

AN EVALUATION OF THE ROLE OF INTERNATIONAL CRIMINAL COURT IN COMBATING WAR CRIMES*

Abstract

It is the desire of every society to live in peace amidst scarce resources. The struggle for resources leads to war where crimes ensue. In order to avoid crimes and criminality at the international level, a uniform legal system is developed. The development of the International Criminal law in recent years is evidence of the overall growth of the International Legal System as an independent super-structure, which culminated in the establishment of the International Criminal Court (ICC). Under Customary International Law, the individual States that collectively made up the International Community had exclusive jurisdiction over crimes committed within their territories, however, States have started yielding ground to international adjudication in circumstances where their domestic structure are overwhelmed or fall short of internationally accepted standards. Despite this, International Criminal Justice war crimes began immediately after the end of the Second World War when the International Military Tribunal was set up in Nuremberg and Tokyo. Similar tribunals were set up to determine the abuses that occurred during the Yugoslavian Civil War, the Rwandan genocide, and the Sierra Leone Civil War, thus reinforcing calls for the establishment of a permanent international court. The ICC eventually became operational in 2002 and since then it has recorded measurable successes amidst several criticisms. Nonetheless, the Rome Statute which is the principal legislation that confers jurisdiction on the ICC to determine liability of parties in War Crime situations needs to be evaluated to determine how it has fared in enhancing the role of the court in combating war crimes. This research therefore seeks to ascertain how the International Criminal Court has fared under her primary objective of combating War Crimes; evaluate the jurisdiction of the ICC in relation to War Crimes among others.

Keywords: International Criminal Court, Rome Statute, War Crimes, Jurisdiction, State Responsibility.

1. Introduction

War crimes and its attendant consequences have occupied the attention of the international community especially in the 20th and 21st centuries. The atrocities of the Second World War had barely settled when erratic wars erupted within the territorial jurisdiction of several countries leading to severe loss of lives with horrific experiences to humanity with hardly any redress as individual countries canopied under state sovereignty¹ refused or failed to take any action to bring the perpetrators to justice. The frequency in the occurrence of these wars led to questions being asked as to feasibility of the international community forming a body for remediating grave human rights abuses such as attack on civilian population, causing of excessive collateral damage to properties, use of prohibited weapons, rape and other forms of sexual violence and protection of children during armed conflicts (collectively referred to as war crimes) in those countries. This led to calls for the establishment of an International Criminal Court (ICC) that will try individuals for diverse roles played during such conflicts. The essence of this research therefore is to evaluate the role of the ICC in combating war crimes bearing in mind its jurisdiction as conferred by the Rome Statute.

2. Conceptual Underpinnings

In this segment of the work an attempt is made to contextually situate some of the key words and phrases as employed in this dissertation. Words like crime, international criminal law, jurisdiction and war crime are defined.

Crime

The word ‘crime’ is derived from the Latin word *crimen* meaning an accusation. A crime ordinarily refers to an act or omission prohibited by law and breach of which makes offenders liable to sanction. Crimes could take different dimensions. A panoply of municipal instruments employs the terms ‘crime’ or ‘offense’ interchangeably and defines them in terms of ‘acts’ or ‘omission’.² The Administration of Criminal Justice Act (ACJA)³ in expounding the bounds and quiddity of crime, adopted the use of felony. ‘felony’ was designated to mean an offense on conviction for which a person can, without proof of his having been previously convicted of an offense, be sentenced to death or to imprisonment for three years or more, or which is declared by law to be a felony. The Criminal Code Act⁴ defines a crime as ‘an act or omission which renders the person doing the act or omission liable to punishment under this code or under any Act or Law’. The Penal Code defines an offence as ‘anything done in violation of the Act’.⁵ The Judiciary has

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¹ Sovereignty is the right of a state to rule itself and those who live within its territory; to choose its own constitution, form of government, and economic system; to write and enforce its own laws; to exercise a territorial monopoly on publicly sanctioned use of force through its armed forces NDL Scholarship, what is the Principle of State Sovereignty in International Law? <<https://Scholarship.law.nd.edu/cgi>viewpoint>> accessed 26 August, 2024.

²For example, the Criminal Code applicable to the Southern States adopt the term ‘crime while the Penal Code applicable to the Northern States adopt the term offence.

