

MATTERS ARISING FROM THE INTERNATIONAL CRIMINAL COURT JURISDICTION: THE AFRICAN PERSPECTIVE*

Abstract

The International Criminal Court (ICC) established by Article 1 of the Rome Statute of 1998 is vested with powers to exercise its jurisdiction over persons for genocide, crimes against humanity, war crimes, aggression. Its jurisdiction is however limited to crimes committed after the statute came into force and with respect to states which have become parties to the Statute. This research looks into the structure, jurisdiction of the ICC, the purpose of its establishment and impact on international criminal justice. Since its establishment in 2002, the ICC has investigated eight situations involving alleged violations of international criminal law and each of these investigations is related to situations in Africa. This raises an issue of if the ICC has an African prosecution bias. While there are a number of arguments in response to the critics of the ICC's African bias which were examined in this research, it is noted that this is not an issue to be casually waived as it could nullify the purpose and impact of the ICC. It was recommended that one of the ways to prove the neutrality of the ICC with respect to international criminal justice and encourage participation of more countries in the achievement of its objectives should be to ensure that members of the Security Council become an active part and subject to the jurisdiction of the ICC.

Keywords: International Criminal Court, Rome Statutes, Jurisdiction, Africa

1. Introduction

Article 1 of the Rome Statute 1998 sets up the International Criminal Court (ICC). According to the Statute, the ICC shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern proscribed by the Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of the Statute.¹The Court shall be brought into relationship with the United Nations through an agreement approved by the Assembly of State Parties to the Statute and thereafter concluded by the president of the Court on its behalf.² Its permanent seat is at The Hague in Netherlands ("the host State"). The Court may, however, sit elsewhere whenever it considers it desirable.³The Court has international legal personality which means it that it has rights and duties and can sue and be sued in its own name. It also has such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. It may exercise its functions and powers, as provided under the Statute, on the territory of any State Party and, by special agreement on the territory of any other State.⁴

2. Structure of the ICC

The ICC the first ever standing International Criminal Court. Prior to its establishment, *ad hoc* tribunals had been exercising jurisdiction over international crimes but with the coming into force of the Rome Statute, the ICC came into being, thus doing away with the services of *ad hoc* tribunals in the dispensation of international justice in most cases. ICC is headed by the President of the Court and is further structured in such a way to investigate cases of international crime by the Prosecutor, have a pre-trial hearing of the cases and if the cases have proven merits in them then they are transferred to the appropriate chamber for trial. After the trial any aggrieved party can go on appeal within the jurisdiction and precinct of the ICC. The administrative hub of the Court lies with the Registry. According to the Rome Statute, the composition of the Court is made up of The Court shall be composed of the following organs: (a) the Presidency; (b) an Appeals Division, a Trial Division and a Pre-Trial Division; (c) the Office of the Prosecutor; and (d) the Registry.⁵ The Presidency consists of three judges (the President and two Vice-Presidents) elected by an absolute majority of the 18 judges of the Court for a maximum of two, three-year term. It is responsible for the administration of the Court, with the exception of the Office of the Prosecutor. It represents the Court to the outside world and helps with the organisation of the work of the judges. The Presidency is also responsible for carrying out other tasks, such as ensuring the enforcement of sentences imposed by the Court. The chambers comprises of 17 judges, including the three judges of the Presidency, are assigned to the Court's three judicial divisions: the Pre-Trial Division (composed of not less than six judges), the Trial Division (composed of six judges), and the Appeals Division

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¹Rome Statute, Art. 1.

²*Ibid.* Art. 2.

³*Ibid.* Art. 3(1) and (2).

⁴*Ibid.* Art. 4.

⁵*Ibid.* Art. 34

(composed of five judges). The Pre-Trial Chamber, each of which is composed of either one or three judges, resolves all issues which arise before the trial phase begins.⁶ Their role is essentially to supervise how the Office of the Prosecutor carries out its investigatory and prosecutorial activities, to guarantee the rights of suspects, victims and witnesses during the investigatory phase, and to ensure the integrity of the proceedings. The Pre-Trial Chambers then decide whether or not to issue warrants of arrest or summons to appear at the Office of the Prosecutor's request and whether or not to confirm the charges against a person suspected of a crime. They may also decide on the admissibility of situations and cases and on the participation of victims at the pre-trial stage.⁷

