its abuse or misuse.

Another pressing concern was the impact of such deferral on proceedings or investigation already undertaken by the ICC. Certain issues that I found intriguing were: What would happen to evidence collected, and the status of investigations? Would the detainees have to remain in detention during the period of deferral or would they have to be released? What would the implications of this deferral be upon resumption of the investigation and proceedings? Additionally, the perceived legitimacy of a deferral will depend on the stage in the Court's proceedings at which the deferral is made. Thus, it would be more credible that such a deferral is not made after issue of arrest warrants but at the stage of investigation into the situation. The former would suggest an escape from judicial accountability, thereby, breeding impunity.

III. Position of Referral by Waki Commission

In response to the post-elections violence of 2007-2008 in Kenya, former UN Secretary General Kofi Annan brokered a power-sharing agreement which included the appointment of the Waki Commission to investigate the violence. The Waki Commission, officially, "The Commission of Inquiry on Post Election Violence (CIPEV)", was an international commission of inquiry established by the Government of Kenya in February 2008 to investigate the clashes in Kenya following the disputed Kenyan presidential election of 2007.

The post-election violence report by Waki Commission, commonly known as the *"Waki report"*, was handed over to president Mwai Kibaki and prime minister Raila Odinga on 15 October 2008.[238] The report has 529 pages.[239] The Waki Commission recommended to the government of Kenya:

> *"To break the cycle of impunity which is at the heart of the post-election violence, the report recommends the creation of a special tribunal with the mandate to prosecute crimes constituted as a result of post-election violence. The tribunal will have an international component in the form of the presence of non-Kenyans on the senior investigations and prosecution staff."*[240]

The report however did not publicly disclose the alleged perpetrators in the report handed to the President. Instead, the Waki Commission handed the list of alleged perpetrators to Kofi Annan. In July 2009, Koffi Annan handed the envelope to Luis Moreno-Ocampo, the Prosecutor at the ICC.

The jurisdiction of the ICC can be triggered by State Party Referal, Security Council Referral and proprio motu by the Prosecutor.[241] The Waki Commission was constituted by the government of Kenya, this would mean that a communication from the Commission may be read as that from the State. In the pertinent matter, it appears that Waki Commission has made a reference to the ICC. The issue arises here that whether this referral through Waki Commission is legitimate or not. Having read the writings of Prof. William A. Schabas, this would not be a State Referral. In strictly legitimate

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[238] *Waki report to be handed over,* DAILY NATION, Oct. 14, 2008, *available at* http://www.nation.co.ke/News/politics/-/1064/480490/-/ywbs9iz/-/index.html.

[239] Waki Commission Report, Annexed to "Request for Authorization of Investigation Pursuant to Article 15, ICC-01/09, Nov. 26, 2008" as ICC-01/09-3-Anx5 *available at* http://www.icc-cpi.int/iccdocs/doc/doc785984.pdf [hereinafter Waki Commission Report].

[240] Waki Commission Report, *supra* note 239, at ix.

[241] See, WILLIAM A. SCHABAS, *supra* note 74, at 157-186.

terms, the matter can be considered as a bringing into notice of the Prosecutor and not a referral. The Prosecutor, has on his own motion initiated investigation of the case post permission of the Trial Chamber.[242]

IV. CONCLUDING REMARKS

A deferral is not necessarily an obnoxious instrument. It may also help protect the ICC's independence in situations where it is overburdened if it operates in a highly politicised environment. African nations have heavily criticised the ICC as the Colonial Court, in view of all situations being investigated are located in Africa alone whereas there are other States that also commit human rights violations. In such a scenario, transparency in grounds for refusal for grant of deferrals would help grant legitimacy to the Court's actions.

In the Kenyan situation, it would be important to balance the pressing concerns of the ICC and the African states. The denial of deferral would question the legitimacy of the trial, yet its grant would mystify the process of justice entirely.

[242] Decision on Authorization, *supra* note 39.

CHAPTER V

SELECTION AND PRIORITIZATION CASES BY THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT: CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO THE KENYAN CASES

The ICC is a politically independent judicial institution created, in the words of former Chief Prosecutor of the ICC Luis-Moreno Ocampo:

> *"to conduct investigations [concerning the most serious violations of international humanitarian law] fairly, impartially, and present it to the judges."*[243]

The International Law Commission had, however, envisioned the ICC as perfectly subordinated to the UNSC, an ideology that played heavily during negotiations for the Rome Statute and resulted in the UNSC's power of referral and deferral to the ICC under Article 13 and Article 16.[244] Under such circumstances, it is interesting to examine the criteria that the ICC follows for selection and prioritization of cases.

The selection and prioritization of cases to be prosecuted before the ICC, while necessary and legitimate given the existing capacity constraints and the goals of the Court to prosecute the "most serious crimes" of the "most responsible", runs the risk to bring the Court into disrepute if not done properly, i.e., in a transparent and rational way. In order to understand the selection and prioritization process at the ICC, the researcher would address three areas. First it will identify the principal sources that indicate the criteria for the selection and prioritization of cases with respect to the public documents issued by the

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[243] Louis Moreno Ocampo, *It is up to Security Council to refer Syria to ICC: Ocampo, Al-Arabya News*, Nov. 4, 2011, http://english.alarabiya.net/articles/2011/11/04/175443.html.

[244] Discussed earlier in Chapter IV of this dissertation.

Office of the Prosecutor (OTP) of the ICC so far; in the process of identifying these sources, it will explore the process that has led to these criteria and third, it will reflect on some of the particular challenges facing the OTP in the matters of selection and prioritization.

I. SOURCES OF STRATEGY

According to OTP Regulation 14,[245] the OTP, the ICC can make use of policy papers that reflect the key principles and criteria. Four fundamental principles lie at the core of the Strategy: (i) positive complementarity, (ii) focused investigations and prosecutions, (iii) addressing the interests of victims, and (iv) maximizing the impact of the Office's work.[246]

In accordance with OTP Regulation 14, the OTP have made various papers available to the public. First, key strategic issues are laid down in two strategy papers: (i) the Strategy 2006–2009,[247] and (ii) the Strategy 2009–2012.[248] Second, several policy papers of the OTP clarify other key issues, such as the "interests of justice", victim's participation and preliminary examinations. The draft policy paper on preliminary examinations of 2010[249] and that of 2013[250]

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[245] *see* Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Apr. 23, 2009, http://www.icc-cpi.int/Menus/ICC/Legal+Texts+Tooles/.

[246] Prosecutorial Strategy, 2009–2012, 1 February 2010, The Hague, at 4–7, http://www.icc-cpi.int/Menus/ICC/Strucutre+of+the+Court/Office+of+the+Prosecutor/.