³Administration of Criminal Justice Act, 2015, Section 494

⁴ Section 2,

⁵ Section 5 of the Penal Code

also attempted to define the word crime. In *Amgbare v Sylva*⁶ (the Nigerian Court of Appeal defined a Crime as: ‘a positive or negative act in violation of penal law. It follows, therefore, that a crime must involve certain acts. Where a person sits and does nothing and someone is hurt, that may amount to a negligent act which may give rise to civil liability and not amount to crime’. Again, in *Odon v Barigha-Amenge* (No.2)⁷ the Court of Appeal said ‘a crime is an offence which is punished by law or activities that involve breaking the law or prohibited by law. It is an act that the law makes punishable or breach of a legal duty treated as the subject matter of a criminal proceeding’.

International Crimes

International crime is a collective term for certain extremely serious violations of international law such as genocide, war crimes, crimes against humanity, torture and enforced disappearances.⁸ The core crimes under international law are; genocide, war crimes, crimes against humanity and crime of aggression.⁹ The definitions and elements of each of these listed ‘crimes’ are well delineated in the Rome Statute (genocide is defined in article 6, crimes against humanity in article 7, and war crimes in article 8). Because of the detailed nature of those definitions, it is safe to generally state adopting article 5 (1) of the Rome Statute that these are ‘most serious crimes of concern to the international community as a whole’.

Jurisdiction under International law

The concept of jurisdiction is derived from State’s sovereignty and constitutes several features. It is the authority of the State over persons, property, and events that are primarily within its territories. Jurisdiction is a state’s ability to make and enforce its laws. While often related to sovereignty, and intrinsically linked to its territory, jurisdiction can exist without a connection to territory. Jurisdiction can be held to exist in a variety of contexts, depending on the location of events, the nationality of participants or the surrounding circumstances, and will also indicate whether a State may be able to undertake enforcement action to uphold its law.¹⁰ Jurisdiction is the court’s power to enter a matter. The Rome Statute requires that several criteria exist in a particular case before an individual can be prosecuted by the court. The statute contains three jurisdictional requirements and all criteria must be met for a case to proceed. These requirements are: (i) Subject Matter jurisdiction (what acts constitute crimes), (ii) Territorial or personal jurisdiction (where the crime was committed or who committed them) and, (iii) Temporal jurisdiction (when the crimes were committed). The court’s subject-matter jurisdiction focuses on the crimes for which individuals can be prosecuted as listed in the statute and defined in the articles¹¹. The crime of genocide, crimes against humanity, war crimes especially breaches of the Geneva conventions of 1949 which apply to non-international conflicts¹², and serious violations of Article 3 common to the Geneva Conventions of 1949, which apply to non-international conflicts, and crimes of aggression are classified under personal or individual crimes that the court (ICC) can prosecute, even though the jurisdiction to try crimes of aggression is yet to be conferred.¹³

The issue of jurisdiction is very key to prosecuting any matter, whether territorial, personal or temporal jurisdiction, one must exist to give the court power to try the accused/ suspect. This jurisdiction depends on whether the individual is from a state that has declared that it accepts the jurisdiction of the court for a period of time or states parties to the Rome statute or the crime was committed in the states parties or states that have accepted temporary jurisdiction of the court. This means that if a state entered or accepted the jurisdiction after the crime has taken place, the court cannot prosecute in retrospect the perpetrators of such crime as it was not known to law at the time of commission¹⁴, although no statute of limitation applies to any case.¹⁵

War Crimes

War crimes are those violations of international humanitarian law (treaty or customary law) that incur individual criminal responsibility under international law. Other serious violations of the laws and customs applicable in armed conflict are not of an international character.¹⁶ Article 8 (2) (a) of the Rome Statute defines ‘war crimes’ as:

⁶ (2009)1 NWLR (pt. 1121) 1 @ 81 para E – F (CA)

⁷ (2020) 12 NWR (pt.1207) 12 @55 para A – B (CA)

⁸Netherlands Public Prosecution, ‘What are International Crimes?’ < [www.https// Prosecution service.nl/topics/international crimes/what-are-international crimes#](https://www.prosecution.nl/topics/international-crimes/what-are-international-crimes#)> accessed 24 August, 24

⁹ Article 5 of the Rome Statute

¹⁰ Barker Craig, *Immunities from Jurisdiction in International Law*, (Oxford University Press 2009) 121.