Once an arrest warrant is issued, the alleged perpetrator arrested and the charges confirmed by a Pre-Trial Chamber, the Presidency constitutes a Trial Chamber composed of three judges to try the case. A Trial Chamber's primary function is to ensure that trials are fair and expeditious and are conducted with full respect for the rights of the accused and due regard for the protection of the victims and the witnesses. It also rules on the participation of victims at the trial. The Trial Chamber determines whether an accused is innocent or guilty of the charges and, if he or she is found guilty, may impose a sentence of imprisonment for a specified number of years not exceeding a maximum of thirty years or life imprisonment. Financial penalties may also be imposed.⁸ A Trial Chamber may thus order a convicted person to make reparations for the harm suffered by the victims, including compensation, restitution or rehabilitation. The Appeals Chamber is composed of the President of the Court and four other judges. All parties to the trial may appeal or seek leave to appeal decisions of the Pre-Trial and Trial Chambers. The Appeals Chamber may uphold, reverse or amend the decision appealed from, including judgments and sentencing decisions, and may even order a new trial before a different Trial Chamber. It may also revise a final judgment of conviction or sentence.⁹ The Office of the Prosecutor is an independent organ of the Court. Its mandate is to receive and analyze information on situations or alleged crimes within the jurisdiction of the ICC, to analyze situations referred to it in order to determine whether there is a reasonable basis to initiate an investigation into a crime of genocide, crimes against humanity, war crimes or the crime of aggression, and to bring the perpetrators of these crimes before the Court.¹⁰

In order to fulfill its mandate, the Office of the Prosecutor is composed of three divisions: (i) the Investigation Division, which is responsible for conducting investigations (including gathering and this respect, for the purpose of establishing the truth, the Statute requires the Office of the Prosecutor to investigate incriminating and exonerating circumstances equally.¹¹ (ii) The Prosecution Division has a role in the investigative process, but its principal responsibility is litigating cases before the various Chambers of the Court.¹² (iii) The Jurisdiction, Complementarity and Cooperation Division, which, with the support of the Investigation Division, assesses information received and situations referred to the Court, analyses situations and cases to determine their admissibility and helps secure the cooperation required by the Office of the Prosecutor in order to fulfill its mandate.¹³ The Registry helps the Court to conduct fair, impartial and public trials. The core function of the Registry is to provide administrative and operational support to the Chambers and the Office of the Prosecutor. It also supports the Registrar's activities in relation to defence victims, communication and security matters. It ensures that the Court is properly serviced and develops effective mechanisms for assisting victims, witnesses and the defense in order to safeguard their rights under the Rome Statute and the Rules of Procedure and Evidence. As the Court's official channel of communication, the Registry also has primary responsibility for the ICC's public information and outreach activities.¹⁴

3. Examination of the Jurisdiction of the ICC

The Statute provides that the jurisdiction of the International Criminal Court is limited to the 'most serious crimes of concern to the international community as a whole', being genocide, crimes against humanity, war crimes, aggression,¹⁵ and that the person who commits a crime within the jurisdiction of the Court shall be

⁶*Ibid.* Art. 39 (b) (iii).

⁷ Understanding the International Criminal Court <https://www.icc-cpi.int> >pidsPDF last accessed 3rd August 2021

⁸*Ibid.* Art. 77 (1) (a), (b), 2(a), (b).

⁹ Understanding the International Criminal Court <https://www.icc-cpi.int> >pidsPDF last accessed 3rd August 2021

¹⁰ *Ibid*

¹¹ *Ibid*

¹² *Ibid*

¹³ *Ibid*

¹⁴ *Ibid*

¹⁵ Art 5. These provisions are further defined in detail in articles 6-8. In addition article 9 provides for the preparation of Elements of Crimes to assist the Court in the interpretation and application of articles 6,7 and 8. This was adopted on 9 September 2002 by the Assembly of States Parties, together with the Rules of Procedure and Evidence. However, jurisdiction cannot be exercised with regard to the crime of aggression until the Statute has been amended by its definition and the acceptance of conditions for jurisdiction.

individually responsible and liable for punishment' in accordance with the Statute.¹⁶ The ICC only has jurisdiction with respect to crimes committed after the Statute came into force and with respect to states which have become parties to the Statute.¹⁷ Further, jurisdiction may only be exercised provided either the state on the territory of which the conduct in question occurred (or if the crime was committed on board a vessel or aircraft) or the state of which the person accused of the crime is a national of the party to the Statute.¹⁸ This means that the jurisdiction of the ICC is not universal, but territorial or personal in nature. It also means that the jurisdiction of the ICC is not universal, but territorial or personal in nature. It also means that the national of a state which is not a party to the Statute may be prosecuted where the crime is committed in the territory of the state which is a party. There are three major situations which could give rise to the exercise of the Court's Jurisdiction which are stated: 'A situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by a State Party requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of the crime'.

There have been three examples to date of referral by a state party. In December 2003, Uganda referred to the Prosecutor the situation with regard to the Lord's Resistance Army;¹⁹ in April 2004, the Democratic Republic of the Congo referred to the Prosecutor the situation of crimes committed in its territory;²⁰ and in December 2004, the Central African Republic referred the situation in its country during the armed conflict of 2002-3 to the Prosecutor²¹

- a) A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the UN; or
- b) The Prosecutor has *proprio motu* initiated an investigation in respect of such a crime.²²

A key feature of the ICC, and one that distinguished it from the two international criminal tribunals, is that it is founded upon the concept of complementarity, which means essentially that the national courts have priority. A case will be inadmissible and the Court will be unable to exercise jurisdiction in a number of situations.²³ These are, first, where the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution; secondly, where the case is being investigated or prosecuted by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from unwillingness²⁴ or inability²⁵ of the state

¹⁶ Art. 25

¹⁷*Ibid.* Art. 11. Note, however, that a state may make a declaration under article 12(3) to permit the Court to exercise jurisdiction in the particular case as from 1 July 2002. Note also that under article 124, a state may, upon ratification, decide not to accept the jurisdiction of the ICC over war crimes with regard to its nationals or to crimes committed on its territory for a period of seven years. In fact, only France and Columbia have taken advantage of this provision.

