

THE INTERNATIONAL CRIMINAL COURT AND ITS MAJOR ACTORS: AN ANALYSIS OF THEIR ROLE TOWARDS ATTAINING CRIMINAL JUSTICE*

Abstract

The International Criminal Court is charged with an enormous task of ending global impunity through trying perpetrators of most serious crimes. Over the past two decades the Court has encountered several challenges that have hindered its mandate of administering international criminal justice. Most times the criticisms directed at the Court are as a result of its reliance on certain institutional actors. This research analysed the role of the Court's major actors in aiding the Court towards attaining its criminal justice mandate. It was found that States have not fared well in giving the Court the needed support, particularly in terms of cooperation. More so, the Court's alleged exclusive focus on the African region also affects its justice mandate. Additionally, the investigations of the Office of The Prosecutor (OTP) have been found to be marred in politics and discriminatory practices. The activities of the United Nations Security Council (UNSC) have been discovered to affect the ICC's legitimacy to a great extent. The methodology adopted is doctrinal with the 'Law in Context' approach; research materials were sourced from international instruments, Statute, case laws, books, journal articles and online materials.

Keywords: International Criminal Court, State Cooperation, Office of the Prosecutor, Referrals, United Nations Security Council and Veto Power.

1. Introduction

Most times the criticisms directed to the International Criminal Court (ICC) are as a result of the actions of the major actors constituting the Court. This study seeks to examine the practice of the State parties to the Rome Statute, the Office of the Prosecutor (OTP) and the United Nations Security Council (UNSC). This is in order to find out if these organs align their activities to the furtherance of the Court's goal of ending impunity. Particular emphasis will be placed on the controversies surrounding State cooperation and the Court's severed relationship with the African nations in the subsections of 1.2 of this study. The research will proceed to analyse the practice of the OTP in case selection and investigations under 1.3. Finally, the referral practice and the utilisation of the veto power of the UNSC will be examined under the subsections of 1.4 of this work.

2. State Parties Relationship with the Court

The ICC relates with its state parties both on an individual and a collective basis. The latter taking the form of the Assembly of State Parties (ASP). By ratifying the Rome Statute, the legal obligation enshrined under Article 26 of the Vienna Convention becomes operative. This provision otherwise referred to as the principle of *pacta sunt servanda* affirms the binding nature of conventions and treaties and requires signatory States to such instruments to act in line with the purpose of their agreement.¹ Consequently, State parties to the Rome Statute are obliged to comply with the provisions of the law establishing the Court which they willingly consented to. The activities of the State parties are fundamental as it affects the Court's justice delivery system. The State parties have been argued to affect the ICC in three ways: by making the rules of the Court, by cooperating with the Court and through adopting the Court's budget.² Cooperation from States is pivotal for the ICC given the latter's lack of an enforcement mechanism. Highlighting its importance, a former President of the Court stated that the cooperation of States, civil societies and intergovernmental organisations is necessary for the Court to effectively discharge its mandate of ending impunity.³ The United Kingdom's (UK) representative to the Court, Lord Ahmed, stating the UK's role in aiding the enforcement of the custodial sentence of Ahmed Al Mahdi, called upon the ASP to work together with the Court in order to ensure that ICC efficiently and effectively delivers accountability and justice for most serious crimes.⁴

It is quite unfortunate that the ICC's relationship with State parties has been characterised with controversies. There have been shortfalls in State cooperation, particularly as it relates with powerful nations.⁵ Furthermore, the Court's

*By **Chidimma Dorathy UMEGO, LLM, ACI Arb, BL, LLB**, Lecturer at the Faculty of Law Nnamdi Azikiwe University, Email: cd.umego@unizik.edu.ng, Tel: +2348164009023;

***Vivian Chinelo ARINZE, LLM, BL, LLB**, Lecturer at the Faculty of Law Nnamdi Azikiwe University, Email: vc.arinze@unizik.edu.ng. Tel: +2348033135965; and

***Chidimma Anuli EWELUKWA, LLB, BL, LLM, PhD Candidate**, Lecturer at Faculty of Law Nnamdi Azikiwe University, Email: ac.ewelukwa@unizik.edu.ng. Tel: +2348036517077

¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331, art 26.

² Hannah Woolaver and Emma Palmer, 'Challenges to the Independence of the International Criminal Court from the Assembly of States Parties' (2017) 15(4) Journal of International Criminal Justice 641.

³ Judge Philippe Kirsch, 'The Role of the International Criminal Court in Enforcing International Criminal Law' (2007) 22 AM. U. L. REV. 539, 547 (as cited in Rebecca A Shoot, 'Navigating between Scylla and Charybdis: How the International Criminal Court Turned Restraint into Power Play' (2018) 33 Emory Int'l L Rev 133, 135)

⁴ Lord Tariq Ahmad, 'United Kingdom: Speech - Assembly of States Parties of the International Criminal Court 2019' *Asia News Monitor* (Bangkok, 4 December 2019).

⁵ Destaw A Yigzaw, 'The International Criminal Court: Biased against Africa or Weak towards the Powerful' (2018) 43 NC J Int'l L 204, 215.

focus on African situations has resulted in a severed relationship between the Court and African States. The succeeding subsections will then analyse the controversies of State cooperation as well as the Court's fractious relationship with African States.

Controversial Issues Bordering State Cooperation

The ICC's legitimacy has severally been questioned owing to the persistent crises the Court has faced since its inception. This legitimacy debate reached its peak in 2014 when the Prosecutor decided to drop its charges against Kenyatta, the Kenyan President.⁶ This was barely a week after the Prosecutor decided to stop investigations into the situation in Darfur, Sudan. These two decisions by the Prosecutor resulted from a lack of cooperation from the respective States.⁷ Cooperation to the Court among States varies significantly. States like Uganda and Central African Republic (CAR) which referred the situations in their countries to the Court have been seen to cooperate fully with the ICC. Sudan on the other hand failed to cooperate, while Kenya and Libya presented pseudo legal hurdles to cooperation.⁸ It is not surprising that the Court failed to get the needed cooperation from Sudan, Libya and Kenya. This is probably because the referral of these situations was not by the respective governments. The UNSC referred the situation in Sudan and Libya to the Court, while that of Kenya was initiated by a *proprio motu* investigation. State cooperation is often lacking in cases where the referral process is external. Given the lack of cooperation and hostile nature of governments in countries like Kenya and Sudan to the Court, the ICC in such situations is wholly dependent on local support.⁹ These local intermediaries often exert considerable influence over the Court's engagement.¹⁰ Hillebrecht and Straus argue that cooperation by State incumbents with the Court is most likely to occur in cases where the incumbents and their political allies are not the alleged perpetrators.¹¹ Cooperation for these incumbents in situations where the defendants are their opponents, serves as a political lever to consolidate their authority.¹² Article 86 of the Rome Statute provides a general obligation for State parties to cooperate fully with the Court in the latter's investigations and prosecutions of serious crimes.¹³ The Court may equally request for cooperation from State parties, non State parties and intergovernmental organisations.¹⁴ The ICC lacks an enforcement system; it however relies on State cooperation to enforce its decisions. This presents a serious challenge for the Court as oftentimes it is the same government that stands to be investigated that the Court relies on for cooperation in a bid to achieve its mandate.¹⁵ Kenyatta's case exposed the shortcomings of the Court through its dependence on States for cooperation. Archangel and Jon assert that in the light of Kenyan government's unwillingness to cooperate with the Court, the ICC is at a great disadvantage as it lacks the resources which are ordinarily available to a domestic prosecutor.¹⁶ The Attorney General of Kenya during the said case refused to hand over vital documents to the Court.¹⁷ Furthermore, the Court's request for vital information from the Attorney General was left unanswered.¹⁸