¹¹Article 5-8 & 70 of the Rome Statute (e.g Article 6- Genocide, Article 7 – Crimes against Humanity, Article 8- War crimes, and crimes of Aggression; Article 70 defines offences against the administration of justice, which are also crimes for which individuals can be prosecuted.

¹² Article 8 (2) (c).

¹³Two conditions need to be satisfied before it becomes effective, that is, (1) the amendment has entered into force for 30 states parties and (2) on or after January, 1 2017, the Assembly of States parties has voted in favour of allowing the ICC to exercise jurisdiction

¹⁴ Article 11- 13.

¹⁵ Article 29 of the ICC Statute.

¹⁶ Shana Tabak, 'Article 124, War Crimes, and the Development of the Rome Statute' *Geo J Int'l L* (2009) (40)1069.

i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; iv. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; v. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; vi. Killing or wounding a combatant who, having laid down his arms having no longer means of defence, has surrendered at discretion; vii. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; viii. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; ix. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; x. Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; xi. Killing or wounding treacherously individuals belonging to the hostile nation or army; xii. Declaring that no quarter will be given; xiii. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; xiv. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; xv. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; xvi. Pillaging a town or place, even when taken by assault; xvii. Employing poison or poisoned weapons; xviii. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; xix. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; xx. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123; xxi. Committing outrages upon personal dignity, in particular humiliating and degrading treatment; xxii. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; xxiii. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; xxiv. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; xxv. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions; xxvi. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

This is an expansive definition covering virtually every incidence of war. Yet, War crimes are not limited to the several items contained in article 8 (2) (a) but further encapsulates cases of armed conflicts not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; Committing outrages upon personal dignity, in particular humiliating and degrading treatment; Taking of hostages; The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.¹⁷

In the final draft of the Statute, 'war crimes' was defined to include four areas: of grave abuses in an international armed conflict, as serious violations of laws and customs of international law in international armed conflict¹⁸ serious violations of laws and customs applicable in non-international armed conflict.¹⁹ The inclusion of two definitions of

¹⁷ Article 3 Common to the four Geneva Conventions

¹⁸ Article 13 (2) Geneva Convention 1949

¹⁹ Article 8(2)(c) of Rome Statute which made reference to article 3 Common of the Four Geneva Conventions of 1949

war crimes that occur in internal conflicts is a significant consolidation of the principle that inhuman conduct contrary to applicable law in internal conflicts (and not only in international conflicts) deserves repression as a war crime.

3. Historical Evolution of the International Criminal Court (ICC)

Most narratives on the evolution of the ICC trace its origins to the Nuremberg and Tokyo trials,²⁰ where German and Japanese soldiers were respectively prosecuted for their actions during the Second World War, adjudged to be in violation of international law. The judges at Nuremberg established the acceptance and recognition of individual accountability for crimes committed during conflicts, which is the bedrock of international criminal law. They held that ‘crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’.²¹ This essentially, laid the foundations of what has now become international criminal law. Despite what seemed like a general acceptance of the operations of these tribunals, there were arguments against their establishment and operations. Some scholars were of the view that the tribunals were imperfect in the sense that they were nothing more than military courts created by the victorious allied nations whose jurisdiction was founded on surrender.²² Proponents of this view, point to the fact that immediately after the Second World War and during the period of the Nuremberg trials, the four occupying powers²³ in allied-occupied Germany were granted ‘supreme authority with respect to Germany, including all the powers possessed by the German government, the High Command, and any state, or local government or authority’.²⁴ After the Nuremberg and Tokyo trials, the United Nations General Assembly considered the possibility of establishing a permanent international criminal court. To this end, the International Law Commission (ILC) was assigned the responsibility of examining the possibility of establishing a permanent international criminal court. However, efforts towards this pursuit were diminished by the divisive politics of the cold war,²⁵ as the idea of a permanent court gradually ceased to be main concern of the international community.