¹⁸*Ibid.* Art. 12(2)

¹⁹ In July 2004, an investigation was opened by the Prosecutor and on 8 July 2005, warrants of arrest for crimes against humanity and war crimes against five senior commanders of the Lord's Resistance Army were issued under seal by Pre-Trial Chamber II. These warrants were made public on 13 October 2005: @www.icc-cpi.int/library/cases/ICC_20051410-056-1_English.pdf accessed July 19,2021 and Schabas, *International Criminal Court*, 2016, Oxford University Press 2nd Ed pp.36

²⁰See ICC-OTP-20040419-50-En. An investigation was opened in June 2004, the first such investigation by the Prosecutor: see ICC-OTP-20040623-59-En. An arrest warrant was issued in early 2006 against Thomas Lubanga Dyilo, who was charged on various counts concerning the recruitment and use of child soldiers: see *ICC Newsletter*, No 10, November 2006. However, a stay on proceedings was ordered and the accused released due to fair trial considerations. An appeal is pending, ICC-01/04-01/06, 2 July 2008. An arrest warrant was issued against Germain Katanga on 2 July 2007 and he was transferred to the custody of the Court in October that year: This information is @www.icc-cpi.int/library/cases/DRC-18-10-07_eN.PDF accessed 19th July 2021. An arrest warrant was issued against Mathieu Ngudjolo Chui on 7 July 2007 and he was transferred to the custody of the Court in February 2008: www.icc-cpi.int/pressrelease_details&id=329.html accessed 19th July 2021. Both the latter individuals are also charged with regard to the situation in the Congo. See also Schabas, *International Criminal Court*, 2016, Oxford University Press 2nd Ed pp. 42 .

²¹An investigation was opened by the Prosecutor in May 2007 against Dominic Onwegen leader of the Lord Resistance Army in Northern Uganda: www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_a_en.PDF accessed 3rd August 2021 and Schabas, *International Criminal Court*, 2016, Oxford University Press 2nd Ed pp. 51-2.

²²Rome Statute, *op. cit.*, Arts 13 & 14, ICC Statute.

²³*Ibid.* Art. 17. See also the *Thomas Lubanga Dyilo* case, ICC-01/04-01/06, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006.

²⁴ In order to determine this, the Court must consider whether the proceedings were being undertaken or the decision made in order to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC; whether there has been an unjustified delay in the proceedings, and whether the proceedings have been conducted independently or impartially, article 17(2)a-c.

genuinely to prosecute; and thirdly, where the person concerned has already been tried for conduct which is the subject of the complaint, unless the proceedings before the court other than the ICC were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC or where those proceedings were not conducted independently or impartially.²⁶

The Court may have jurisdiction where a situation has been referred to the Prosecutor by the Security Council acting under Chapter VII of the Statute, which is thereby binding and in which case it is unnecessary that a relevant state be a party to the Statute.²⁷ This has happened with regard to the situation in Darfur, Sudan which was referred to the Prosecutor on 31 March 2005 by the Security Council in resolution 1593. After a preliminary examination of the situation, an investigation was opened on 1 June 2005 and after a twenty-month investigation into crimes allegedly committed in Darfur since 1 July 2002, the Prosecutor presented evidence to the judges and a summons to two named Sudanese individuals, one being a government minister and the other a military officer, to appear was issued with regard to charges alleging the commission of war crimes and crimes against humanity.²⁸ Warrants of arrest were issued on 27 April 2007 against the two individuals by Pre-Trial Chamber I.²⁹

4. Analysis of the Power of the ICC Prosecutor under the Rome Statute

Where the Prosecutor concludes, having analysed the seriousness of the information received, that there is a reasonable basis to proceed to an investigation, a request for authorization of an investigation, together with any supporting material collected, will be submitted to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence. Where the Pre-Trial Chamber, upon examination of the request and supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.³⁰

5. Reflections on the Nationality of Convicts and Number of Convictions Secured by the Prosecutor

Jean Pierre Bemba

November 22, 2010- the trial begins for former Congolese Vice President Jean-Pierre Bemba,³¹ who is accused of three counts of war crimes and two counts of crimes against humanity for failing to keep his forces from raping and killing civilians in Central African Republic in 2002-2003.³²

March 21, 2016- The ICC declares Bemba guilty on two counts of crimes against humanity and three counts of war crimes.