[247] Report on Prosecutorial Strategy, 14 September 2006, The Hague, http://www.icc-cpi.int/Menus/ICC/Strucutre+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Report+on+Prosecutorial+Strategy.htm.

[248] Prosecutorial Strategy, 2010, cited in supra note 4.

[249] Draft Policy Paper on Preliminary Examinations, Oct. 4, 2010, *available at* http://iccforum.com/media/background/lectures/ask-former-prosecutor/2010-10-04_ICC_OTP_Draft_Policy_Paper_on_Preliminary_Examinations.pdf [hereinafter Draft Policy Paper on Preliminary Examinations 2010].

[250] Draft Policy Paper on Preliminary Examinations, Nov. 2013, *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf [Draft Policy Paper on Preliminary Examinations 2013].

will be further examined below. Other than these, there are three more documents: the Policy Paper of September 2003;[251] a draft policy paper on selection and prioritization of cases that was widely circulated to both states parties and civil society organisations in June 2006, and the Office's first three year report presented on 12 September 2006.[252] A number of internal documents have been developed throughout the time the Office has been in existence, but discussion for the moment reflects those that are in the public domain.

The policy paper of September 2003 sets out some of the key provisions that have informed selection policy from the earliest days of the Court. The draft selection paper of June 2006 offers a more de-tailed analysis of the relevant criteria as well as presenting some new matters for consideration; the three year report provides some commentary on why certain selections were made in certain situations, particularly in relation to the DRC and Uganda, but does not add much to the principles enunciated in the earlier documents. More policy papers on topics such as positive complementarity and case selection are in the consultation process and will be published in the future.

A. Lack of a comprehensive, overall strategy

The OTP uses the terms "policy" and "strategy" indiscriminately. The strategy papers cover certain time periods (2006–2009 and 2009–2012) and clarify the strategic objectives for the OTP, while the policy papers address particular fundamental issues on which the Office wants to provide more clarity and

[251] Paper on some policy issues before the Office of the Prosecutor (2003), *available at* http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

[252] Report on the activities performed during the first three years (June 2003 – June 2006), *available at* http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf.

transparency. In accordance with OTP Regulation 14 (1), however, it appears that the OTP shall develop a Prosecutorial Strategy as the overall guidance. In our understanding, OTP Regulation 14 (1) refers to one coherent prosecution strategy in one master document. The current practice of strategies for timeframes of approximately three years does thus not comply with the wording of the mentioned Regulation. This is not just a formal point. To have one main document with the overall general or specific goals of a prosecution strategy indicates the general direction for the Office and this not only for the interested public but also for the personnel working in the Office.

Transparency through interim reporting enhances the ICC's legitimacy. It will further contribute to the institutional development of the ICC and strengthen the hand of the new ICC Prosecutor elected by the end of 2011.[253] This lessons learned process involves a two-pronged approach to be taken by the OTP: first, developing a newly-arranged strategy paper in accordance with OTP Regulation 14 (1), and, second, a continuation of the consultation process with external actors to design prosecutorial guidelines that cover the situation and case selection process and its criteria.[254] Such guidelines would have to integrate the existing (draft) policy papers on the "interests of justice", preliminary examinations, case selection, etc., thus harmonizing the papers and consolidating the selection criteria in the form of policy-oriented guidelines.

II. SELECTION STRATEGY AT THE ICC (OTP)

This section analyzes the so far published selection and strategy papers of the Office of the Prosecutor ("OTP") of the International Criminal Court ("ICC") with

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[253] HRW, *Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"*, at 4, June 2011, http://www.hrw.org/en/news/2011/06/16/icc-course-correction [hereinafter HRW, 2011].

[254] Stegmiller, *the Pre-Investigation Stage of the ICC, Criteria for Situation Selection*, 8 STUDIES IN INTERNATIONAL AND EUROPEAN CRIMINAL LAW AND PROCEDURE, 268–9 (2011).

a view to their consistency, coherence and comprehensiveness. Given the high number of communications and referrals to the ICC a focused strategy setting out the criteria for situation and case selection and prioritization should be one of the priorities of the Prosecutor. Thus far the Office has developed a strategic framework guided by four fundamental principles: focused investigations, positive complementarity, the interests of the victims and the impact of the OTP's work. These four principles are critically evaluated by the researcher in light of the ICC Statute and existing case law. In particular the positive complementarity approach, focusing on the cooperation with national jurisdictions and enhancing their own capacity to prosecute, is to be welcomed and reflects a realistic prosecutorial policy approach. The cooperation between the OTP and Germany in the prosecution of the leadership of the FDLR is a good case in point.[255]

A. Focused Investigations

One guiding principle of the OTP is that of focused investigations and prosecutions. The Office has chosen to focus on the most serious crimes and on *"those bearing the greatest responsibility"*. While the latter terminology allows for certain flexibility, the ICC Prosecutor mainly selects the persons from the top of the (state) hierarchy for his cases. Others are left to national criminal justice systems, encouraging territorial and third states to take measures against those offenders and to close the impunity gap[256]. In line with this focused approach the OTP has originally adopted a sequential approach, investigating cases within a situation one after another and selecting them

[255] Kai Ambos & Ignaz Stegmiller, Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?, CRIME LAW SOC CHANGE, DOI 10.1007/s10611-012-9384-z, at 156.
[256] See Positive complementarity section for further understanding.

according to their gravity.[257] Lately, the OTP has been more flexible in its approach and, for example in the Kenya proceedings, moved to simultaneous investigations, bringing two cases for prosecution at the same time (Case of the *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and the Case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*). Thus, while the OTP still mentions "focused investigations", the sequential approach is no longer explicitly contained in the Strategy 2009–2012.[258] This shows that certain flexibility is useful and that the Prosecutor must be able to adjust the strategy from time to time. Further, the Office's aim to shorten investigations and expedite trials is reflected in a selection of a limited number of the gravest incidents, representing the main types of victimization.[259]

1. The OTP's Preliminary Examination

The selection process of the OTP can be roughly divided into two stages: (i) the identification of situations, and (ii) the selection of cases. "Situations" refers to larger areas of conflict, in which the OTP investigates and builds up several case hypotheses. The situation selection is guided by the criteria of article 53 (1) ICC Statute, namely jurisdiction, admissibility and the *"interests of justice"*.[260] Cases are selected according to similar legal criteria, either based on article 53 (2) ICC Statute or on a mutatis mutandis basis of article 53 (1) ICC Statute's factors.[261]

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[257] Report on Prosecutorial Strategy, 2006, supra note 247, at 5.
[258] Strategy 2009-2012, *supra* note 246, at 10.
[259] Prosecutorial Strategy, 2010, *supra* note 249, at 6.
[260] Rules of Procedure and Evidence, Rules 48 and 104; further Stegmiller, *supra* note 254, at 209.
[261] According to OTP Regulation 33 the Prosecutor refers to the criteria of article 53 (1) ICC Statute regarding case selection, which seems to imply that article 53 (2) ICC Statute does not apply to case selection. Nevertheless, OTP Regulation 29 (5) mentions article 53 (2) in the