Where a State party's non compliance to cooperate with the ICC has prevented the Court from exercising its functions, Article 87(7) of the Rome Statute provides that the Court may refer the matter to the ASP or in cases of UNSC referrals to the UNSC.¹⁹ A finding of non compliance by the Court does not always mean that the matter would be referred to the ASP or UNSC.²⁰ This is because the Statute confers on the Court discretionary powers to make such referral through the use of the term 'may'.²¹ Banteka argues that the provision of Article 87(7) of the Rome Statute denotes a set of corollary facts; first, the Court lacks the power to compel State compliance for cooperation.²² Secondly the ICC rather takes an indirect route to sanction State parties through the ASP or UNSC, which is unlikely

⁶ Alexandre Skander Galand, 'A Global Public Goods Perspective on the Legitimacy of the International Criminal Court' (2017) 41 *Loy LA Int'l & Comp L Rev* 125, 126.

⁷ *Ibid.*

⁸ Courtney Hillebrecht and Scott Straus, 'Who Pursues the Perpetrators? State Cooperation with the ICC' (2017) 39 *Human Rights Quarterly* 162, 163.

⁹ Leila Ullrich, 'Beyond the Global-Local Divide: Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court' (2016) 14 *J Int'l Crim Just* 543, 551.

¹⁰ *Ibid.*

¹¹ Courtney Hillebrecht and Scott Straus (n 8) 169.

¹² *Ibid.*

¹³ Rome Statute, art 86.

¹⁴ Rome Statute, art 87(1), (5) and (6).

¹⁵ Vukile Ezrom Sibiyi and Michelle Nel, 'Withdrawal from the International Criminal Court: Biased against Africa or Weak towards the Powerful' (2017) 1 *AJCR* 6.

¹⁶ Archangel B Rukooko and Jon Silverman, 'The International Criminal Court and Africa: A Fractious Relationship Assessed' (2019) 9 *AHRLJ* 85, 94.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Rome Statute, art 87(7).

²⁰ Alexandre Skander Galand (n 6) 128.

²¹ *Ibid.*

²² Nadia Banteka, 'Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem' (2016) 49 *Cornell Int'l LJ* 521.

to produce concrete results.²³ The case of Al Bashir is instructive on the difficulty faced by the Court in getting the cooperation of States. The arrest warrant issued against Al-Bashir was transmitted to all the State parties of the Rome Statute, UNSC members who were not State parties to the Court as well as the Sudanese government.²⁴ One would reason that this meant that Al-Bashir could easily be arrested if he enters any of the territories issued with the arrest warrant.²⁵ Regrettably, States flagrantly failed to cooperate with the Court in this regard. According to the OTP's report of 2016, since 2009 Al-Bashir had on 131 occasions crossed international borders to both State parties' territories and that of non State parties.²⁶ The ICC through its PTC in 2017 reached a decision concerning South Africa's failure to arrest Al-Bashir when he went for the African Union (AU) summit in South Africa.²⁷ The PTC after ruling on South Africa's culpability was confronted with the issue of the relevant body (ASP or UNSC) to refer the matter to for necessary sanctions. This was necessary as it is in line with Article 87(7) of the Rome Statute and also given the fact that the Court lacked its own enforcement mechanism.²⁸ As earlier discussed, the Court has the discretionary powers to decide whether to refer a matter on non-cooperation to the ASP or UNSC as the case maybe. The PTC utilised its discretionary powers by not referring the matter to any of the relevant organs. The PTC deeply concerned with the extent of non cooperation from State Parties in Al-Bashir's case used the opportunity to criticise both the ASP and UNSC.²⁹ According to the PTC, a referral to any of these organs would be futile because of the numerous occasions of inaction on their part with regard to effecting Al-Bashir's arrest.³⁰

The problem of non-cooperation by States is spurred by the fact that the organs (ASP and UNSC) which should sanction non compliance are not doing much to foster States' obligation to cooperate with the Court. Judge Cuno Tarfusser highlighted this challenge during hearing of the Djibouti's non compliance matter.³¹ The Judge reiterated the fact that the Court relies on the cooperation of States to fulfil its mandate given that it lacks an enforcement mechanism.³² It is therefore imperative for the UNSC after referring situations to the Court to follow it up with the appropriate measures in the event of non cooperation from States.³³ It is submitted that the ICC's criminal justice mandate is hindered by the failure of States to comply with their obligation to cooperate with the Court. The ASP and UNSC which are the organs responsible for enforcing sanctions against non cooperating States should live up to expectations as the Court is seen to be helpless in this situation owing to its lack of an enforcement system.

Court's Severed Relationship with African States

States in the African region were instrumental towards the creation of the Court.³⁴ Significantly, they helped to secure the minimum number required for ratification of the Rome Statute thereby necessitating the operation of the ICC.³⁵ African States were initially enthusiastic and supportive of the ICC. It was therefore not surprising that the first three investigations by the Court were based on referrals from African States (Uganda, DRC and CAR).³⁶ Notwithstanding the initial support for the Court from African States, there has been a growing concern and perception that the ICC is biased towards Africa because of its selectivity in prosecutions. This has resulted in a fractious relationship between the Court and African States.³⁷ The ICC's prosecutions overtime has been alluded as a form of race hunt by the African Union.³⁸ Mills and Bloomfield assert that different geopolitical pressures have facilitated the Prosecutor's investigations into African situations rather than other places thereby sending a bad signal for the Court.³⁹ Yigzaw

²³ Ibid.

²⁴ Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *J Int'L Crim Just* 333.

²⁵ Alexander Skander Galand (n 6) 130.