The end of the Cold War and the horrors of the armed conflicts of 1990s saw a resurgence in the clamour for the creation of a permanent international criminal court. This accounts for one of the major reasons why the ICC was formed. The ICC was created to bring justice to the world's worst war criminals, even though the debate and criticisms over the court still lingers. Another precursor to the establishment of the ICC was the establishment in 1993 and 1994 by the UN Security Council of the International Criminal Tribunals for the former Republic of Yugoslavia and Rwanda respectively, in response to atrocities committed in the Yugoslavian civil war and the Rwandan genocide. It is argued that these ad-hoc tribunals were set up by an international community that was incapable of taking meaningful steps to prevent the atrocities in the affected countries.²⁶ However, the establishment of these ad-hoc tribunals played a substantive role that not only culminated in the establishment of the international criminal court, but also contributed to the ever-expansive jurisprudence of international criminal law.

It was the gains made through these tribunals and the limitedness of their jurisdiction that led to the formation of the ICC. However, it was not until the 1990s, that many governments coalesced around the idea of a permanent court to hold perpetrators to account for the world's most serious crimes.²⁷ *Ipso facto*, Trinidad and Tobago requested that a UN commission look into the creation of a permanent court in 1989.²⁸ In the following years, such efforts gained support, especially in Europe and Africa. African countries make up the largest bloc of ICC membership. The ICC's founding treaty was adopted by the UN General Assembly at a conference in Rome in July 1998. After being ratified by more than sixty countries, the Rome Statute entered into force on July 1, 2002. While the UN, was instrumental in the creation of the Court, it is instructive to state that the ICC is not a part of the UN; the treaty creating the court was barely negotiated within the UN.

4. War Crime under the ICC Statute

The international criminal court has jurisdiction over four crimes encapsulated in Article 5 of the Rome Statute to wit: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.²⁹ Traditionally, ‘war crimes were held to embrace only violations of international rules regulating war proper that is international armed conflicts and not civil wars.’ Article 8 of the Rome Statute provides a definition of war crimes that many commentators agree is more comprehensive than had been defined previously by international treaty because it includes war crimes

²⁰MM Penrose, ‘Lest We Fail: the Importance of Enforcement in International Criminal Law’ (2000) *American University International Law Review* (2), 321

²¹R Cryer, *An introduction to International Criminal Law and Procedure* 2nd ed, Cambridge University Press, (2010) 321

²²LS Sunga, *The Emerging Systems of International Criminal Law: Developments in Codifications and Implementation* (Kluwer International Law, 1997) 281

²³ Consisting of United Kingdom, United States, Soviet Union, and France.

²⁴ Declaration Concerning the defeat of Germany’ *Department of State Bulletin*, Vol 12 10th June 1945.

²⁵ MC Basiouni, *Statute of the International Criminal Court: A Documentary History* (Transnational Publishers, 1998) 15

²⁶ RG Teitel, *Humanity's Law* (Oxford University Press, 2011) 81

²⁷ *Ibid*

²⁸ *Ibid*

²⁹ Article 5 of the Rome Statute

committed in both internal and international conflicts. 'War Crimes' are violations such as concentration camps, ethnic cleansing, and execution of prisoners, rape, and bombardment of cities. The tentacles of these crimes extend to those culpable violations of the Laws of War or International Humanitarian Law that incur individual criminal responsibility. By World War I, States had accepted that certain violations of the laws of war—much of which had been codified in The Hague Conventions of 1899 and 1907—were crimes. The 1945 Charter of the International Military Tribunal at Nuremberg defined war crimes as 'violations of the laws or customs of war,' including murder, ill-treatment, or deportation of civilians in occupied territory; murder or ill-treatment of prisoners of war; killing of hostages; plunder of public or private property; wanton destruction of municipalities; and devastation not militarily necessary.³⁰

Violations of the laws of war that gives rise to individual criminal responsibility for actions by the combatants, such as intentionally killing civilians or intentionally killing prisoners of war; torture; taking hostages; unnecessarily destroying civilian property; deception by perfidy; rape; pillaging; the conscription of child soldiers; committing genocide or ethnic cleansing; the granting of no quarter, despite surrender; and flouting the legal distinctions of proportionality and military necessity. The United Nations views a war crime as a serious breach of international law committed against civilians or 'enemy combatants' during an international or domestic armed conflict. A war crime occurs when superfluous injury or unnecessary suffering is inflicted upon an enemy.