This preliminary examination stage is an important and necessary innovation compared to the pre-trial procedure of former International Criminal Tribunals.[262] Contrary to these Ad Hoc International Criminal Tribunals that all possessed jurisdiction over a specific situation, limited in temporal and territorial terms, the ICC does not have such jurisdictional limitations.[263] Instead, the ICC must pre-investigate and select its own situations. Even in the case of prima facie pre-defined situations, by way of a SC or State referral (see next section), the ultimate decision whether to initiate a formal investigation rests upon the Prosecutor and the Judges, based on the criteria of articles 53 (1) ICC Statute.[264]

2. Overview of the Process

During the preliminary examination process the OTP assesses whether it opens a formal investigation into a situation. The analysis of a situation can be triggered through the following three mechanisms: (i) a State referral in accordance with articles 13 (a), 14 ICC Statute, (ii) a SC referral in accordance

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context of prosecutions. As cases form the basis of a prosecution and are selected at a later stage, arising out of the specific situation, there is an argument that article 53 (2) covers case selection. Moreover, a limitation of article 53 (2) only to circumstances where the OTP decides to bring no prosecution at all in relation to a whole situation is not supported by literal and systematic interpretation: Article 53 (2) speaks of a "sufficient basis for prosecution", which is a higher standard than the one mentioned for situation selection ("reasonable basis") in Article 53 (1), and thus refers to a different stage. Systematically, both paragraphs 1 and 2 of article 53 are phrased in negative terms ("no" and "not"), but they do not indicate that they only cover negative decisions not to proceed. Notwithstanding the review mechanism under article 53 (3) solely covers negative decisions ("not to proceed") and the Chamber's intervention depends on such a case-specific decision of the Prosecutor. Otherwise, the carefully drafted review mechanism under article 53 (3) would be undermined. In other words, as long as a decision under article 53 (2) with regard to a particular suspect has not been issued by the OTP, it is not-existent and thus non-reviewable.

[262] the International Military Tribunals in Nuremberg and Tokyo, the ICTY and ICTR, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon)

[263] Draft Policy Paper on Preliminary Examinations, 2010, *supra* note 249, at 4.

[264] Draft Policy Paper on Preliminary Examinations, 2010, *supra* note 249, at 5; Stegmiller, *supra* note 254, at 113–4.

with article 13 (b) ICC Statute, or (iii) by *proprio motu* action of the Prosecutor on the basis of information received in accordance with articles 13 (c), 15 ICC Statute.

In general, all three trigger mechanisms are subject to the same analysis applying the same criteria. The initiation *proprio motu* only differs in two aspects: first, according to article 15 (3) ICC Statute the Prosecutor must submit a request for authorisation to the competent Pre-Trial Chamber, whereas in the case of referrals the Prosecutor can simply proceed with his formal investigation unless he determines that a reasonable basis does not exist (article 53 (1) ICC Statute); second, the assessment of information received under article 15 ICC Statute made it necessary to introduce a pre-filter mechanism. The "information received" (also referred to as "communications") shall be analyzed in accordance with article 15 (2) ICC Statute. This means that the information's "seriousness" is evaluated and crimes manifestly outside the ICC's jurisdiction are sorted out even before becoming formal "situations under analysis".[265] The procedure under OTP Regulation 27 (a) arranges for an initial "pre-preliminary" check to filter out information that is unfounded on its face (according to the ICC website, by the end of May 2011 4,316 of a total of 9,214 communications received were considered "manifestly outside of the jurisdiction of the Court.[266] In any case, the "seriousness" filter is also applied to (State or Security Council) referrals.[267] In fact, it is a procedural filtering mechanism invented by the OTP to manage the large quantity of information about possible crimes it receives.

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[265] so called analysis phase 1, see Draft Policy Paper on Preliminary Examinations, 2010, *supra* note 249, at 18; HRW, *supra* note 253, at 4.

[266] Update on Communications Received by the Prosecutor of the ICC, 10 February 2006, The Hague, at 2–3, *available at* http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/.

[267] see Rule 104 (1) of the Rules of Procedure and Evidence [RPE].

In the Kenyan case, the preliminary examination was conducted by the Prosecutor in furtherance of the Waki Commission Report[268] forwarded by former UN Secretary General, Kofi Annan. Thereafter, seeing the gravity of the offences, the Prosecutor did a preliminary investigation.

3. Critical Evaluation of the Draft Policy Paper on Preliminary Examinations

The question of selecting situations and cases we apparent from the very beginning of the Court's work. Yet, in this starting phase practical necessities and administrative issues were on the top of the agenda rather than the development of a clear selection strategy. Furthermore, the situations of Uganda and the Democratic Republic of Congo (DRC), the first ones referred to the ICC in 2004 by the respective governments, were plainly of such gravity that a detailed weighting procedure did not yet present itself as a necessity. Only when the number of communications on potential situations increased, a policy with regard to preliminary examinations became a matter of urgency. At present, seven situations are under preliminary analysis (Colombia, Afghanistan, Georgia, Guinea, Honduras, Korea and Nigeria), and the OTP recently requested authorisation of an investigation regarding the Ivory Coast,[269] making it the second *proprio motu* request besides the situation in Kenya.

In October 2010 the OTP published a Draft Policy Paper on Preliminary Examinations which was widely circulated and invited critical commentary. This Preliminary Examinations Paper is largely based on an earlier (internal) draft paper on situation and case selection of 2006, which was also circulated, albeit

[268] Waki Commission Report, Annexed to "Request for Authorization of Investigation Pursuant to Article 15, ICC-01/09, Nov. 26, 2008" as ICC-01/09-3-Anx5 *available at* http://www.icc-cpi.int/iccdocs/doc/doc785984.pdf [hereinafter Waki Commission Report].

[269] Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, 23.06.2011.

not that widely, for comments among (external) experts. Other papers on key issues, such as case selection and positive complementarity, are still in the internal consultation process and have not yet been made available to the public. Numerous legal challenges arise during on-going trial proceedings and deadlines pressure the OTP to find quick answers. Still, one wonders why the policy and strategy papers cannot be produced by the Chief Prosecutor and his immediate team, recently considerably reinforced by the appointment of additional advisors.[270] These advisors are not involved in the daily work of the Office and their function is, if any, to help the Prosecutor to develop a coherent strategy and policy. In any case, a transparent selection process is important for the future of the ICC and could save working capacity. It is also crucial for the common acceptance of the Court. Strategic questions must be prioritized and solved as soon as possible. The election of a new Chief Prosecutor in December of last year and her taking over by mid 2012 allows for a fresh start learning the necessary lessons from the various missteps and failures of the predecessor.[271] The new Prosecutor should as one of his/her first actions clarify the overall strategy. Working groups should be formed to tackle this important issue, involving external experts. The selection strategy affects the ICC as a whole and shapes its future.