²⁶ ICC Office of the Prosecutor, Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 13 (Dec. 13, 2016)

²⁷ *Prosecutor v Al Bashir* [2017] ICC PTC (ICC-02/05-01/09-302), Decision under article 87(7) of the Rome Statute on the noncompliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir.

²⁸ International Criminal Court, 'Understanding the International Criminal Court' (International Criminal Court, 2020) <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> accessed 10 July 2022.

²⁹ *Prosecutor v Al Bashir*, (n 27).

³⁰ Ibid

³¹ Rebecca A Shoot, 'Navigating between Scylla and Charybdis: How the International Criminal Court Turned Restraint into Power Play' (2018) 33 *Emory Int'l L Rev* 133, 152.

³² Ibid.

³³ Ibid.

³⁴ Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, 'To be or not to be? The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33 (3) *Nordic Journal of Human Rights* 243, 253.

³⁵ Ibid; The Rome Statute under Article 126 required 60 States to ratify it in order to take effect from 1 July 2002. Africa was responsible for 17 ratifications out of the 60 required.

³⁶ Line Engbo Gissel, 'A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003' (2018) 29(3) *EJIL* 725, 727.

³⁷ Ibid, 725.

³⁸ Kurt Mills and Alan Bloomfield, 'African Resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm' (2018) 44(1) *Review of International Studies* 101.

³⁹ Ibid.

refers the ICC as a European court set to try only Africans with all its indicted persons hailing from Africa.⁴⁰ According to him, the only sitting Heads of State (Uhuru Kenyatta and Omar al-Bashir) ever indicted by the Court were from Africa.⁴¹ Furthermore, two out of the three proprio motu investigations (Cote d'Ivoire and Kenya) initiated by the Prosecutor were from Africa as well as the only two UNSC referrals (Sudan and Libya).⁴² It actually took the Court through its Prosecutor 14 years to open up investigations outside Africa, which is the Georgian situation.⁴³ African State parties to the Court since 2009 have continually acted in ways that has hindered the ICC's criminal justice mandate.⁴⁴ They failed to give the Court the needed cooperation in the latter's cases against Heads of State in Sudan and Libya.⁴⁵ They flagrantly disobeyed the Court orders while hosting wanted perpetrators, threatening to collectively withdraw from the Court and voting indicted individuals into State offices.⁴⁶ The legitimacy of the Court was greatly challenged following the threats of withdrawal by South Africa, Gambia and Burundi in 2016, although only Burundi finally withdrew from the Court.⁴⁷

The relationship between the ICC and African States was greatly severed following the indictment of the Sudanese President and subsequently the Kenyan and Libyan governments. Arguments have been made that the Court's involvement in these three situations aside being biased has equally undermined the peace processes put in place to reconcile the divided States.⁴⁸ Consequently, the AU during one of its meetings recommended that the ICC's Prosecutor's policy be revised to include factors promoting peace as one of the considerations for selecting a case.⁴⁹ The AU equally criticised the double standard of the UNSC's move in referring situations involving two non State parties (Sudan and Libya) to the Rome Statute.⁵⁰ This was predicated on the fact that some members of the UNSC such as China, Russia and the US were not signatories to the Rome Statute but still had powers to refer situations involving non State parties to the Court. Furthermore, African States saw the Court's intervention in prosecuting Heads of two non State parties as a breach of the customary Head of State immunity.⁵¹

Counter arguments have been presented challenging the ICC-African biased narrative. Vilmer argues that the African situations before the Court meet the gravity requirement unlike non-African situations such as Iraq and Venezuela.⁵² These African situations were characterised by large number of victims ranging from 1.3 million in Uganda, 2 million in DRC to 2.5 million in Darfur-Sudan.⁵³ Vilmer further states that it is African governments that are biased against Africans rather than the Court given that the AU only criticised the ICC when it intervened in situations that involved African senior State officials.⁵⁴ The AU never challenged the authority of the Court when it had the likes of Dyilo, Katanga, Bemba and Ngudjolo in the Court's custody.⁵⁵

The Court's focus on African States is also as a result of the large number of State parties to the Rome Statute from the African continent.⁵⁶ It is argued that the Court relies on the principle of complementarity to try these African situations given the unwillingness of the concerned States to try them nationally. It was in the light of this complementary principle that the former UN Secretary-General, Kofi Anan defended the ICC by stating that Africans should seek justice from the Court if they cannot get it domestically.⁵⁷ Anan further stated that the Court was not biased against Africans and that ordinary Africans were satisfied with the Court as they wanted their leaders to be held

⁴⁰ Destaw A Yigzaw, (n 5) 205.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Line Engbo Gissel, (n 36) 725.

⁴⁵ Jean-Baptiste Jeangène Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis' (2016) 92(6) *International Affairs* 1319.

⁴⁶ Ibid.

⁴⁷ Line Engbo Gissel, (n 36) 726.

⁴⁸ Line Engbo Gissel, (n 36) Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid, 728.

⁵¹ AU Assembly, *Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court*, Doc. Assembly/AU/Dec.397/XVIII (29–30 January 2012).

⁵² Jean-Baptiste Jeangène Vilmer (n 45) 1328.

⁵³ Rebecca Davis, 'Analysis: Is the International Criminal Court biased against Africa?' *Daily Maverick* (Johannesburg, 19 June 2015).

⁵⁴ Jean-Baptiste Jeangene Vilmer, (n 45) 1336.

⁵⁵ Ibid

⁵⁶ Ibid, 1329.

⁵⁷ David Pilling, 'Kofi Annan defends International Criminal Court despite Africa row' *The Financial Times Limited* (London, 16 June 2016).

accountable.⁵⁸ Majority of Kenyans were happy with the Court following the indictment of senior Kenyan officials for post election violence.⁵⁹

This study submits that the fractious relationship between the Court and African States affects the former's criminal justice mandate. The ICC's legitimacy is threatened by the activities of African States. This was seen through the latter's acts of non cooperation, criticisms and threats of withdrawal from the Court. Interestingly, the Court probably as a result of the numerous criticisms on its exclusive focus on Africa has started investigating serious crimes in non-African States. The current Chief Prosecutor of the Court, Fatou Bensouda, in a bid to change the narrative has launched investigations into situations involving the activities of powerful States like the US, UK and Russia.⁶⁰ This action of the Prosecutor promises to change the severed relationship between the ICC and African States.