June 21, 2016- Bemba is sentenced to 18 years in prison.

October 19, 2016- The ICC convicts Bemba and four members of his legal team of interfering with witnesses³³ during his original trial.

June 8, 2018- Bemba's 18 year jail sentence is over turned by the appeals court.³⁴

June 13, 2018- the court orders Bemba's 'interim release',³⁵ pending sentencing on his other conviction.

September 17, 2018- Bemba receives a one year suspended sentence and is fined 300,000 euros (almost \$ 350,000) for his witness tampering conviction.³⁶

²⁵ In order to determine this, the Court must consider whether due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, article 17(3).

²⁶Rome Statute, *op. cit.* Art. 20(3)

²⁷*Ibid.* Art. 13(b)

²⁸ www.icc-cpi.int/library/organs/otp/ICC-OTP_FACT-sHEET-dARFUR-20070227_en.pdf. accessed 19th July

²⁹See ICC-02/05-01/07-2 01-05-2007 1/16 CB PT and ICC-02/05-01/07-3 01-05-2007 1/17 CB PT. See also Schabas, *International Criminal Court*, 2016, Oxford University Press 2nd Ed pp. 47 ff. The Prosecutor applied for a warrant of arrest against the President of Sudan on 14 July 2008 alleging genocide, war crimes and crimes against humanity, ICC-OTP-200807 14-PR341-ENG.

³⁰Rome Statute, *op. cit.* Art. 15. The refusal of the Pre-Trial Chamber to authorise the investigation will not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation. If, after the preliminary examination, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

³¹ <https://www.icc-cpi.int/car/bemba> accessed 3rd August 2021

³² www.cnn.com/2014/04/18/world/africa/central-african-republic-fast-facts/index.html accessed 3rd August 2021

³³ <https://www.icc-cpi.int/Pages/item.aspx?name=pr1245> accessed 3rd August 2021

³⁴ <https://www.cnn.com/2018/06/08/africa/congo-warlord-sentence-overturned/index.html> accessed 3rd August 2021

³⁵ <https://www.cnn.com/2018/06/13/africa/congo-warlord-sentence-release-duplicate/index.html> accessed 3rd August 2021

Laurent Gbagbo and Charles BleGoude

January 28, 2016- The trial begins for former Ivory Coast President Laurent Gbagbo and former Ivorian politician Charles BleGoude. Gbagbo and Ble Gourde are charged with four counts of crimes against humanity,³⁷ including murder and rape, for acts allegedly committed in 2010 and 2011.

January 15, 2019- Gbagbo and BleGoude are acquitted from all charges³⁸ of crimes against humanity by the ICC.

March 31, 2021- The ICC Appeals Chamber upholds the acquittal of Gbagbo and Ble Goude.³⁹ As the decision is now final, the court also instructs the ICC Registrar to make arrangements for their safe transfer to a receiving state.⁴⁰

Germain Katanga and Mathieu Ngudjolo Chui

November 24, 2009- The trial begins with former Congolese rebel leaders Germain Katanga and Mathieu Njudjolo Chui.⁴¹ They are accused of three counts of crimes against humanity and seven counts of war crimes stemming from attacks on the village of Bogoro that occurred between January and March 2003.

November 21, 2012- the trial against Katanga and Ngudjolo Chui is separated into individual cases.

December 18, 2012- Former rebel leader Ngudjolo Chui is acquitted⁴² of charges of war crimes and crimes against humanity.

March 7 2014- Katanga is found guilty⁴³ “as an accessory to one count of a crime against humanity (murder) and counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging)” for the 2003 attack.

May 23, 2014- Katanga is sentenced to 12 years in prison.

January 18, 2016- After an appeal for a sentence reduction, Katanga’s ICC jail term officially ends, although he remains in Congolese custody as the DRC investigates additional charges against him.⁴⁴

Thomas Lubanga

January 26, 2009- The trail begins for Congolese warlord, Thomas Lubanga,⁴⁵ who is accused of “conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities (child soldiers).”⁴⁶

March 14, 2012- Lubanga is convicted of war crimes for using children under the age of 15 as soldiers.

July 10, 2012- Lubanga is sentenced to 14 years in prison. He is the first person to be convicted and sentenced by the ICC.

March 15, 2020- Lubanga is released from prison⁴⁷ after serving 14 years.⁴⁸

Ahamad al-Faqi al-Mahdi

September 27, 2016- Islamic militant Ahmad al-Faqi al-Mahdi is sentenced to nine years in prison⁴⁹ after pleading guilty to war crimes for destroying religious and historic monuments in the ancient city of Timbuktu, Mali.⁵⁰ The trial marks the first time the ICC has tried the destruction of cultural heritage as a war crime.⁵¹

³⁶<https://www.google.com/amp/s/amp.cnn.com/cnn/2016/07/18/world/international-criminal-court-fast-facts/index.html> accessed 3rd August 2021