The incumbent Prosecutor also introduced a practice of inviting so-called self referrals, which, according to the OTP, was "explicitly contemplated during the

[270] Special Advisor on Gender Crimes Prof. Catharine MacKinnon, Special Advisor on International Humanitarian Law Prof. Tim McCormack, Special Advisor on International Law Prof. José Alvarez, Special Advisor on Crime Prevention Prof. Juan Méndez, Special Council to the Prosecutor Benjamin Ferencz, and Consultant for the OTP Judge Baltasar Garzon (in the meantime in Colombia as advisor to the OAS mission MAPP-OEA and currently lawyer of Julian Assange). See also the debates by invited 'experts' at http://uclalawforum.com/.

[271] Kai Ambos & Ignaz Stegmiller, Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?, CRIME LAW SOC CHANGE, DOI 10.1007/s10611-012-9384-z, at 156.

negotiations in Rome."[272] It is, however, controversial if the "idea that a State might refer a situation against itself was ever contemplated"[273]; in any case, the wording of Art. 13 (a), 14 does not exclude this possibility.[274] Moreover, the policy question whether such referrals are to be favoured over the proprio motu trigger, which the OTP explicitly mentions in its policy paper with regard to DRC, Uganda and Kenya,[275] is worth discussing. The Court is now working at full capacity and *proprio motu* investigations might be the better choice in some situations. The possibility of the perception of a biased Court conducting one-sided investigations must, however, not be underestimated. These denunciations can easily be propagated in communities where knowledge about the ICC is scarce; a self-referral policy facilitates the spreading of such rumors, although the subsequent case selection, prosecuting all sides of the conflict, may neutralize criticism. The OTP can also avoid or diminish criticism by its well-established outreach program, the re-definition of referred situations and by an increased use of the *proprio motu* power. The last-mentioned switch to the *proprio motu* mechanism could be facilitated by the pending situations of Kenya and Côte d'Ivoire that will necessarily entail the treatment and hopefully solution of some legal questions involved. Obviously, the decision whether *proprio motu* to be used as the OTP's last resort or as an equal and powerful trigger mechanism ultimately lies in the hands of the new Prosecutor.

B. Case Selection

Within those chosen situations the OTP must select cases for further investigation and prosecution. The determination of a case involves the

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[272] Draft Policy Paper on Preliminary Examinations, 2010, supra note 249, at 16.
[273] Schabas, *supra* note 74, at 10.
[274] For a recent thorough analysis, including of the travaux: Robinson, D., *The Controversy over Territorial State Referrals and Reflections on ICL Disclosure*, 9(2) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 355, 359 (2011).
[275] Draft Policy Paper on Preliminary Examinations, 2010, supra note 249, at 16–7.

following steps: (i) selecting regions, (ii) selecting incidents, (iii) selecting groups, and (iv) selecting individual perpetrators.[276] The Prosecutor has decided to select cases inside a situation according to gravity and prosecute only those suspects who bear the greatest responsibility for the most serious crimes.[277] The OTP implements the last-mentioned criteria in a discretionary manner.[278] If applied in such a manner, the two criteria – "gravity" and "those bearing the greatest responsibility" – must be linked to the statutory basis that provides for prosecutorial discretion, i.e., article 42 (1) in general and article 53 (2) (c) in particular, including the broad "interest of justice" clause.[279]

1. Gravity as a case selection criterion

The OTP stated in its policy papers that gravity is at the very heart of its selection procedure. According to OTP Regulation 29 (2), the following factors are to be taken into account: (i) scale, (ii) nature, (iii) manner of commission, and (iv) impact.

Before the adoption of the OTP Regulations, there had been an intense debate on the factors that should be taken into account when applying gravity. The Pre-Trial Chambers upheld the factors mentioned by the OTP and equally favoured a mixed qualitative-quantitative approach. Thus, as observed by the Pre-Trial Chamber in the Kenya Cases, in making its assessment, the Chamber considers that gravity may be examined following a quantitative as well as a

[276] C. STAHN, JUDICIAL REVIEW OF PROSECUTORIAL DISCRETION: FIVE YEARS ON, IN: THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 249 (Carsten Stahn/Göran Sluiter eds., 2009) [hereinafter STAHN]; HRW, The Selection of Situations and Cases for Trial before the International Criminal Court, A Human Rights Watch Policy Paper, October 2006, at 4, http://www.hrw.org/en/news/2006/10/26/selectionsituations-and-cases-trial-international-criminal-court [hereinafter HRW 2006]; see also Regulation 49 of the Regulations of the Court which give guidance on what type of information the OTP needs to gather in order to start an inquiry.

[277] Prosecutorial Strategy, 2009–2012, *supra* note 246, at 6.

[278] STAHN, *supra* note 276, at 251, 263.

[279] Stegmiller, *supra* note 254, at 332, 355, 425, 428.

qualitative approach.[280] In the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,[281] the Court observed with regard to gravity that:

> *"Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave."*[282]

When considering the gravity of the crime(s), several factors concerning sentencing as reflected in rule 145(I)(c) and (2)(b)(iv) of the Rules, could provide useful guidance in such an examination. These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families. In this respect, the victims' representations will be of significant guidance for the Chamber's assessment.[283]

Prior to that, a very rigid interpretation of the gravity threshold by Pre-Trial Chambers I in the case against Lubanga and Ntaganda, establishing a legal threshold through a focus on senior leaders only,[284] was reversed in appeal

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[280] Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-02/05-02/09-243-Red, ¶ 31.
[281] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (ICC-01/09), Mar. 31, 2010, available at http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf
[282] *Id.* at ¶ 62.
[283] *Id.*
[284] Prosecutor v. Lubanga, Decision on the Prosecutor's application for warrant of arrest, 10.2.2006, paras. 41 et seq.

proceedings.[285] In the Pre-Trial Chamber's view gravity is to be understood as a legal threshold limiting the admissibility of ICC cases to "senior leaders"; this, of course, seriously limits the scope of the Court's activities. Contrary to this view, we submit that gravity entails both a discretionary notion and a legal filter, the "senior leaders" focus belonging to the former concept of discretionary gravity. In any event, the floor for further legal arguments regarding gravity has been re-opened by the Appeals Chamber.