Prosecutorial Dynamics affecting the Office of the Prosecutor

The Office of the Prosecutor (OTP) is an independent organ of the Court responsible for receiving referrals, examining cases, conducting investigations and prosecutions.⁶¹ The Rome Statute mandates members of the OTP not to seek or rely on information from external sources.⁶² The Prosecutor of the Court is unique basically because of the global and permanent nature of the ICC.⁶³ Unlike the ad hoc tribunals of Rwanda and Yugoslavia, the exact parameters of the ICC Prosecutor's power are not defined by Statute.⁶⁴ The Rome Statute permits the Prosecutor to exercise considerable discretion in selecting situations and cases to be tried by the Court.⁶⁵ The OTP taking into account the Court's jurisdictional limits to most serious international crimes and its limited resources employs this broad discretion in selecting cases to prosecute.⁶⁶ Ambos and Stegmille argue that the case selection and prioritisation by the OTP while necessary given the capacity constraints of the ICC may affect the Court's credibility if it is not done in a rational and transparent manner.⁶⁷ The OTP in a bid to regulate this prosecutorial discretion has occasionally developed policy and strategy papers over the years. This has subsequently resulted to a situation where the case selection and investigation process of the OTP is dynamic. Whiting, a former Investigation and Prosecution Coordinator of the OTP, asserts that the dynamic nature of the investigations by the OTP is necessary to bring it at par with the ever changing positions of the global community, witnesses and suspects.⁶⁸ The OTP's current practice of producing prosecutorial strategies over a time frame of approximately 3 years appears to be contrary to Regulation 14(1) of the OTP Regulation.⁶⁹ Ambos and Stegmille assert that the said provision envisages the OTP to produce its prosecution strategy in one coherent master document.⁷⁰ It is on the basis of the said master document that the OTP can develop further prosecutorial policies periodically.⁷¹ This research agrees with this view as it would help to prevent a situation where the OTP derails from its powers or even possibly abuse such powers in the absence of a ground document.

The OTP's prosecutorial discretion has been a thorny issue since the emergence of the Rome Statute.⁷² It has been erstwhile argued that wide discretionary powers of the OTP may result in politicisation or even abuse of power.⁷³ Benyera asserts that the prosecution record of the Court in fact reveals the need to strike a balance between law and

⁵⁸ Ibid.

⁵⁹ Samuel Okpe Okpe, 'Anti-Impunity Norm of the International Criminal Court: A Curse or Blessing for Africa?' (2020) *Journal of Asian and African Studies* 1, 12.

⁶⁰ Jonathan Stevenson (ed), 'Africa and the International Criminal Court, Strategic Comments' (2016) 22(10) *International Institute of Strategic Studies* 1, 2.

⁶¹ Rome Statute, art 42(1).

⁶² Ibid.

⁶³ Lovisa Badagard and Mark Klamberg, 'The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court' (2017) 48 *Geo J Int'l L* 639, 648.

⁶⁴ Ibid, 649.

⁶⁵ Ibid, 642.

⁶⁶ Alette Smeulers, Marrtje Weerdesteijn and Barbora Hola, 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance' (2015) 15 *Int'l Crim L Rev* 1, 3.

⁶⁷ Kai Ambos and Ignaz Stegmille, 'Prosecuting International Crimes at the International Criminal Court: Is there a Coherent and Comprehensive Prosecution Strategy?' (2012) 58 *Crime Law Soc Change* 391, 392.

⁶⁸ Alex Whiting, 'Dynamic Investigative Practice at the International Criminal Court' (2013) 76 *Dul J L & Contemp Probs* 163.

⁶⁹ Regulations of the Office of the Prosecutor (23 April 2009) ICC-BD/05-01-09, reg 14(1).

⁷⁰ Kai Ambos and Ignaz Stegmille (n 67) 393.

⁷¹ Kai Ambos and Ignaz Stegmille (n 67) 394.

⁷² James A Goldston, 'More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8 *J Int'l Crim Just* 383 (as cited in Lovisa Badagard and Mark Klamberg, 'The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court' (2017) 48 *Geo J Int'l L* 639, 642).

⁷³ William A Schabas, 'Victor's Justice: Selecting Situations at the International Criminal Court' (2010) 43 *J Marshall L Rev* 535, 549-550.

politics in its case selection.⁷⁴ Advocates of the ICC however insist that the apolitical nature of the OTP is relevant for the credibility of the Court.⁷⁵ The following subsections will examine the practice of the OTP in its case selection and investigations. This is in a bid to find out if the OTP is indeed apolitical and has aided towards achieving the criminal justice mandate of the ICC.

Case Selection and Prioritisation

The OTP through its Policy Paper on Case Selection and Prioritisation emphasises the underlying principles of objectivity, independence and impartiality in its case selection process.⁷⁶ Independence according to this policy paper extends beyond not relying on information from external sources but also to the decisions of the OTP not being influenced by external actors.⁷⁷ Impartiality denotes that the OTP will employ consistent criteria in its assessment irrespective of the persons or States involved.⁷⁸ Objectivity means that the OTP will only pursue a case if the evidence available to the office can justify a case selection.⁷⁹ Regarding this last principle, Benyera argue that because the OTP will only select a case when there is enough evidence to warrant a successful investigation, there is a likelihood of the OTP pursuing only cases where State parties or other external actors have already gathered substantial evidence.⁸⁰ This reliance on third parties for the sensitive role of collection of evidence hinders the ICC's effectiveness especially when it is done by those interested in the case as was seen in Kenyatta's case.⁸¹ It is argued that the OTP cannot function effectively without the cooperation of these external sources owing to the Court's lack of an enforcement mechanism. The OTP however has to be true to the underlying principles governing its case selection by making sure that any information or evidence received from external sources are independently and objectively assessed.

The case selection criteria of the OTP are based on gravity of the crime, potential charges and degree of responsibility of the suspects.⁸² The last criterion will form the focus of study under this subsection. Through this criterion the OTP tends to ensure that charges are brought only against persons alleged to be most responsible for the crime in issue.⁸³ Thereby narrowing its scope to mid and high level perpetrators and will only pursue low level perpetrators if their involvement has been grave.⁸⁴ The OTP's strategic choice of targeting high ranking perpetrators is related to its aim to separate politics from law thereby appearing as an independent umpire. In practice, this aim is difficult to achieve following the obstruction by these high level perpetrators as was seen in the case of Al Bashir and Kenyatta already discussed under 1.2. Nevertheless, the OTP should never be seen to yield to such oppositions and politics surrounding these top power players. The OTP in persisting with these high level cases "promotes an uncompromising form of justice, setting a pedagogical example and challenging impunity even for the most powerful".⁸⁵ Badagard and Klamberg argue that the ICC will attain a high degree of effectiveness if the OTP focuses on low level cases which have a higher probability of success.⁸⁶ They however state that the selectivity of cases involving high ranking perpetrators is necessary in a bid for the OTP to effectively work within its limited time and resources.⁸⁷

This study argues that though it is difficult to try high level perpetrators especially senior State officials as it is often shrouded in controversies and non cooperation from States. However, these high level perpetrators are primarily the reason why the ICC was created as they tend to manoeuvre national prosecutions. The low level perpetrators through the principle of complementarity can be effectively tried at the national level while the OTP effectively prosecutes these high level suspects at the ICC despite the challenges it may present. Therefore, it is submitted that the OTP policy and practice of selecting cases involving mid to high level perpetrators conforms to the Court's criminal justice mandate. The OTP under the present leadership of Fatou Bensouda has shown great courage in pursuing tough and high profile cases.⁸⁸ This was seen in the Afghanistan situation involving US military personnel as well the Iraq

⁷⁴ Everisto Benyera, 'On the Complexities of Prosecuting Robert Mugabe at The International Criminal Court' (2017) 6(12) *Austral: Brazilian Journal of Strategy & International Relations* 104, 108.