³⁷ <https://www.icc-cpi.int/cdi/gbagbo-goude> accessed 3 August 2021

³⁸ <https://www.cnn.com/2019/01/15/Africa/Laurent-gbagbo-acquitted-by-icc/index.html> accessed 3rd August 2021

³⁹ <https://www.icc-cpi.int/Pages/item.aspx?name=pr1583> accessed 3rd August 2021

⁴⁰<https://www.google.com/amp/s/amp.cnn.com/cnn/2016/07/18/world/international-criminal-court-fast-facts/index.html> accessed 3rd August 2021

⁴¹ <https://www.icc-cpi.int/pages/item.aspx?name=PR477> accessed 3rd August 2021

⁴² www.cnn.com/2012/12/18/world/africa/congo-war-crime-acquittal/ accessed 3rd August 2021

⁴³ <https://www.icc-cpi.int/drc/katanga> accessed 3rd August 2021

⁴⁴<https://www.google.com/amp/s/amp.cnn.com/cnn/2016/07/18/world/international-criminal-court-fast-facts/index.html> accessed 3rd August 2021

⁴⁵ <https://www.icc-cpi.int/drc/lubanga> accessed 3rd August 2021

⁴⁶ https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF accessed 3rd August 2021

⁴⁷ <https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf> accessed 3rd August 2021

⁴⁸<https://www.google.com/amp/s/amp.cnn.com/cnn/2016/07/18/world/international-criminal-court-fast-facts/index.html> accessed 3rd August 2021

⁴⁹ www.cnn.com/2016/09/27/africa/al-mahdi-timbuktu-sentence/ accessed 3rd August 2021

⁵⁰ <https://www.icc-cpi.int/mali/al-mahdi> accessed 3rd August 2021

⁵¹<https://www.google.com/amp/s/amp.cnn.com/cnn/2016/07/18/world/international-criminal-court-fast-facts/index.html> accessed 3rd August 2021

Bosco Ntaganda

September 2, 2015- The trial begins for Bosco Ntaganda, who stands accused of 13 counts of war crimes and five crimes against humanity⁵² which allegedly took place in 2002-2003 in Ituri, Democratic Republic of Congo.

August 28-30, 2018- Closing arguments in Ntaganda's trial take place.

July 2019- Ntaganda is found guilty of all 18 crimes,⁵³ which include murder, rape, sexual slavery, enlisting child soldiers, persecution, forcible transfer and deportation, pillage and intentionally directing attacks against civilians.

November 7, 2019- Ntaganda is sentenced to 30 years in prison⁵⁴ by unanimous vote. This is the longest sentence ever handed down by the ICC and Ntaganda is the first person to be convicted of sexual slavery by the ICC. Ntaganda's time served from March 22, 2013 to present will be deducted from his sentence.⁵⁵

Dominic Ongwen

December 6, 2016- The trial against Dominic Ongwen begins.⁵⁶ Ongwen, who was a Lord's Resistance Army commander, faces 70 charges involving war crimes and crimes against humanity⁵⁷ allegedly committed from 2002 to 2004 in Northern Uganda.

February 4, 2021- Ongwen is convicted of 61 of the 70 charges against him.⁵⁸ The court can sentence Ongwen to up to 30 years imprisonment or a life sentence in certain circumstances, according to the Rome Statute, the ICC's founding document.

6. Matters Arising from the Proceedings of the ICC: An African Perspective

African Prosecution Bias

All situations and cases under investigation or prosecution by the ICC are in Africa. Since its establishment in 2002, the Office of the Prosecutor of the International Criminal Court (ICC) has investigated eight situations involving alleged violations of international criminal law. Each of these investigations related to situations in Africa, namely, the Democratic Republic of the Congo (DRC), Uganda, the Central African Republic (CAR), Darfur/Sudan, Kenya, Libya, Ivory Coast, and Mali. While the Office of the Prosecutor has received information on alleged abuses in other parts of the world, such as Iraq, Venezuela, Palestine, Colombia, and Afghanistan, no open investigations into those situations or preliminary examination relating to them in order to make a determination on whether to proceed with an investigation has been made. Critics claim that the Office of the Prosecutor's Office focus on Africa has been inappropriate. The Chairman of the African Union Commission accused the Prosecutor of harboring an African bias, in his questions, "Why not Argentina? Why not Myanmar... Why not Iraq?"⁵⁹ Rwandan President Paul Kagame has dismissed the Court, saying it was created to prosecute Africans and others from poor countries. Critics note that the Office of the Prosecutor has yet to open an investigation into crimes allegedly committed in a territory or by nationals of States that are wealthy and powerful and argue that the failure to do so has weakened support for the ICC in African countries and given the impression that the ICC is partisan.⁶⁰ In addition, some argue that the ICC's work has interfered with efforts to achieve peace in Africa or that under-developed, unstable, or stateless territories need foreign aid more than international criminal investigation and prosecution. Even where a situation in Africa has been referred to the Prosecutor by a State Party or the Security Council, the Prosecutor is not obliged to open an investigation into the situation, including for the reason that s/he believes that there are substantial reasons that an investigation would not serve the interests of justice. Further, s/he may exercise *proprio motu* authority to open an investigation into crimes committed in any of the 121 States Parties or other States accepting the Court's jurisdiction, subject to legal criteria set forth in the Rome Statute and judicial authorization.⁶¹