At present, despite this intense debate, the overall concept of gravity remains largely unclear.[286] In particular, it is unclear where the gravity determination can, in the Statute, be normatively grounded. For case selection, gravity could be taken into account under articles 53 (2) (b), 17 (d) ICC Statute and/or article 53 (2) (c) ICC Statute. Taking into account OTP Regulation 29 and the above-mentioned decision by Pre-Trial Chamber II in the Kenyan situation, it seems that the OTP and the Pre-Trial Chamber solely regard gravity as the second part of the admissibility test under article 17 (1) ICC Statute. The statutory basis would then be found in articles 53 (2) (b), 17 (1) (d) ICC Statute.[287] However, the OTP's own understanding in its policy papers is different, suggesting a broader reading of gravity in the sense of a discretionary concept as mentioned above. In line with this understanding, Paul Seils, the former Head of the Situation Analysis Section of the OTP, argues that some form of discretion ("principle of opportunity") is taken into account when the Office reaches its

[285] Situation in DRC, Judgement on the Prosecutor's appeal against the decision of Pre-Trial Chamber I, 13.7.2006, paras. 1 et seq.
[286] M. De Guzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INTERNATIONAL LAW JOURNAL 1400, 1401 (2009).
[287] F. Guariglia, *The selection of cases by the Office of the Prosecutor of the International Criminal Court*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (CARSTEN STAHN & GÖRAN SLUITER EDS., 2009) at 213.

gravity decision.[288] The way gravity is applied by the OTP entails a relative assessment, comparing cases to one another and involving discretionary choices, thereby going beyond a purely legal determination. Such a discretionary approach differs from the legal (non-discretionary) determination of gravity under article 17 (1) (d) ICC Statute (Ambos, 2010, at 48–9 [4]). In our view, the OTP is not prevented by the law to use gravity in such a way, but the statutory basis for a discretionary understanding can be found in article 53 (2) (c) (not article 17) of the Statute. Therefore, if gravity is used by the Prosecutor as a case selection and prioritization factor, it should be labelled accordingly, i.e., the OTP must reveal whether it uses gravity as a legal minimum threshold under article 17 (1) (d) ICC Statute or as a case selection criterion that involves discretionary considerations. If the latter is the case, as it appears from the strategy and policy papers, the OTP's gravity determination is a matter of article 53 (2) (c) ICC Statute, subject to judicial control under article 53 (3) ICC Statute. As a consequence, any decision not to prosecute individuals based on discretionary determination of gravity – no matter whether the pending situation was triggered *proprio motu*, through a State referral or a Security Council referral – could be reviewed by the Chambers.[289] This clearly follows from the wording of article 53 (3) ICC Statute, although the ensuing power of the respective State or the Security Council to trigger such a review (pursuant to article 53 (3) (a)) gives rise to concerns for these parties normally decide according to political considerations. It is therefore to be welcomed that, under

[288] P. Seils, *The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court*, in FICHL PUBLICATION SERIES NO. 4, CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASES, (Morten Bergsmo ed., 2010) at 69–78 [hereinafter Seils].

[289] Stegmiller, supra note 254, at 451.

this provision, the Pre-Trial Chamber may only request the Prosecutor to "reconsider" his decision, i.e., the ultimate decision is with the OTP.[290]

2. Those bearing the greatest responsibility

During case selection another important aspect is the OTP's policy of focusing on those suspects who bear the greatest responsibility for the most serious crimes. While a certain level of flexibility with regard to the rank and role of suspects to be prosecuted is essential not only for the already mentioned reasons of deterrence but probably even more for very practical reasons, the implicit prosecutorial discretion in prioritizing certain suspects over others requires justification and reasons in order not to appear completely arbitrary. The OTP itself has not yet made public its interpretation of this policy threshold, although factors related to gravity, such as the "manner of commission", give some indications as to the policy.[291] Nevertheless, the OTP has been very reluctant to link senior leadership to any statutory basis, except the very general reference to the preamble, articles 5 and 17 ICC Statute. In fact, the OTP claims always to have full discretion once the article 17 (1)(d) gravity threshold is passed but it should not be overlooked that article 53 (2) (c) ICC Statute provides for an adequate framework for the OTP's policy.[292] Article 53 (2) (c) ICC Statue comprises the three factors that are relevant for the adoption of a focus on those bearing the greatest responsibility: (i) discretion, (ii) gravity (as a policy matter), and (iii) the role in the alleged crime. The latter two factors are

[290] In contrast, a decision not to proceed in the "interests of justice" under article 53 (3) (b) ICC Statute must be confirmed by the Chamber

[291] See the Draft Policy Paper on Preliminary Examinations, 2010, *supra* note 249, at 15: "*The manner of commission of the crimes may be assessed in light of, inter alia, the means employed to execute the crime, the degree of participation and intent in its commission, the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying communities.*"

[292] Stegmiller, *supra* note 254, at 444.

even explicitly mentioned in the relevant sub-paragraph of article 53 and cover the most important characteristics of the terminology used by the OTP: "those bearing the greatest responsibility" (= "role" in article 53 (2) (c)) for the "most serious crimes" (= "gravity" in article 53 (2) (c)). If the OTP combines these three factors, it can apply its policy focus accordingly and it finds a solid statutory basis for such a policy. The only argument that might speak against such a reading of article 53 (2) (c) ICC Statute - from an OTP perspective - is the fact that the Prosecutor cannot apply a free-standing discretionary policy, but is subject to checks and balances as envisaged by article 53 ICC Statute. In other words, the Prosecutor's choices might be reviewed by a Pre-Trial Chamber under article 53 (3) ICC Statute.

C. Positive Complementarity

With regard to complementarity, the OTP correctly emphasises that the primary responsibility for conducting investigations and prosecutions rests with the territorial State.[293] The combination of the complementarity principle with the OTP's focus on the most responsible entails, however, the risk of impunity gaps if the territorial state, due to capacity or other problems, fails to bring those responsible for international crimes, but below the top level to justice. Complementarity contains two conceptual approaches: (i) the admissibility principle that deals with competing jurisdictions, and (ii) a principle of burden sharing for the consensual distribution of caseloads.[294] Concerning the latter the OTP adopted a policy of coordinated action which has been labeled positive

[293] Report on Prosecutorial Strategy, 2006, *supra* note 247, at 5.
[294] R. Rastan, Complementarity: Contest or collaboration? In FICHL Publication Series No. 7, Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes (Morten Bergsmo ed., 2010) at 83[hereinafter Rastan].

complementarity.[295] Positive complementarity rests, in the sense of the mentioned burden sharing, on a partnership-based approach.[296] The ICC is not meant to "compete" with States for jurisdiction, but is guided by the principles of partnership and vigilance.[297] In practical terms, positive complementarity means that the Prosecutor will encourage proceedings at the national level rather than taking over a case himself.