⁷⁵ James A Goldston, (n 72) 387.

⁷⁶ International Criminal Court Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (15 September 2016) para 16.

⁷⁷ *Ibid*, para 17.

⁷⁸ *Ibid*, para 19.

⁷⁹ *Ibid*, para 21.

⁸⁰ Everisto Benyera, (n 74) 109.

⁸¹ *Ibid*, 110.

⁸² International Criminal Court Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (15 September 2016), para 34.

⁸³ Regulations of the Office of the Prosecutor, reg 34(1); International Criminal Court Office of the Prosecutor Strategic Plan 2016-2018 (16 November 2015) para.34.

⁸⁴ International Criminal Court Office of the Prosecutor, Policy paper on case selection and prioritisation (15 September 2016) para 42.

⁸⁵ Lovisa Badagard and Mark Klamberg, (n 63) 706.

⁸⁶ *Ibid*.

⁸⁷ *Ibid*, 730.

⁸⁸ Human Rights Watch, 'World: Office of the Prosecutor, International Criminal Court, Strategic Plan, 2019-2021 Comments of Human Rights Watch' *Asia News Monitor* (Bangkok, 15 November 2019) 2.

situation involving UK nationals. This current practice by the OTP has helped to dispel the narrative of the Court being a tool for the powerful States. The OTP by adhering to its policy on case selection in pursuing States on an equal and fair ground has aided the ICC in dispensing justice effectively.

Investigations by the Prosecutor

The Prosecutor of the ICC has the duty of conducting investigations of alleged crimes irrespective of the mode of referral. The Prosecutor first makes an assessment to determine if there is a reasonable basis to initiate an investigation and goes ahead with same if his findings show a need for an investigation.⁸⁹ This subsection is concerned with the actual practice of the OTP's investigation to see if it is in tune with the ICC's justice mandate.

First, one of the guiding principles of the OTP practice, 'focused investigations' has been criticised.⁹⁰ The OTP through focused investigations limits its scope on few incidents and witnesses. Foster asserts that the OTP's inadequate investigative mechanism as well as its reliance on State cooperation which is oftentimes lacking, affects its ability in relying on this strategy in investigations.⁹¹ Additionally, it is risky for the OTP to rely on few witnesses for its investigations as there are cases which ordinarily cannot be sustained by a handful of witnesses.⁹² It is argued that it may seem right to the OTP to adopt this mechanism in a bid to achieve effective investigations. However, the OTP should be aware that situations involving large scale crimes and large number of victims will warrant the flexibility of this focused approach. Secondly, Smeulers et al relying on the information published by the Uppsala Conflict Data Program (UCDP) assert that the OTP has commenced investigations in five situations (CAR, Uganda, Kenya, Mali and Libya) which are not among the eight gravest situations established by their list.⁹³ The OTP's investigation in CAR has been justified because it qualifies as grave going by the OTP's criteria and also because CAR features in the list of ten gravest situations involving State parties.⁹⁴ Unfortunately, the Kenyan situation cannot be justified as it does not even feature among the top twenty gravest situations over a ten year period.⁹⁵ The Kenyan situation only reflected in the top ten lists in 2008.⁹⁶ This was as a result of the post election violence which killed about 1300 persons and displaced 35,000.⁹⁷ The Kenyan situation could at best be argued to have an impact domestically.⁹⁸ The decision of the OTP to commence investigations in Kenya has been the most criticised.⁹⁹ This was done despite the mediation process that was already put in place by the African Union over the situation.¹⁰⁰ Furthermore, the OTP practice in conducting investigations has been criticised to be discriminatory and selective of persons to prosecute especially in situations of internal conflict.¹⁰¹ It has been erstwhile argued that in most of the African State-referred situations, the OTP focuses on one party to the conflict thereby exempting the other party.¹⁰² Phooko asserts that the government forces and officials in Uganda and DRC who were parties to the atrocities in those situations were not investigated by the OTP.¹⁰³ This practice by the OTP renders the principle of equality irrespective of official positions provided under Article 27 of the Rome Statute irrelevant.¹⁰⁴ It is submitted that this issue is apparent in situations where the sitting government is the other party to the conflict and the OTP has to rely on such government's cooperation for its investigation. The OTP's investigations in such circumstances will be greatly compromised to the detriment of the ICC's effective justice delivery. Finally, the OTP has also been criticised for its decision to stop investigations into the Iraq situation in 2006 on the basis that the victims of the British forces were not much when compared to other cases.¹⁰⁵ By doing so, the OTP prioritised the number of victims over the fact that crimes of aggression were actually committed in Iraq.¹⁰⁶ This decision raises question regarding whether the OTP's gravity assessment at that stage of preliminary

⁸⁹ Rome Statute, art 53.

⁹⁰ Kai Ambos and Ignaz Stegmille, (n 67) 394.

⁹¹ Jacob N Foster, 'A Situational Approach to Prosecutorial Strategy at the International Criminal Court' (2016) 47 *Geo J Int'l L* 439, 491.

⁹² *Ibid*, 492.

⁹³ Alette Smeulers, Marttje Weerdesteijn and Barbora Hola (n 66) 28.

⁹⁴ *Ibid*, 31.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*.

⁹⁷ Stephen Brown and Chandra Lekham Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya' (2012) 111(443) *African Affairs* 244, 248.

⁹⁸ *Ibid*.

⁹⁹ Alette Smeulers, Marttje Weerdesteijn and Barbora Hola (n 66) 32.

¹⁰⁰ Monica Kathina Juma, 'African Mediation of the Kenya Post-2007 Election Crisis' (2009) 27(3) *Journal of Contemporary African Studies* 407.

¹⁰¹ Lydia Nkansah, 'International Criminal Justice in Africa: Some Emerging Dynamics' (2011) 4(2) *JPL* 74, 77.

¹⁰² *Ibid*.