There appears to be some overlapping between war crimes and Crimes against humanity as most of the incidences of one easily fit the other. Perhaps it is given this overlapping and similarity nature of the offences that charges of war crimes invariably go hand in hand with Crimes against humanity as demonstrated in the following charges handled by the court including but not limited to: Al Mohammed Ali Abd-Rahaman³¹ of the Central African Republic, Al Hassan Al Abdoul Aziz³² of Mali, and Maxime Joffrey Mokom Gwaka³³ of Central African Republic.

5. Challenges of the International Criminal Court in Curbing War Crimes

The ICC has since inception been bedeviled by seemingly intractable problems bothering on its legitimacy and its operations this has grossly affected its capacity to curb war crimes and impunity. Ironically some of these challenges are intrinsic to the organisation as they emanate from the Rome Statute (such as non-prosecution of group atrocities, reliance on state parties for effectiveness and some procedural issues) while others (refusal of major parties to be part of the ICC, low output of cases, and security and safety of personnel of the court) are extrinsic to it. However, the challenges relating to the statute are discussed thus:

Lack of Jurisdiction Over Group Atrocities during War

The ICC has no powers to try group of offenders such as *ISIS*, *Boko Haram* and so on for crimes that ordinarily fall within the jurisdiction of the Court.³⁴ Admitted that most of these groups are branded as terrorists which is not a crime under the Rome Statute, but the crimes they commit do sometimes fit squarely within the definition of crimes against humanity and war crimes.³⁵ This is because the ICC has jurisdiction only over persons that committed the crimes under it and not to the state parties or non-state actors. But the *modus operandi* can be akin to declaration of war and insurgency against Nation States where they operate. However, to invoke the jurisdiction of the court, the state party accused must belong to a state party or enter the jurisdiction of the state who is a party to the Rome Statute or accept the jurisdiction of the court. Evidently, terrorist groups or other groups no matter how heinous the crimes they commit may be, do not qualify as persons under the Rome Statute³⁶ and therefore, cannot be tried by the court. In this way, the enabling Statute has itself limited the jurisdiction of persons who can be tried under it.

Reliance on State Parties for its Effectiveness in Prosecuting War Crimes.

The success of ICC in prosecuting war crimes lies largely in the corporation received from State parties during the process of investigations and gathering evidence. The ICC places high premium on the cooperation of state parties for it to actualize its mandate among which is to investigate effectively investigate and prosecute war crimes, an expectation which unfortunately is not realised in several cases. The ICC expect State parties to help it in the investigation of the accused persons by providing an enabling environment within which its investigators will not only feel safe and secure but will have the necessary assistance in the exercise of their onerous task of investigations. This high expectations of the ICC on state cooperation are predicated on the provisions of part IX and X of the Rome Statute dealing with international

³⁰ Article 5

³¹ ICC 01/05 – 01/20

³² ICC 01/12 – 01/18

³³ ICC 01/14 – 01/22

³⁴ Sections 5, 6, 7 and 8 of the Rome Statute

³⁵ Take for example, the activities of Boko haram in the abduction of Chibok School girls and the mindless killing of innocent civilians in Nigeria

³⁶ *Ibid* articles 17 (c), 20, and 25

cooperation and judicial assistance³⁷ and Enforcement³⁸ respectively. The court is given the right to demand of any State party for cooperation³⁹ which shall include among other things, request information or document concerning war crimes or any heinous act,⁴⁰ surrender of persons to the court for the purpose of prosecution,⁴¹ and the provisional arrest of accused persons.⁴² Other areas from which cooperation is anticipated is the identification and whereabouts of persons or the location of items,⁴³ the service of documents including judicial documents,⁴⁴ facilitating the voluntary appearance of persons as witnesses or experts before the court,⁴⁵ the temporary transfer of persons,⁴⁶ the examination of places or sites including the exhumation and examination of graves sites,⁴⁷ the execution of searches and seizures,⁴⁸ the provision of records and documents, including official records and documents,⁴⁹ the protection of victims and witnesses of war crimes and the preservation of evidence,⁵⁰ the identification, tracing, freezing and seizure of proceeds, property and asserts and instrumentalities of crime for the purpose of eventual forfeiture without prejudice to the rights of bona fide third parties,⁵¹ and any other type of assistance which is not prohibited by the law of the requested State with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the court.⁵²