The Waki Commission established post the mediation by Kofi Annan required the government to establish a special tribunal for investigation into post election violence. In November 2009, the Constitutional Bill seeking to establish a local tribunal faced yet another hurdle as MPs, for the second time, absented themselves from the House.[298] This event was annexed by the ICC Prosecutor to the Request for Authorization. Subsequently, in a trial conducted in local court regarding the violence, all four accused Stephen Kiprotich Leting, Emmanuel Kiptoo Lamai, Clement Kipkemei Lamai, and Julius Rono were acquitted *in Republic v Stephen Kiprotich Leting & 3 others [2009] eKLR*.[299] In the verdict dated April 30, 2009, the judge observed:

> *"The omission on the part of the complainants to mention their attackers to police goes to show that the complainants were not sure of their attackers' identity... In the upshot I acquit all the Accused*

[295] Prosecutorial Strategy, 2009–2012, *supra* note 246, at 5; Rastan, *supra* note 294, at 112–3; Stahn, *supra* note 276, at 88.
[296] Stahn, *supra* note 276, at 93–4, 102.
[297] Informal Expert Paper on Complementarity, 2003, at 37.
[298] Request for Authorization, ICC-01/09-3-Anx32, available at http://www.icc-cpi.int/iccdocs/doc/doc786011.pdf.
[299] Request for Authorization, ICC-01/09-3-Anx32, available at http://www.icc-cpi.int/iccdocs/doc/doc786009.pdf.

persons of all the charges in this case. They shall be set free forthwith unless otherwise lawfully held."[300]

With regard to these submissions, the ICC had to finally authorize the investigation in the Situation in Kenya.

D. Addressing the interests of victims

Another principle of the OTP's policy is that it will always take into account the interests of victims. The Prosecutor will seek their views during all stages of the ICC-OTP Prosecutorial Strategy proceedings, i.e. the preliminary examination, investigation, pre-trial, trial and reparation stage.[301] This approach corresponds to OTP Regulation 16 which stipulates: "The Office shall, in coordination with the Victims Participation and Reparations Section (VPRS) of the Registry, as appropriate, seek and receive the views of the victims at all stages in order to be mindful of and take into account their interest." It is not yet an easy task to identify the needs of the victims and who speaks on behalf of victims.[302] For this purpose, the OTP promotes direct interaction with victims and victims' associations.[303] Clearly the inclusion of victims' views in such strategies places the ICC and the OTP in a new, particular and innovative constellation. Victims' participation is a statutory right, mainly grounded in article 68 (3) ICC Statute, but also in other provisions of the ICC's legal texts. It was an innovation of the ICC to grant victims a more active role in the proceedings. Be that it may, the OTP is, in any case under various statutory obligations (articles 15 (3), 19 (3), 53 (1) (c) ICC Statute) to grant victims certain participatory rights through making representations, even during investigations, and to inform them of

[300] Id. at p. 23-24.
[301] Prosecutorial Strategy, 2010, supra note 249, at 6–7.
[302] Stahn, supra note 276, at 317.
[303] Policy Paper on Victims' Participation, 2010, at 1.

decisions accordingly.[304]The OTP has acknowledged this responsibility and stated that it "ensures interaction through public notice of its preliminary examination and investigation activities"[305]

Among the 44 documents annexed by the Prosecutor to the Request for Authorization, there were testimonials of victims to the crimes they and their community suffered. Acknowledging those, it becomes important to punish the perpetrators behind them.

III. CHALLENGES

In sum, the OTP's strategy is still a work in progress. Issues of major importance, such as case selection and positive complementarity, are in the internal queue waiting for attention. Once the respective papers are published, the general ideas of prosecutorial selection are known and can thus be subject to public scrutiny. Some prosecutorial questions have already been consolidated by the OTP, while others remain disputed. In particular, the gravity criterion is far from settled jurisprudence and requires fine-tuning.[306] The whole selection process must lead to equal choices. If need be, a review mechanism for the Chambers could be established. Hitherto, the possible inclusion of judicial control under article 53 (3) ICC Statute has been carefully avoided due to the undefined use of discretion. Finally, the understanding of discretion will shape the future of Court, especially the interaction and allocation of powers between the Prosecutor and the Chambers. Applying discretion in the selection process is certainly the Prosecutor's domain.

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[304] Stahn, supra note 276, at 319.
[305] Policy Paper on Victims' Participation, 2010, at 14.
[306] Stegmiller, supra note 254, at 329.

However, as has been explained above, the ICC Statute does not provide for unlimited, free-standing discretion. The carefully drafted provision, dealing with selection choices, is article 53 ICC Statute. The Prosecutor must therefore adhere to the criteria of this provision, in other words, issues of (discretionary) "gravity" and "those bearing the greatest responsibility" are a matter of article 53 (1) (c) and (2) (c) ICC Statute. As such, a limited review power of the Pre-Trial Chamber may be exercised. Only checks and balances between the Prosecutor and the Chambers as well as a transparent selection strategy can ensure coherence of the ICC's future practice.

IV. KENYAN CASES AND JUDGES

Courts are only as good as the people sitting on the bench. This is true for national as well as international courts, with the caveat that the legal officers/clerks of national supreme or international courts may to some extent compensate for the limited competence of the judges they work for. This does not mean, though, that the qualification of the judges should in any way be compromized by political considerations.

The ICC Statute does not only require, as does the ICJ Statute, that the candidates shall be of "high moral character, impartiality and integrity" and "possess the qualifications of their national law for appointment to the highest judicial offices".[307] It demands further that they "have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings"[308] or "competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive

[307] Article 36 (3)(a) ICC-Statute; Article 2 ICJ Statute.
[308] Article 36 (3)(b)(i) ICC Statute

experience in a professional legal capacity which is of relevance to the judicial work of the Court"[309] and "have an excellent knowledge of and be fluent in at least one of the working languages of the Court", i.e., English or French.[310] In addition, the Assembly of States Parties[311] on 10 September 2004 adopted a resolution on the "Procedure for the Nomination and Election of Judges of the International Criminal Court"[312] which contains quite precise rules for the nomination and election of the judges.

The current Prosecutor, Fatou Bensouda, a Gambian lawyer, joined ICC in April 2012. She has had a rich experience as the Legal Adviser and Trial Attorney at the International Criminal Tribunal for Rwanda (ICTR). Mr. Ocampo has been an enthusiastic Prosecutor on behalf of the ICC. He conducted investigations in seven different countries, presenting charges against Muammar Gaddafi for crimes against humanity committed in Libya, the President of the Sudan Omar Al Bashir for genocide in Darfur, the former President of Ivory Coast Laurent Gbagbo, Joseph Kony and the former Vice President of the Democratic Republic of Congo Jean Pierre Bemba.