¹⁰³ Moses Phooko, 'How Effective the International Criminal Court has been: Evaluating the Work and Progress of the International Criminal Court' (2011) *NDJICHL* 182, 189-190 (as cited in Celestine Nchekwube Ezennia, 'The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime' (2016) 16 *Int'l Crim L Rev* 448, 462).

¹⁰⁴ *Ibid*.

¹⁰⁵ Alette Smeulers, Marttje Weerdesteijn and Barbora Hola (n 66)26.

¹⁰⁶ Margaret M deGuzman, 'Choosing to Prosecute: Expressive Selection at the ICC', (2012) 33 *Michigan Journal of International Law* 1461 (as cited in Alette Smeulers, Marttje Weerdesteijn and Barbora Hola, 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance' (2015) 15 *Int'l Crim L Rev* 1, 26).

investigation should focus on the situation in Iraq as a whole or solely the individual cases for which the Court can exercise jurisdiction (the crimes involving the British forces in Iraq).¹⁰⁷ Schabas asserts that the OTP's reluctance to pursue the Iraq situation could be politically motivated.¹⁰⁸ He further argues that the OTP's justification for stopping investigations based on the gravity criteria is merely a contrived effort to make its decisions appear lawful and objective.¹⁰⁹ These speculations of double standards and political motives mar the legitimacy of the OTP.¹¹⁰ It is pertinent to state that the OTP in 2014, under the leadership of Fatou Bensouda decided to reopen preliminary investigations into the Iraq situation on the ground of new information that was made available to the Court.¹¹¹ This is commendable and the OTP should dispel criticisms surrounding its practice by objectively and independently investigating and possibly prosecuting the British forces responsible in that situation.

4. An Assessment of the Role of the United Nations Security Council in the Court

The UNSC plays a significant role with respect to the jurisdictional parameters of the Court. This is evident through the former's power to refer situations to the Court as well as its powers to defer investigations.¹¹² Consequently, the UNSC acts as a trigger institution by promoting investigations through referrals and also as a gatekeeper institution by stopping investigations in the interests of peace and security through its deferral powers.¹¹³ It is pertinent to note the important role exercised by the UNSC in extending the jurisdiction of the ICC to non State parties to the Rome Statute. This has been considered as a huge achievement towards attaining universal justice for the Court.¹¹⁴ Aloisi argues that some of the crimes of international concern would have gone unpunished in the absence of a UNSC referral.¹¹⁵ There are bound to be conflicts between the UNSC and the ICC in the performance of the former's role to the Court. Given that these two institutions have divergent mandates; the UNSC is a political organisation charged with the maintenance of international peace and security.¹¹⁶ On the other hand, the ICC is a judicial institution responsible for prosecuting most heinous crimes of international concern with an aim to ending impunity. The relationship between the Court and the UNSC is marked by tensions between politics and law. Kyle asserts that the difference in the mandates of these two institutions does not mean that conflicts are bound to arise in every case they act together.¹¹⁷ The Rome Statute's Preamble by recognising the fact that serious crimes threaten the security and peace of the global community aligns itself with the goal of the UNSC.¹¹⁸ Roach argues that the Court's interest in punishing perpetrators and the UNSC's interest in maintaining peace will often pull apart.¹¹⁹

It is not surprising that the marriage between the ICC and the UNSC has generated a lot of criticisms and controversies over the years given the divergence in the goals of these two institutions. The greatest weakness of the Court has been attributed to its dependency on the UNSC and the latter has not been committed towards holding individuals accountable for serious crimes.¹²⁰ This dependency is dangerous for the Court as it is subjected to the caprices of the global politics in the UNSC whereby it would be difficult to hold accountable the permanent members of the Council or their allies.¹²¹ Louise Arbour, a former Chief Prosecutor of the ICTY and ICTR aptly captures the problem with the Court's reliance on the UNSC, according to him:

the increasing entanglement of justice and politics is unlikely to be good for justice in the long run. To make criminal pursuits subservient to political interests, activating and withdrawing cases as political imperatives dictate, is unlikely to serve the interest of the ICC which must above all establish its credibility and legitimacy as a professional and impartial substitute for deficient

¹⁰⁷ Margaret M deGuzman and William A Schabas, 'Initiation of Investigation and Selection of Cases' in Goran Sluiter et al (eds), *Towards Codification of General Rules and Principles of International Criminal Procedure* (1st edn, Oxford University Press 2012) 131-192.

¹⁰⁸ William A Schabas, (n 73) 548-549.

¹⁰⁹ *Ibid*, 549.

¹¹⁰ Lovisa Badagard and Mark Klamberg, (n 63) 715.

¹¹¹ International Criminal Court, 'Preliminary Examination: Iraq/UK' (International Criminal Court, 2020) <https://www.icc-cpi.int/iraq> accessed 20 July 2022.

¹¹² Rome Statute, arts 13(b) and 16.

¹¹³ Rosa Aloisi, 'A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court' (2013) 13 *Int'l Crim L Rev* 147, 150.

¹¹⁴ *Ibid*, 159

¹¹⁵ *Ibid*.

¹¹⁶ Jess Kyle, 'The New Legal Reality: Peace, Punishment, and Security Council Referrals to the ICC' (2015) 25 *Transnat'l L & Contemp Probs* 109, 121.

¹¹⁷ *Ibid*, 122.

¹¹⁸ *Ibid*.

¹¹⁹ Steven C Roach, 'The Turbulent Politics of the International Criminal Court' (2011) 23 *Peace Rev* 516, 519 (as cited in Jess Kyle, 'The New Legal Reality: Peace, Punishment, and Security Council Referrals to the ICC' (2015) 25 *Transnat'l L & Contemp Probs* 109, 123).

¹²⁰ *Ibid*

¹²¹ John-Mark Iyi, 'Re-thinking the Authority of the UN Security Council to Refer Nationals of Non-Party States to the ICC' (2019) 66 *Netherlands International Law Review* 391, 396.

national systems of accountability. I'm not sure that partnership with the Security Council is the best way to attain these objectives.¹²²

The ICC through the President of the ASP has refuted this dependency narrative by stating that the Court is autonomous from the UNSC.¹²³ Furthermore, once a UNSC referral has been made to the Court, the ICC is not influenced by any external actor including the UNSC in its investigations and prosecutions.¹²⁴ The UNSC has only made two referrals (Sudan and Libya) to the ICC since the inception of the Court. The geographical locations of these referrals have given rise to criticisms of the UNSC's selectivity and focus on weak African nations.¹²⁵ Questions have been asked why the UNSC has neglected referring conflict ridden situations in places like Syria, Gaza, Iraq, Sri Lanka, Yemen, among others.¹²⁶ It is against the background of these criticisms that the succeeding subsections will examine the referral practice adopted by the UNSC to find out if same aligns with the Court's criminal justice mandate.