Evidently, state parties by the provisions of the Rome Statute bear the greatest part of the investigation of war crimes and other related crimes of which their nationals are being charged before the court. Failure to assist the court in this regard would jeopardize the effective and speedy investigation of the cases before the court. Bluntly put, the court from the foregoing provisions is at the mercy of the State parties for a successful investigation, and many times, this cooperation is not forthcoming. For example, in the *Prosecutor v Uhuru Mugai Kenyatta*⁵³ Kenya, a state party, refused to offer the necessary cooperation led to the main reason for the collapse of the case. The Kenyan Government presented obstacles to obtaining the needed evidence (telephone conversations, financial and banking records) which would have had direct bearing on alleged financing and organization of violence in Kenya by Kenyatta. Apart from not complying with the request, the Kenyan Government further challenged their legality. This led to the withdrawal of the case altogether. The same obstacles were noted in the cases of the *Prosecutor v Omar Hassan Ahmed Al Bashir*⁵⁴ which was referred to the Court by the United Nations Security Council. Even though investigation had been conducted into the alleged crimes committed in Darfur, the outstanding arrest warrants against President Al Bashir and other indictees has remained unexecuted by Sudan, a state party. The same thing applied to the warrant of arrest issued against Saif Gadhafi of Libya. As if these ineffective and inefficient investigations are not enough problems, the court heavily rely on State parties for the Execution of the sentence handed down. In this regard, the Rome Statute provides that the sentence of the court shall be enforced by any State party that has indicated willingness to have the convict in her prison⁵⁵ but in deciding where to sentence the convict, his views and nationality shall be given primacy of considerations.⁵⁶ For example, in *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*⁵⁷ of the Democratic Republic of Congo, Katanga was convicted on a one count charge of crime against humanity and four count charges of war crimes and sentenced to 12 years imprisonment by the court which he initially served in the Netherland but was to latter transferred back to his country where he served eight years of the sentence.

These examples have validated the obvious challenge in the effective execution of the mandate of the court as it must rely heavily and almost exclusively on member states to garner the needed evidence or to effect the arrest of persons wanted for trial before it and for the enforcement of the resultant judgment. The examples have further demonstrated the helplessness with which the court finds itself. While there appear to be some succour under the Rome statute for the enforcement of States' compliance with their legal obligations is to refer the matter back to the Assembly of States Parties or to the United Nations Security Council, so far this has remained largely ineffective. These are major bottlenecks that are difficult to overcome, and which has led to the very few war crimes cases tried to conclusion by the court to date.

³⁷ *Ibid* Articles 86 - 102

³⁸ *Ibid* Articles 103 - 111

³⁹ *Ibid* Article 87

⁴⁰ *Ibid* Article 87 (6)

⁴¹ *Ibid* Article 89

⁴² *Ibid* Article 92

⁴³ *Ibid* Article 93 (1) (a)

⁴⁴ *Ibid* Article 93 (1) (d)

⁴⁵ *Ibid* Article 93 (1) (e)

⁴⁶ *Ibid* Article 93 (1) (f)

⁴⁷ *Ibid* Article 93 (1) (g)

⁴⁸ *Ibid* Article 93 (1) (h)

⁴⁹ *Ibid* Article 93 (1) (i)

⁵⁰ *Ibid* Article 93 (1) (j)

⁵¹ *Ibid* Article 93 (1) (k)

⁵² *Ibid* Article 93 (1) (j)

⁵³ *Prosecutor v Uhuru Mugai Kenyatta* No ICC-01/09-02/11-982

⁵⁴ No. ICC-02/05-01/09-237

⁵⁵ *Ibid* Article 103 (1) (a)

⁵⁶ *Ibid* Article 103 (3) (c) and (d)

⁵⁷ ICC -01/04-01/07

Challenge Associated with the Pre-Trial Chamber and Pre-Hearing in War Crime Matters