Judge Trendafilova and Judge Tarfusser have helped restructure the Offices to aid in better investigation and higher rates of conviction.[313] In the Confirmation of Charges in Situation in Kenya, the 19 page ruling by Justice Hans Peter-Kaul, the Vice- President of the International Criminal Court, contradicted those of his other colleagues in the Pre-Trial Chamber II. He argued that claims that the violence was organised were not supported by any

[309] Article 36 (3)(b)(ii) ICC Statute
[310] Article 36 (3)(c) ICC Statute.
[311] see Article 112 Rome Statute.
[312] Stahn, supra note 276, at 67.
[313] Refer Annexure II to this Dissertation.

of the material presented to the judges and that he found no evidence suggesting a State policy of attacking civilians.

V. CONCLUDING REMARKS

Whenever two legal systems or regimes can each exercise jurisdiction over the same issues, some mechanism will usually be developed in order to determine which one proceeds first. In the case of genocide, crimes against humanity, war crimes and the crime against aggression, the International Criminal Court operates in parallel with the national justice systems, which are also positioned to prosecute the offences in question. The underlying premise of the Rome Statute, therefore, is that when national justice systems fail, the International Criminal Court steps in, as a last resort to speak. The preamble to the Rome Statute recalls that *'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'* Consequently, Article 17 of the Statute prescribes that the Court may take on a prosecution only when national justice systems are 'unwilling or unable genuinely' to proceed. The Statute addresses the issue under the rubric of 'admissibility'.

Prof. Nigel notes that *"[t]here is strong evidence that substantial moves have been made since the adoption of the UN Charter towards combining peace and security with justice."*[314] It must not be thought, however, that the progress is linear or inevitable. The progress is being made when perpetrators are tries. It is, however, desirable that the ICC makes its policy and strategy more transparent in interest of peace and justice.

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[314] NIGEL D. WHITE, ADVANCED INTRODUCTION TO INTERNATIONAL CONFLICT AND SECURITY LAW 124 (2014)

CONCLUSION

"Peace and security can only be achieved by reducing the occurrence of violence between and within states"

-Prof. Nigel[314]

The situation in Kenya requires international attention and prosecution of perpetrators to help peace ensue, alternative route would not be a promising one.

Prof. Nigel further observes that *"International conflict and security law has emerged to achieve these purposes but, as Plato rightly recognized in the Laws,[315] law is an imperfect instrument of governance, an inherent defect that is exacerbated in the instance of international law by the complexity of negotiations and political compromise that goes into its formation."*[316]

Apart from punishing perpetrators, the purpose of international law and justice system is also to ensure post-conflict transition from war to peace. The regulation of post-conflict situations between States and within States is essential to ensure the stability of international relations and to provide for sustainable peace, as well as state and human security. International law aims to secure freedom from conflict and threat, and , increasingly to provide justice between States and within States, so that the stability of States is deeper than that which is provided by effective control of the monopoly on violence. It is desirable that post-conflict States should not simply be rebuilt on the basis of effective government, but on the basis of accountable,

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[314] NIGEL D. WHITE, ADVANCED INTRODUCTION TO INTERNATIONAL CONFLICT AND SECURITY LAW 10 (Chelterham, 2014)
[315] PLATO, LAWS 184-5 (T.J. Saunders *trans.*, 1976).
[316] NIGEL D. WHITE, ADVANCED INTRODUCTION TO INTERNATIONAL CONFLICT AND SECURITY LAW 11 (Chelterham, 2014)

representative government. In other terms, legitimate governments are effective governments.

Not only does the International Criminal Court's normative regimes require adaptation to address situations in a more appreciable manner, but it requires certain policy changes as well. The centrality of the United Nations Security Council is both a source of potential power and a serious weakness. The Council's abilities as a forum for diplomacy, its most basic function, arguably need greater attention than its military capabilities. Indeed, its competence to authorise referrals to the Court is so dependent upon willing States' voting at the session, it is not difficult to understand that such a power heavily politicizes the entire process.

Based on the research in previous chapters and the critical analysis of its judgments and indictments to determine independence and impartiality of ICC, it is submitted that the Court does have some answers to give and some amendments to make. It is, however, a progressive institution which speaks for years of negotiations that went into bringing it into existence. The myth of International Colonial Court and the alleged racism by the ICC, is certainly an opinion and not a fact. The ICC Prosecutor, who is herself an African lady, has vehemently denied these allegations.

The ICC is now caught on the horns of a dilemma: to pursue justice, it does what it can where it can, but it cannot actually prosecute figures in powerful states. Russia will never surrender troops who may have acted badly in Georgia, and America is not about to hand over soldiers who killed civilians in Afghanistan. Nobel laureate Archbishop Desmond Tutu of South Africa has equated unaccountable African leaders *"looking for a license to kill, maim and oppress their own people"* to perpetrators of the Nazi genocide and critiqued their *"playing both the race and colonial cards"* for vilifying the ICC.

Contrarily, the ICC has been very selective in taking up situations to investigate. African leaders may be trying to carve out exceptions from universal justice by highlighting the seeming double standards of the Court, but the empirical reality does indicate that the Court has ignored non-African situations involving extreme violence perpetrated on a mass scale.

On outreach, the ICC is having to make up for lost time and missed opportunities stemming, in part, from early budget constraints. As the Court does this, it must ensure that its outreach work adapts to sensitive and fluid political situations; that it finds creative solutions to security constraints; and that it effectively manages local expectations.

Ultimately, the ICC will be judged by local public opinion, as has been the case in international criminal proceedings for Rwanda and the Balkans. Reflecting this reality in the Court's vision and goals from the outset would help it interpret its mandate. Unlike its precursors, the ICC is fortunate to have a mandate, enshrined in the Rome Statute, that fully provides for victim involvement. The question is how far the ICC will learn from past mistakes and creatively interpret its provisions to render it a truly independent international criminal court.