Challenges of the Referral Practice adopted by the Security Council

The UNSC has exercised its referral powers only twice over African based situations of serious crimes.¹²⁷ It has been argued that the UNSC was quick to refer the African situations involving Sudan and Libya to the Court leaving out other non-African situations where crimes of similar grave nature were committed.¹²⁸ The situation in Iraq justifies this selective approach of the UNSC. Iraq just like Sudan and Libya is not a party to the Rome Statute and can only have the Court intervene if a referral is made by the UNSC under Article 13(b) of the Rome Statute. Smeulers et al argue that Iraq represents one of the gravest situations globally over a long period of time and that a UNSC referral is unlikely to happen given the political nature of the UNSC.¹²⁹ This non referral is further aggravated by the permanent members of the UNSC who have their varying national interests at stake in the Iraq situation.¹³⁰ The failure of the UNSC to apply its referral powers fairly and equally compromises its role in the ICC's justice mandate.¹³¹ The UNSC has failed to follow up its referrals to the Court thereby not giving the Court the needed support. The two referrals from the UNSC of the situations in Sudan and Libya merely contain obligation to cooperate with the Court by the States being referred.¹³² This practice by the UNSC is problematic as it limits cooperation to the States referred.¹³³ It is therefore not surprising that none of the arrest warrants issued against the Sudanese officials by the Court has been given effect till date.¹³⁴ Despite the OTP's biannual reports to the UNSC on the progress of situations, the UNSC still does not provide any commitment to ensure that prosecutions and investigations are effectively carried out.¹³⁵ The ICC even went further to give the UNSC reports of non-cooperation arising out of the Sudan referral but the UNSC failed to take any action in that regard.¹³⁶ The Libyan situation before the Court further exemplifies the UNSC's reluctance to assist the ICC. The Court in that case encountered great difficulties in its investigations (accessing the crime scenes, gathering evidence and speaking to indicted persons) but the UNSC failed to lend any support whatsoever, "remaining mostly silent on the consequences its referral is having on the implementation of justice".¹³⁷ The ICC's PTC reacting to the failure of the UNSC to follow up its referrals stated that:

When the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the

¹²² Louise Arbour, 'The Rise and Fall of International Human Rights' Sir Joseph Hotung International Human Rights Lecture (British Museum London, April 27, 2011).

¹²³ International Criminal Court: Office of the President, 'ICC underlines Impartiality, reiterates Commitment to Cooperation with the African Union' (May 29, 2013) (as cited in Alana Tiemessen, 'The International Criminal Court and the politics of prosecutions' (2014) 4 *The International Journal of Human Rights* 444, 454).

¹²⁴ *Ibid.*

¹²⁵ Victor O Ayeni and Matthew A Olong, 'Opportunities and Challenges to the UN Security Council Referral under the Rome Statute of the International Criminal Court' (2017) 25 *Afr J Int'l & Comp L* 239, 250.

¹²⁶ *Ibid.*

¹²⁷ Evelyne Owiye Asaala, 'Rule of law or *Realpolitik*? The role of the United Nations Security Council in the International Criminal Court processes in Africa' (2017) 17 *African Human Rights Law Journal* 265, 268.

¹²⁸ *Ibid.*, 269.

¹²⁹ Alette Smeulers and Marttje Weerdesteijn and Barbora Hola, (n 66) 26.

¹³⁰ *Ibid.*

¹³¹ Evelyne Owiye Asaala (n 127) 270.

¹³² UNSC, 'Reports of the Secretary-General on the Sudan' (2005) UN Doc S/RES/1593; UNSC, 'Peace and Security in Africa' (2011) UN Doc S/RES/1970.

¹³³ Jennifer Trahan, 'The Relationship between The International Criminal Court and The U.N. Security Council: Parameters and Best Practices' (2013) 24 *Criminal Law Forum* 417, 462.

¹³⁴ Jennifer Trahan, (n 133).

¹³⁵ *Ibid.*, 465.

¹³⁶ Victor O Ayeni and Matthew A Olong, (n 125) 254.

¹³⁷ Rosa Aloisi, (n 113) 155.

part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.¹³⁸

It is quite regrettable that the UNSC has failed to give the ICC the needed support the latter needs to achieve its mandate of ending impunity. It is pertinent to point out the difference in practice adopted by the UNSC in the two ad hoc tribunals (ICTY and ICTR) and the ICC. Contrary to its practice in the ICC, the UNSC imposed a general obligation to cooperate on all United Nation (UN) member States in the Statute establishing the ad hoc tribunals.¹³⁹ This consequently facilitated the execution of arrest warrants on all indicted persons in the cases before the tribunals.¹⁴⁰

Furthermore, the UNSC has failed to provide any fund to the ICC to facilitate the latter's investigations and prosecutions arising out of a UNSC referral.¹⁴¹ Article 115 of the Rome Statute provides for three sources of funding for the Court among which is the funds provided by the UN in connection to the Court's expenses on issues arising out of a UNSC referral.¹⁴² Regrettably, the UNSC in its two referrals involving Sudan and Libya expressly stated that the UN shall not bear any of the expenses incurred as a result of the referrals.¹⁴³ Ayeni and Olong argue that this was a compromise that had to be reached in a bid for the US which wields a veto power to approve these referrals.¹⁴⁴ This approach adopted by the UNSC conflicts with Article 115 of the Rome Statute as already highlighted and also the UN Charter. Under the UN Charter, budgetary matters are to be exclusively overseen by the UN General Assembly and not the UNSC.¹⁴⁵

This study submits that the controversies surrounding the UNSC referral practice such as its selectivity, lack of support and funding to follow up referrals are as a result of the political nature of the UNSC. The UNSC in its decisions concerning referrals is seen as trying to balance its political mandate and the Court's judicial mandate. The result most often tilts in favour of securing the UNSC's mandate to the detriment of the Court's goal of ending impunity. Aloisi aptly captures the consequence of the relationship between the two institutions by stating that "the UNSC has come at a high cost for the legitimacy and functioning of international justice".¹⁴⁶ It is argued that progress by the UNSC in aiding the ICC's criminal justice delivery has been considerably slow going by its two referrals since the inception of the Court. Furthermore, the criticisms surrounding these two referrals already discussed in preceding paragraphs of this subsection points to the fact that the UNSC has done more harm than good to the ICC.