On the other hand, there may be good reasons for Office of the Prosecutor to have opened investigations only in Africa. First, many situations of concern simply do not fall within the ICC's jurisdiction. According to its

⁵² <https://www.icc-cpi.int/Pages/item.aspx?name=pr1143> accessed 3rd August 2021

⁵³ <https://www.cnn.com/2019/07/08/africa/drc-bosco-ntaganda-convicted-intl/index.html> accessed 3rd August 2021

⁵⁴ <https://www.cnn.com/2019/11/07/Africa/bosco-ntaganda-congo-general-sentenced-ibtl/index.html> accessed 3rd August 2021

⁵⁵ <https://www.google.com/amp/s/amp.cnn.com/cnn/2016/07/18/world/international-criminal-court-fast-facts/index.html> accessed 3rd August 2021s

⁵⁶ <https://www.icc-cpi.int/Uganda/ongwen> accessed 3rd August 2021

⁵⁷ <https://www.cnn.com/2016/01/22/africa/kony-commander-war-crimes/index.html> accessed 3rd August 2021

⁵⁸ <https://www.cnn.com/2021/02/04/africa/hague-uganda-rebel-commander-intl/index.html> accessed 3rd August 2021

⁵⁹ <https://iccforum.com/africa> accessed 3rd August 2021

⁶⁰ <https://iccforum.com/africa> accessed 3rd August 2021

⁶¹ *Ibid*

mandate set out in the *Rome Statute* (Statute), the ICC's jurisdiction is limited to crimes committed after July 1 2002. Moreover, its subject matter jurisdiction is limited to war crimes, crimes against humanity, and genocide. In those situations, the ICC's jurisdiction is further limited to crimes committed by a national of, or on the territory of, a State Party or a State which has declared its acceptance of jurisdiction by the Court, or where a situation has been referred by the Security Council. Even then, the Court may not exercise jurisdiction if credible national investigations or prosecutions are taking place.⁶² Second, investigations into African situations have been opened at the request or with the support of African states. Three of the African situations currently under investigation were self-referred; two have been referred by the Security Council. The DRC, Benin and Tanzania voted in favour of the UN Security Council referral of the Darfur situation to the ICC; South Africa, Gabon and Nigeria voted in favour of the UN Security Council referral of the Libya situation to the ICC. Ivory Coast accepted the jurisdiction of the ICC and undertook to cooperate with the ICC. Kenya's President Kibaki and Prime Minister Odinga pledged support to the Prosecutor's independent decision to open an investigation into crimes in Kenya *proprio motu*. Most recently, Mali referred to the ICC the crimes occurring on its own territory since January 2012 and this was supported by ECOWAS. Third, it could be argued that the situations under investigation or prosecution in Africa are distinguished by the gravity of the crimes perpetrated there—for example, 2.5 million victims in Darfur, 2 million in the DRC, and 1.3 million in Uganda—and an inability or unwillingness on the part of the State concerned to properly investigate and prosecute those cases.⁶³

In my opinion it is not about the ICC choosing intentionally to prosecute only in Africa but a situation where the readily available, severe cases in line with its jurisdiction with referrals and support from the States involved all come from Africa.

Perceptions of Selective Justice

A perception of selective justice has dogged the work of the ICC, and undermined its image as a fair and impartial forum for the administration of international criminal justice. This perception has been the product of both events external to the ICC, and events within its own operations. First, the failure of the majority of the Security Council's P5 members to sign up for the Court and to be subject to its jurisdiction is its Achilles heel. Why have those who are providing funding for the Court, and who have the power to refer cases to the Court, not signed up and subjected themselves to its jurisdiction? Is it only poor and weak states whose conduct can invoke international criminal justice?⁶⁴ The undeniable conclusion is that by limiting the ability of the court to operate in the arena of the powerful – an undeniable result of its nature as a treaty-based institution – a perception of its helplessness in the face of powerful nations has been sown. The events that unfolded within the Security Council, where Russia and China vetoed a Resolution on 22 May 2014 to refer both sides of the Syrian crisis – the Assad regime and opposition elements – to the Court, only reinforce the perception.⁶⁵ This is underlined by the fact that earlier that same month, Russia was threatening the interim administration of Ukraine with just such a referral for moving against pro-Russian separatists in eastern Ukraine, leading to the deaths of a few insurgents. How can atrocities committed in Ukraine be considered grave enough for the attention of the ICC when a Resolution based on reports of the UN on the situation in Syria be considered worthy of a veto? There is thus the inescapable conclusion that it is international politics that determines who gets referred by the Council to the ICC, rather than the gravity of one's legal responsibility for infractions of human rights.⁶⁶ There is also the slightest hint that where a person is vulnerable by reason of being from a state that is geostrategically unimportant (and therefore being without a friend among the P5 powers) there is greater certainty that one could face the music for one's acts and inactions. These currents again reinforce the view that it is not only egregious conduct that amounts to crimes as provided under Article 5 that can secure a referral by the Security Council, but other less worthy considerations as well. No wonder every continent wants a permanent seat on the Council!⁶⁷