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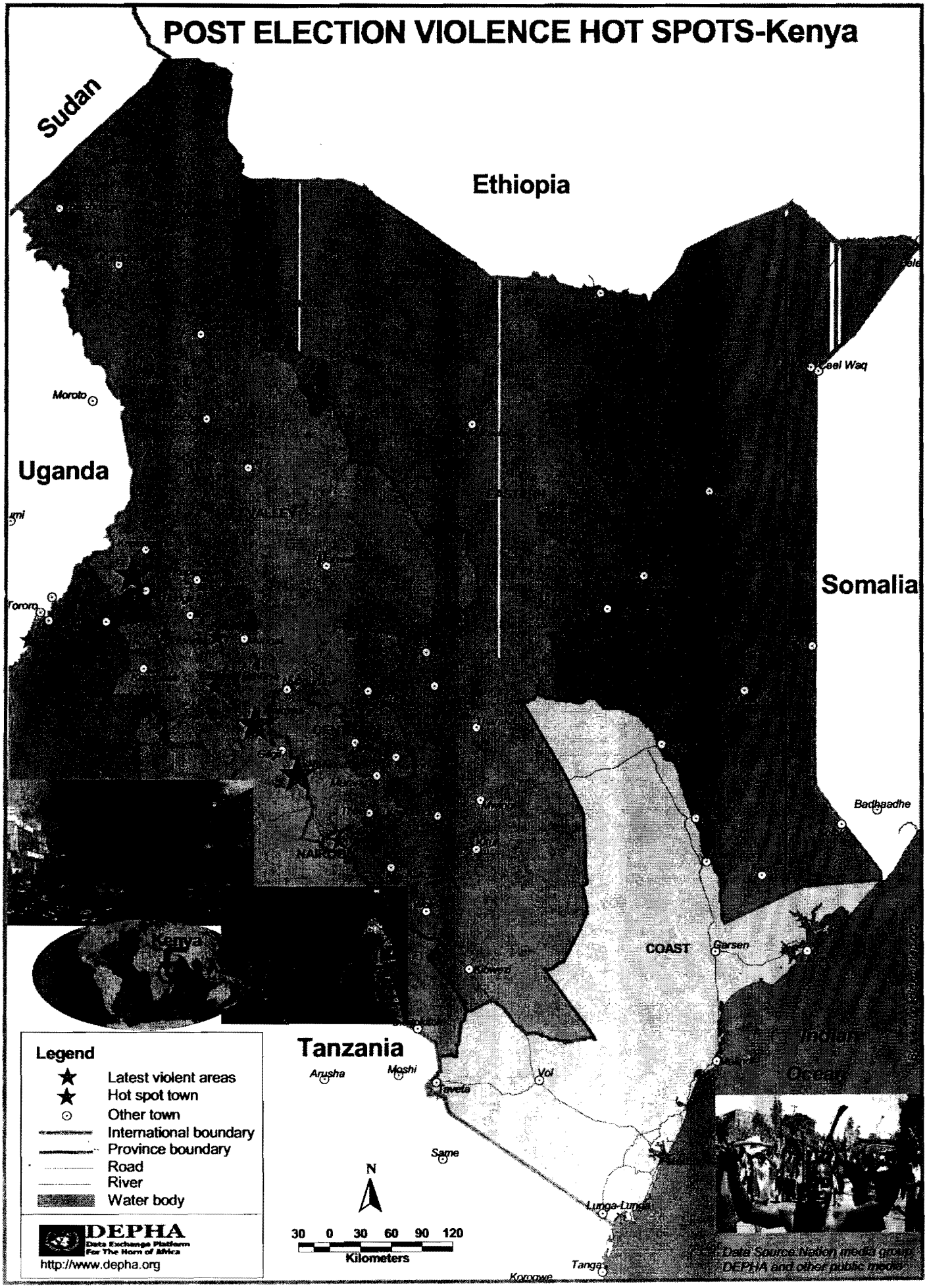
POST ELECTION VIOLENCE HOT SPOTS-Kenya



The boundaries and names on these map do not imply any official endorsement or acceptance by the United Nations

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ANNEXURE-2

Prosecutors

1. Fatou Bensouda, a Gambian lawyer, began her job as ICC's Chief Prosecutor in June 2012, succeeding Luis Moreno Ocampo. Mrs. Bensouda had previously held the position of ICC Deputy Prosecutor (Prosecutions), having been elected with an overwhelming majority by the Assembly of States Parties on 8 August 2004 and serving as such until May 2012. Prior to her work at the International Criminal Court, Mrs. Bensouda worked as Legal Adviser and Trial Attorney at the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, rising to the position of Senior Legal Advisor and Head of The Legal Advisory Unit.

Her major interest area is the investigations and prosecutions of gender crimes. According to the whole debate of peace versus justice is only an excuse. At another time, Bensouda stated that officials at the court "have nothing to do with politics," yet recognized, "We operate in a political atmosphere. The ICC "recognizes itself as a player with the other stakeholders who have different mandates," said Bensouda and specifically, the ICC is "bringing to the table that justice is part of the components that can be used to bring peace and security to these conflict-torn situations.[1]

2. Luis Moreno Ocampo: As might be expected of an instrument made of political compromise, the Rome Statute leaves open to interpretation how the Office of the Prosecutor is to operate when its actions stir political debate. The court's first Prosecutor, Luis Moreno Ocampo, stressed that "I was given a clear judicial mandate. My duty is to apply the law without political considerations."Contending that the statute deprived his office of discretion over cases once the ICC had exercised jurisdiction, he insisted that "there can be no political compromise on legality and accountability."

He served as first Chief Prosecutor of the International Criminal Court (ICC), spent his career seeking justice in the face of adversity. He believes communities must be governed by law, not political considerations, and that one's community is, "the world, not just my neighborhood or my country." He conducted investigations in seven different countries, presenting charges

[1] Diane Marie Amann, Politics And Prosecutions, From Katherine Fite to Fatou Bensouda 44 STUDIES IN TRANSNATIONAL LEGAL POLICY (2012).

against Muammar Gaddafi for crimes against humanity committed in Libya, the President of the Sudan Omar Al Bashir for genocide in Darfur, the former President of Ivory Coast Laurent Gbagbo, Joseph Kony and the former Vice President of the Democratic Republic of Congo Jean Pierre Bemba. He came under intense scrutiny and international resistance when he pursued justice against genocide and issued an arrest warrant for Sudanese President al-Bashir, marking the first time a warrant has been issued for a head of state.[2]

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

1. As a judge of the International Criminal Court, Judge Trendafilova (1953) served as the Judge of Pre-Trial Chambers II and III. Prior to assuming her office at the Court, Judge Trendafilova advised the Ministry of Foreign Affairs on the establishment of the International Criminal Court and served as an expert to the Ministry of Justice and the Parliament of Bulgaria where she chaired the Criminal Division of the Legislative Consultative Council. She has also been a Professor of Criminal Justice at Sofia University since completing her PhD in 1984.

2. Hans-Peter Kaul (born 25 July 1943) is a German judge, international law scholar, and former diplomat. Since 11 March 2003, he has served as Judge at the International Criminal Court in The Hague, in its Pre-Trial Division. From 2004 to March 2009, he was the first President of the Pre-Trial Division. From 2009 to 2012, he served as Second Vice-President of the ICC

3. Judge Tarfusser (1954) has served the Public Prosecution Office of the Bolzano District Court, Italy, as Deputy Public Prosecutor for a period of sixteen years and then as Chief Public Prosecutor for a further eight years. Under his guidance the working practices of the Office were radically restructured, the organisational model of which is now considered as the standard for the entire justice administration system throughout Italy.

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[2] http://www.watchersofthesky.com/luis-moreno-ocampo (Last visited on May 04, 2014).