Pre-Trial or Pre-Hearing large sets the tune for trial of perpetrators of war crimes. The Rome Statute made elaborate provisions for the composition and functions of the pre-trial chambers.⁵⁸ It is to be constituted by at least a single Judge of the court and is to deal with diverse matters such as, termination or withdrawal of the charge or that the prosecution of the accused is not in the interest of justice, in admissibility of the charge under article 17, issuance of warrant of arrests and summons to appear before it and finally, having a bird's eye view of the evidence to see if it would support the charge the prosecutor intends to bring before the Trial Chambers. It is also the duty of the prosecution to seek clarification on the nature of information and how to proceed with the investigation from the pre-trial chambers.⁵⁹ The pre-trial Chamber is to hold a hearing upon the surrender or voluntary appearance of the accused before the court for the purpose of the prosecutor supporting each charge with the sufficient appearance to establish substantial grounds to believe that the persons committed war crime or any other crime being charged. This the prosecutor may do by relying on documentary or summary of evidence without necessarily having to call the witnesses expected to testify at the trial.⁶⁰ The pre-trial Chamber is also the appropriate place for the accused to object to the charges, challenge the evidence presented by the prosecutor.⁶¹ If the pre-trial chamber is satisfied with that there is basis for the prosecution, the case proceeds to trial.

Ostensibly, the philosophical underpinnings for the copious provisions of the Rome Statute for the pre-trial Chambers is to avoid the unserious cases filtering to the trial chambers thereby clogging their precious time and *a fortiori* avoid delay. The pre-trial chambers are expected to filter the cases, remove all technical and preliminary issues that most of the time slow down hearing to the barest minimum. In practice however, it has been found that despite this precaution, some of the cases that go to trial are either not well investigated or well prosecuted resulting to dismissal of the charges. When it comes to weak investigation and prosecution, *Gbagbo's case*⁶² stands out for further elucidation as all the judges of the trial chambers took turns to condemn the weak evidence presented by the prosecution. The trial Chamber was exceptionally critical of the evidence presented by the prosecution especially for poor handling of the evidence, distorted evidence gathering and reliance on hearsay testimony of witnesses. Judge Tarfusser described the evidence as 'a vortex of circularity, self-reference and repetition that has not made the Chamber's task any easier'⁶³ while to Judge Henderson, the prosecutor's witnesses lacked almost any direct evidence for her version of events'.⁶⁴ This apart, the ICC has since inception handled 31 cases out of which 8 (25.8%) have been dismissed for lacking in evidence or insufficiency of evidence.⁶⁵

While it is not the business of the prosecution to ensure that every war crime case presented ends up in conviction, it is apposite to at least, try to ensure that the right thing is done. In the face of the 'fine provisions relating to pre-trial chambers, how come this was not noticed until at the trial Chambers? One would have thought that this is exactly the type of thing that the pre-trial chambers was set out to avoid. Yet the pre-trial chambers took nearly 6 years in the case sifting the evidence! The six years were enough to have decided the substantive issue on the merit.

6. Conclusion and Recommendations

It is trite that the ICC plays significant role in combating war crimes as encapsulated under the Rome Statute. However, there are challenges inherent in the Statute that prevents it from effectively combating war crimes. These challenges include but not limited to non-prosecution of group atrocities, reliance on state parties for effectiveness and some procedural issues. There is therefore a need to re-visit the provisions of the Rome Statute with the view to making the necessary amendments in order to enable the ICC efficiently discharge one of its mandates of combating war crimes and holding perpetrators of war crimes to account for their actions. From the above challenges, the researcher recommends the following: Articles 7 and 8 of the Rome Statute should be revisited by defining with clarity (as done with genocide) what constitute Crimes against humanity and war crimes. The present nebulous definition should be jettisoned in favour of a crisp definition especially of war crimes. The provisions relating to Pre-Chamber proceeding should be discarded and all applications which by the extant provisions are treatable by the Pre-trial Chamber now be handled by the Trial Chamber. Again, the court should be given automatic jurisdiction once a war crime or any of the crimes within her jurisdiction is committed.

⁵⁸ Part V Articles 53 – 61

⁵⁹ Article 54 (2) (b)

⁶⁰ Article 60 (5) of the Rome Statute

⁶¹ *Ibid* Article 60 (6)

⁶² *The Prosecutor v Laurent Gbagbo and Charles Ble Goude* ICC-02/11-01/15

⁶³ *Ibid*

⁶⁴ *Ibid*

⁶⁵ Foundation HI Rondelle, Facts and Figures of the ICC <@hironlle.org> accessed 24 August, 24