7. Appraisal of the Purpose for the Establishment of ICC and its Global Impact on the Promotion of International Criminal Justice

The International Criminal Court is the first permanent international criminal court established to help end impunity and try the perpetrators of the most serious crimes of concern to the international community. The need for such a court was evident when it had become clear that to enforce universal human rights standards and demand accountability from those that breached same, setting up judicial bodies that operated under a perception of victor's justice with all the attendant animosity that this projected was to do a disservice to

⁶² *Ibid*

⁶³ <https://iccforum.com/africa> accessed 3rd August 2021

⁶⁴ Malcolm N. Shaw, 'International Criminal Law' 6th Edition, Cambridge University Press

⁶⁵ *Ibid*

⁶⁶ *Ibid*

⁶⁷ Malcolm N. Shaw, 'International Criminal Law' 6th Edition, Cambridge University Press

humanity. Again it has become clear that in instances when egregious offences had been committed by a state/public officials of high standing, its national courts were unwilling or unable to act to punish such perpetrators.⁶⁸ Thus when the International Law Commission (ILC) was constituted under the auspices of the UN to prepare a draft Code of Crimes Against the Peace and Security of Mankind as well as the draft statute for an International Criminal Court, the global community's enthusiasm to establish an International court to try genocide, crimes against humanity and war crimes had been fully expressed.⁶⁹ The Rome Statute came into force in 2002 to ensure that crimes against humanity and mass atrocities do not occur with impunity. It made it the first tribunal to be established under an international treaty with equal participation of all states and to operate a separate and independent entity within the international system. The ICC certainly faces a number of significant challenges.. These include institutional capacity challenges, inability to secure suspects subject to arrest warrants in a number of situations, resource constraints that limit the Court's ability to do its work; push back and non cooperation by some states; difficulties of witness protection to name a few. The Court also struggles with a gap between expectations of those seeking justice and what it can realistically deliver in the light of limitation on its jurisdiction and capacity.⁷⁰ However it has made a number of impacts worthy of note.

Building a Track Record of Justice for Atrocity Crimes

The ICC is bringing people to justice for crimes committed within its jurisdiction. Though it got off to a slow start it has completed a relatively small number of trials. The court's outcomes include Thomas Lubanga's conviction for the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities in Democratic Republic of Congo (DRC); Germain Katanga's conviction for war crimes of murder and attacking a civilian population in the Ituri District of the DRC; Jean-Pierre Bemba's guilty verdict for crimes against humanity and war crimes, including murder and rape, in the Central African Republic. This was the ICC's first conviction under command responsibility and the first for sexual and gender based crimes.⁷¹ In the fall of 2016 Al Mahdi was convicted after pleading guilty to the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion in Timbuktu Mali. In addition to these guilty verdicts for atrocity crimes five more defendants in a Central African Republic case were found guilty of obstruction of justice in October 2016, underscoring the importance of effective action against efforts to obstruct justice and undercut the integrity of the ICC proceedings. ICC judges have also upheld an acquittal and decided not to confirm charges in some cases as one would expect from a court that scrutinizes and weighs the evidence presented in order to determine whether the prosecution has met its burden.⁷² The ICC also engages with directly affected communities and victims many of whom participate and assist the court in important ways. Genuinely listening to the concerns and aspirations of victims and their communities and explaining forthrightly both what the Court can and can't do is a crucially important and challenging part of the Court's work to build a track record of justice. And certainly more can be done to support and strengthen this essential work.⁷³

Catalyzing Domestic Accountability Processes

The ICC helps to catalyze domestic legal action in pursuit of justice and accountability for atrocity crimes. This intended effect is built into the Rome Statute. By giving primacy to genuine national processes; the ICC's complementarity principle reinforces⁷⁴ efforts to encourage and support meaningful domestic capacity for justice. Complementarity can be conceptualized and assessed in a number of different ways. The ICC may catalyze a defensive response that leads states to take credible domestic action to avoid the risk of ICC prosecution. There is also "positive" or proactive complementarity which involves the ICC working to actively encourage and even assist domestic accountability efforts. Examples of this include the office of the Prosecutor (OTP)'s work to assist Guinea⁷⁵ in bringing domestic prosecutions for the 2009 stadium massacre and aftermath, including the widespread sexual and gender based crimes. Another example is in the Central African Republic (CAR) where there is cooperation and a division of labor between the ICC and national authorities. And the CAR government with international assistance is setting up the Special Criminal Court,⁷⁶ a domestically based hybrid court to try atrocity crimes. This is an initiative that will include capacity building in

⁶⁸ Henrietta J.A.N. Mensa Bonsu, *The ICC, International Criminal Justice & International Politics*. Africa Development, Vol XL No 2, pp 33-35.