Veto Power as an Instrument Hindering the Court's Mandate

The aftermath of the Second World War led China, France, UK, US and the Russian Federation (the big five) to constitute themselves into permanent members of the UNSC while conferring upon them the veto power.¹⁴⁷ The veto power is a major distinguishing factor between the permanent and non permanent members of the UNSC. Article 27(3) of the UN Charter provides that all the substantive decisions of the UNSC shall be made with the affirmative votes of the permanent members.¹⁴⁸ This veto power which has been used 293 times has continuously been the subject of criticisms even among the UN as the 'big five' have utilised it for their national interests.¹⁴⁹ Ayeni and Olong argue that the veto power of the big five is a potential impediment to the UNSC's referrals to the Court thereby affecting the latter's legitimacy.¹⁵⁰ It is not surprising that the UNSC was quick to refer the situation in Libya but has stalled to refer the Yemeni, Bahraini and Syrian situations.¹⁵¹ The big five exercise this veto power depending on their political affiliations and interests thereby undermining the ICC's mandate. The Syrian situation is a typical example where two of these permanent members (China and Russia) vetoed the UNSC's resolution that would have referred

¹³⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir* [2013] ICC PTC (ICC02/05-01/09) para 22, Decision on the Non Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir.

¹³⁹ Rosa Aloisi, (n 113) 153.

¹⁴⁰ *Ibid.*

¹⁴¹ Victor O Ayeni and Matthew A Olong (n 125) 255.

¹⁴² Rome Statute, art 115(b).

¹⁴³ UNSC, 'Reports of the Secretary-General on the Sudan' (2005) UN Doc S/RES/1593, para 7; UNSC, 'Peace and Security in Africa' (2011) UN Doc S/RES/1970, para 8.

¹⁴⁴ Victor O Ayeni and Matthew A Olong, (n 125) 255.

¹⁴⁵ United Nations, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI, art 17.

¹⁴⁶ Rosa Aloisi (n 113) 149.

¹⁴⁷ Evelyne Owiye Asaala (n 127) 267.

¹⁴⁸ UN Charter, art 27(3).

¹⁴⁹ UN Security Council Working Group, 'The Veto' (Security Council Report, 7 March 2020) <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php> accessed 27 July 2022.

¹⁵⁰ Victor O Ayeni and Matthew A Olong (n 125) 258.

¹⁵¹ *Ibid.*

the situation in Syria to the Court.¹⁵² It is quite unfortunate that some permanent members of the UNSC will stop a referral involving one of the gravest serious crime situations. Aloisi argues that the presence of Russia and China among the big five has further made it difficult for the Court to get the needed UNSC's support following the latter's referral of the Sudan situation.¹⁵³ These two countries have always affirmed their position of non-interference in the affairs bordering other nations partly on the basis of State sovereignty and their concerns over possible external interference in their affairs.¹⁵⁴ This presents a serious cause for concern as there will be a possibility of these two nations or even any of the big five stopping a UNSC resolution that is seeking to provide State cooperation to the Court. Furthermore, the UNSC's relationship with the ICC is fundamentally problematic because three of its five permanent members are not parties to the Rome Statute but can still intervene in issues concerning the Court.¹⁵⁵ Consequently, it is not realistic for the Court to try the nationals of these three States (US, China and Russia) or even their allies.¹⁵⁶ It is submitted that it can only be logical if the UNSC-ICC related powers are to be exercised by State parties to the Rome Statute who are members of the UNSC. This will prevent a situation where outsiders (non State parties) are seen to decide the fate of their fellow outsiders.

5. Conclusion and Recommendations

This research set out to examine the activities of the ICC's major actors in a bid to assess their role in aiding the Court in ending global impunity. The practice of the State parties to the Rome Statute, the OTP and the UNSC formed the focus of study in this work. Given the ICC's lack of an enforcement mechanism, it relies heavily on State cooperation to function effectively. Regrettably, this study reveals the unwillingness of States to cooperate with the Court especially in politicised cases thereby hindering the latter's goal of ending impunity. African States which constitute a major fraction of signatories to the Rome Statute have been found to be at loggerheads with the ICC because of the latter's purported selectivity of African situations. This fractious relationship from the findings of this study has been shown to continuously threaten the Court's legitimacy. The OTP which is an independent organ of the Court was found to align its case selection and prioritisation criteria in line with the Court's mandate. Regrettably, the OTP's practice in its investigations reveals a politicised and discriminatory approach. The investigations by the OTP into the Kenyan situation have been criticised till date as it does not fall within the gravest situations. The OTP through its current practice of investigating situations involving personnel of powerful countries such as the US and UK has presented itself as an unbiased umpire which is willing to execute its functions independently. The analysis under 1.4 reveals the politicisation of the UNSC's referral practice to the detriment of the judicial mandate of the ICC. The UNSC was found wanting in providing cooperation obligations as well as funding to the Court to follow up its referral. The veto power which is wielded by the five permanent members of the UNSC further worsens the Court's relationship with the UNSC. This veto power is merely a political tool used to serve the national interests of the big five and it hinders the Court's criminal justice mandate as was seen in the failed UNSC Syrian referral. In sum, this research provided a comprehensive insight into the controversies and challenges bordering the Court. It is therefore argued that most of the criticisms directed at the Court are as a result of the practice of its major actors. According to the current ICC President, Judge Chile Eboe-Osuji, there will continually be a need for reforms within the Court system just like every other institution in a bid to improve its ability to attain its mandate with greater efficiency and purpose.¹⁵⁷ It is on the basis on this need for reforms within the Court structure that this research will proffer the following recommendations:

- It is long overdue for the Court to establish its enforcement system. This will help curb the problem of the Court's total reliance on State parties and the UNSC. It will further foster States' obligation to cooperate with the Court given that the ICC can directly sanction any non-compliant State.
- Policies should be put in place to curtail the wide discretionary powers of the OTP. This will help curb the problem of abuse of power or even one sided investigations and prosecutions by the OTP.
- The Rome Statute should be revised to the effect that members of the UNSC who are not signatories to the Statute should not exercise any power over the activities of the Court. Furthermore, the Rome Statute should make the veto power of the UNSC inoperative in the affairs of the ICC.

¹⁵² Security Council, 'Referral of Syria to International Criminal Court fails as Negative Votes prevent Security Council from Adopting Draft Resolution' (United Nations Meetings, Coverage and Press Releases, 22 May 2014) <<https://www.un.org/press/en/2014/sc11407.doc.htm> > accessed on 27 July 2022.

¹⁵³ Rosa Aloisi, (n 113) 157-158.

¹⁵⁴ *Ibid*, 158.

¹⁵⁵ Jonathan Stevenson (ed), (n 60).

¹⁵⁶ Destaw A Yigzaw, (n 5) 220.

¹⁵⁷ Chile Eboe-Osuji, 'Remarks at Solemn Hearing in Commemoration of the 20th Anniversary of the Rome Statute of the International Criminal Court' (International Criminal Court, 17 July, 2018) <https://www.icc-cpi.int/itemsDocuments/20180717-pres-speech.pdf> accessed 3 August, 2022.