⁶⁹ *Ibid*

⁷⁰ <https://www.justsecurity.org/47717/icc-making-difference/> accessed 2nd August 2021

⁷¹ *Ibid*

⁷² *Ibid*

⁷³ <https://www.justsecurity.org/47717/icc-making-difference/> accessed 2nd August 2021

⁷⁴ www.harvardilj.org/wp-content/uploads/2010/09/HILJ_49-1_Burke-White.pdf accessed 4th August 2021

⁷⁵ https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf accessed 4th August 2021

⁷⁶ <https://www.amnesty.org/en/latest/campaigns/2017/10/progress-and-challenges-in-establishing-the-special-criminal-court-in-the-central-african-republic/> accessed 4th August 2021

investigation, witness protection and adjudication among other areas, hopefully with some spill over effects for the country's domestic justice system more broadly.⁷⁷ Through its Preliminary Examinations⁷⁸ that is the OTP's initial examinations into a number of potential situations in which crimes within the jurisdiction of the Court may have been committed, the ICC is also helping to catalyze domestic accountability. Examples include Columbia where the ICC's ongoing scrutiny since 2004 helped to encourage inclusion⁷⁹ of justice provisions in the peace agreement and as mentioned earlier in Guinea. The OTP views encouragement of genuine national proceedings as "one of the most cost effective ways for the office to fulfil the Court's mission".⁸⁰

Empowering Civil Society Advocacy for Justice

The ICC is helping to empower civil society justice advocates. Both as a galvanizing symbol and as a practical convener, the ICC is a focal point for civil society groups seeking justice for atrocity crimes. The Annual ICC Assembly of States Parties (ASP) brings together governments as well as a large, diverse network of civil society organizations and justice advocates from around the world.⁸¹ Side events at the annual ASP focus attention on urgent issues of the day: documenting atrocities in Syria, building national capacity to prosecute atrocity crimes, reparative justice for victims; Africa and the ICC to name just a few. These discussions bring together civil society justice advocates, government officials and scholars from countries around the world and providing a uniquely valuable forum for engagements as well as access to key government decision makers.⁸² Through its very visible work the ICC is helping to change the terms of discussion about justice for atrocity crimes by reinforcing a baseline presumption in favour of accountability. This presumption in favour of accountability for genocide, war crimes and crimes against humanity puts the burden on states in the first instance to take action to prevent or punish these offenses and to explain themselves if they do not. And both the norms in the Rome Statute and the institutional role of the ICC give civil society actors in ICC State parties a basis to advocate for justice within their own societies as political scientists have documented.⁸³ The work of the ICC couples with that of other international and hybrid courts has helped reinforce that the victims and survivors of egregious atrocities have experienced international crimes and are deserving of justice. Victim-driven demand for justice supported by local and international civil society groups is generating pressure to find/create forums for justice even when the ICC itself is not available as for instance in the case of the hybrid court in Senegal that held Chadian dictator Hissene Habre to account⁸⁴ and the UN supported efforts to document and develop case files for atrocity crimes in Syria.⁸⁵

8. Conclusion and Recommendations

The purpose for the establishment of the ICC as the first permanent treaty based international criminal court to help end impunity for the perpetrators of the most serious crimes of concern to the international community is laudable. From the time of its establishment till date there has been visible progress with respect to achievement of the purpose for which it was formed though the speed of its progress is not as expected. The issue of its African bias is however one that should not be overlooked as it is powerful enough to destroy the essence of the court. Though the reasons for the seeming bias may seem plausible, it is recommended that members of the Security Council become an active part and subject to the jurisdiction of the ICC. This will encourage more countries to be part of the court and allay the fears of African nations that the court is targeted against Africans.

⁷⁷ <https://www.justsecurity.org/47717/icc-making-difference/> accessed 2nd August 2021

⁷⁸ https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paaaaper_Preliminary_Examinations_2013-ENG.pdf accessed 4th August 2021

⁷⁹ <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/prosecutorial-politics-the-iccs-influence-in-columbian-peace-processes-20032107> accessed 4th August 2021

⁸⁰ https://www.icc-cpi.int/icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf accessed 4th August 2021

⁸¹ <https://www.justsecurity.org/47717/icc-making-difference/> accessed 2nd August 2021

⁸² *Ibid*

⁸³ [Tulane.edu/liberal-arts/political-science/upload/Dancy-and-Montal-Unintended-Positive-Complementarity-AJIL.pdf](https://tulane.edu/liberal-arts/political-science/upload/Dancy-and-Montal-Unintended-Positive-Complementarity-AJIL.pdf) accessed 4th August 2021

⁸⁴ www.bbc.com/news/world-africa-18927845 accessed 4th August 2021

⁸⁵ www.ochr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21241 accessed 4th August 2021